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FOREWORD

Fifty Years of Futureproofing: The Flexibility, Foresight, and Fallout of the Copyright Act of 1976

Molly Van Houweling*

I. INTRODUCTION

The 29th Annual Berkeley Technology Law Journal—Berkeley Center for Law & Technology Spring Symposium was held in Berkeley on April 16 and 17, 2026. The event, entitled Origins, Evolution, and Possible Futures of the 1976 Copyright Act, was the first part of a joint effort with the Kernochan Center for Law, Media and the Arts at Columbia Law School to mark the 50th anniversary of the Copyright Act of 1976. The second event in this collaboration took place at Columbia Law School on October 23 and 24, 2026.

This special issue of the *Berkeley Technology Law Journal* collects Articles prepared in connection with the Berkeley Symposium. In this preface, I situate those Articles within the context of the Symposium, describing how they capture ideas and examples that were woven throughout the discussions among the presenters and participants.

I frame my discussion of the Symposium and this issue with four key questions that arose throughout the event:

(1) How well did the drafters of the 1976 Act "futureproof" its provisions to remain relevant and effective despite unpredictable technological change?

(2) How effectively did the 1976 Act accomplish the stated goal of its drafters: to improve the lot of individual creators?

(3) How have the courts contributed to (or hindered) the 1976 Act's achievement of its goals?

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* Harold C. Hohbach Distinguished Professor of Patent Law and Intellectual Property, Co-Director, Berkeley Center for Law & Technology. Thank you to the Berkeley Center for Law & Technology; the Kernochan Center for Law, Media and the Arts at Columbia Law School; the editors of the Berkeley Technology Law Journal; and the Symposium presenters and attendees who contributed to the success of the event.

(4) How well-equipped is the Copyright Act to deal with the new challenges posed by generative artificial intelligence?

The Sections that follow take up these questions in turn, explaining how they shaped the conversations at the Symposium and how the Articles in this issue capture and expand on the insights shared at the event.

II.
FUTUREPROOFING COPYRIGHT

The opening keynote speaker was Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office. Her keynote remarks introduced the idea that the drafters of the 1976 Act aimed to "futureproof" the statute—making it flexible enough to respond to evolving technology and thereby stand the test of time. As she describes in her Article in this issue, Register Perlmutter views this futureproofing effort as largely successful, in part due to the high level of abstraction at which many of the Act's provisions were drafted. In particular, she praises the way the Act simplified the treatment of copyright owners' exclusive rights—making them "capacious enough to cover many new means of copying and sharing copyright works, from photocopying to streaming."[1] In Perlmutter's view, the "basic framework remains sound"—even half a century later.[2]

The lunchtime keynote speaker, the Honorable M. Margaret McKeown, Senior Circuit Judge on the United States Court of Appeals for the Ninth Circuit, likewise reflected on how the drafters of the 1976 Act anticipated a changing copyright landscape despite not being able fully to foresee five decades of remarkable technological change. As Judge McKeown puts it in her Article, the drafters "understood that copyright could not remain too closely tied to the technologies of the moment. They understood that there is value in a certain degree of abstraction, which would make the language adaptable to future circumstances."[3]

Peter Menell, the Koret Professor of Law at UC Berkeley Law and Co-Director of the Berkeley Center for Law & Technology, elaborates further on futureproofing in his Article. He explains that many of the most enduring features of the 1976 Act have in fact survived for nearly *six* decades, as they were already evident by the mid-1960s in the series of Register's Reports and draft bills that preceded the 1976 Act.[4] Menell characterizes the Act, especially those

1. Shira Perlmutter, *The Copyright Act at 50: Evolution and Impact*, 41 BERKELEY TECH. L.J. 715, 719 (2026).

2. *Id.* at 727.

3. Honorable M. Margaret McKeown, *A View from the Bench: The 1976 Copyright Act*, 41 BERKELEY TECH. L.J. 729, 733 (2026); *see also id.* at 731 ("What seems most striking, as I look back, is that the 1976 Act's drafters understood, with an unusual clarity, the challenges of writing copyright for a future that could not yet be clearly seen.").

4. *Transcript of Opening Keynote & Panel 1*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 16, 2026) [hereinafter *Panel 1 Transcript*], https://www.law.berkeley.edu/research/

features established in the early phases of drafting, as a "forward-looking, relatively flexible, and balanced statutory regime based on what was known, knowable, and politically feasible."[5] And he argues that it has, in fact, endured.[6]

Register Perlmutter, Judge McKeown, and Professor Menell all acknowledge that some features of the 1976 Act and its subsequent amendments have not stood the test of time as well as the Act's fundamental structure of rights and limitations. For example, Register Perlmutter notes in her Article that the provisions added by the Digital Millennium Copyright Act regarding online service providers are "detailed and technology-specific," making them "less durable as business models evolve"[7] than the more open-ended and flexible provisions at the core of the 1976 Act.[8] Similarly, Professor Menell observes that in some areas, "particularly relating to the internet, further reforms are necessary."[9]

Judge McKeown asks whether the "limits of the Act's legal imagination have begun to show."[10] She observes pointedly that "the last major amendment was eight years ago in 2018 with the Orrin Hatch–Bob Goodlatte Music Modernization Act"[11] and that, since then, "[a]t least forty-four unique copyright bills have been introduced but have gone nowhere."[12]

Other Symposium speakers suggested that the biggest factor threatening the 1976 Act's durability may not be technological change, but rather the behavior of individuals, businesses, and markets who shape the practical effects of the law—for better and for worse. This was a theme introduced by Jessica Litman, the John F. Nickoll Professor of Law at Michigan Law, who explained during the Symposium's opening panel how some aspects of the 1976 Act reflected compromises between interested parties that were predicated on assumptions about the future that turned out to be wrong, and on implicit promises between those parties that would soon be broken.

One such compromise was reflected in the 1976 Act's provisions specifying that authors who granted rights to publishers would receive an inalienable right to terminate those transfers, but works made for hire would be excluded from the termination provisions (and works made for hire would be defined in the statute more broadly than the concept had been understood under

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bclt/bclt-legal-analysis/btlj-spring2026-p1/ ("[G]iven that most of the 1976 act dates back to 1967 it's really not the 50th anniversary. Today is more like the 59th anniversary of the Copyright Act of 1976.").

5. Peter S. Menell, *The Making of the Copyright Act of 1976: Part I—Technocracy and Compromise*, 41 BERKELEY TECH. L.J. 753, 757 (2026).

6. *Id.* at 758 ("[T]he architecture of the 1976 Act continues to structure contemporary copyright law, particularly through its delineation of exclusive rights and the fair use doctrine.").

7. Perlmutter, *supra* note 1, at 722–23.

8. *Compare id.* at 721 ("The Act's flexible provisions have by and large proven up to the task of meeting the resulting challenges.").

9. *Panel 1 Transcript*, *supra* note 4.

10. McKeown, *supra* note 3, at 733.

11. *Id.*

12. *Id.*

the 1909 Act). Litman suggested that this bargain reflected an implicit promise that publishers would honor authors' termination rights. But, of course, "the individuals who would need to keep the promises are entirely different people from the individuals who made them."[13] And, predictably, they have not behaved as if they are bound: "[A]s authors have sought to terminate copyright grants, grantees have proffered a variety of arguments why termination is not available, or why authors are entitled to recapture only a narrow slice of the copyright."[14] Consequently, authors who want to exercise their termination rights "must first jump through all of the statutory hoops and then be prepared to pursue litigation."[15]

Litman's theme of faulty assumptions and broken promises, and the termination example, resurfaced later in the day when Tyler Ochoa, Professor of Law at Santa Clara School of Law, kicked off the second panel by describing how the 1976 Act changed copyright formalities and duration. Ochoa reminded the audience that the termination-of-transfer provision was enacted in part to allow a "second bite at the apple" to negotiate over rights in the work.[16] That second bite opportunity was also an intended consequence of the dual term of protection (initial term plus renewal) under previous versions of the Act.[17] But, as Ochoa observed, that opportunity was eliminated as a practical matter by the Supreme Court's 1943 decision in *Fred Fisher Music Co. v. M. Witmark & Sons*, which enforced agreements to assign both the initial term and the contingent renewal right in one big bite.[18]

The *Fred Fisher* case served as the point of departure for the next speaker: David Nimmer, Professor from Practice at UCLA School of Law and of counsel to Irell & Manella LLP. Nimmer explained in his talk, and elaborates in his Article co-authored with Peter Menell, that Congress intended the 1976 Act to override the result in *Fred Fisher* by giving authors a second bite at the bargaining apple that was neither dependent on renewal nor subject to contractual modification.[19] It did so by granting authors a right to terminate transfers thirty-five years after making them and expressly providing that "termination of the grant may be effected notwithstanding any agreement to the contrary."[20] Nimmer then described one of a series of cases in which courts have

13. *Panel 1 Transcript*, *supra* note 4.

14. *Id.*

15. *Id.*

16. *Transcript of Panel 2*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 16, 2026) [hereinafter *Panel 2 Transcript*], https://www.law.berkeley.edu/research/bclt/bclt-legal-analysis/btlj-spring2026-p2/.

17. *Id.* ("And the whole point of the two term structure was, after 28 years, you'd get your copyright back, and if it turned out it was unexpectedly valuable, you'd have a chance to renegotiate.").

18. 318 U.S. 643, 657 (1943).

19. *Panel* 2 *Transcript*, *supra* note 16.

20. Peter S. Menell & David Nimmer, *Author Empowerment in the Copyright Act of 1976: Work Made for Hire and Termination of Transfers*, 41 BERKELEY TECH. L.J. 907, 924, 926 n.101 (2026) ("Congress declared in unmistakable terms that '[t]ermination of the grant may be effected

nonetheless allowed parties to renegotiate transfers to eliminate the termination right. Nimmer represented the party resisting this contractual override in *Milne v. Stephen Slesinger, Inc*.[21] He recounted trying, in his argument before the Ninth Circuit, to vindicate the statutory language.[22] Instead, freedom of contract trumped the second-bite policy and "*Fred Fisher* was resurrected."[23] Nimmer closed with a tongue-in-cheek common sense solution: "Congress should pass a new law that says termination may be effected notwithstanding any agreement to the contrary, *and this time we really mean it!*"[24] In their Article, Nimmer and Menell expand on these remarks. They provide additional examples of judicial application of the termination-of-transfer provisions—including some recent decisions in favor of termination. They express uncertainty about "[w]hether a complete reversal in the polarity of termination rights is now underway."[25] But their conclusion is, for now, broadly consistent with Litman's: "termination has largely failed to live up to its promise."[26]

Peter DiCola, Professor of Law and Director of the JD/PhD Program at Northwestern Pritzker School of Law, used the example of the music industry to explain how another type of unforeseen development has undermined the durability the 1976 Act. Despite the clear intent of the drafters to empower individual creators, the copyright reforms of 1976 did not and, "perhaps more importantly, could not provide authors with meaningful economic leverage in the face of what was about to happen economically."[27] What happened, DiCola described, was the rise of "twin oligopolies" due to consolidation in the market for copyright aggregation (resulting in only three major music publishers and three major record labels) and concentration among music streaming companies (with four companies combining to control 97% of the market).[28] This degree of concentration means that the economic model of a copyright owner setting a price based on their exclusive rights is obsolete because "copyright can only deliver economic benefits based on the structure and institutional design of the markets that the authors have to sell into."[29] As an example, DiCola cited Spotify's policy of no longer paying royalties on tracks that achieve fewer than 1000 streams in the preceding 12 months.[30] For artists, notwithstanding the

notwithstanding any agreement to the contrary.' That language was designed to override *Fisher* and to ensure that future contractual arrangements could not neutralize the statutory right of recapture.") (quoting 17 U.S.C. § 203(a)(5)).

21. 430 F.3d 1036 (9th Cir. 2005).

22. *Panel 1 Transcript*, *supra* note 4.

23. *Id.*

24. *Id.*

25. Menell & Nimmer, *supra* note 20, at 927.

26. *Id.* at 926.

27. *Panel 2 Transcript*, *supra* note 16.

28. *Id.*

29. *Id.*

30. *Modernizing Our Royalty System to Drive an Additional $1 Billion toward Emerging and Professional Artists*, SPOTIFY (Nov. 20, 2023), https://artists.spotify.com/en/blog/modernizing-our-royalty-system.

rights that copyright law theoretically gives them, "having your music on Spotify means agreeing that less successful tracks don't receive any royalties at all."[31] And, as DiCola concluded, artists have no real alternative: "Your choice as an artist is to forgo roughly 30% of the US streaming market or be subject to this new policy."[32]

While Litman, Nimmer, and DiCola provided examples of private litigants and markets undermining the goals and durability of the 1976 Act, other speakers described ways in which the actions of private actors and institutions have helped to maintain a healthy copyright ecosystem during the Act's first fifty years. Jule Sigall, who served as Associate General Counsel at Microsoft and as Associate Register for Policy & International Affairs at the U.S. Copyright Office, described how the software industry has found "different ways of getting paid," even as the effectiveness of copyright protection has waxed and waned over time.[33] For example, when the rise of the web during the 1990s made it easier for people to acquire unauthorized copies of software, software companies augmented their reliance on copyright and anti-piracy efforts with the technique of bundling software with hardware—from which it was easier to exclude users who had not paid.[34] Sigall went on to describe other examples of copyright-complementary techniques, including business-to-business contracts, ad supported business models, and selling subscriptions to software as a service.[35] On the same panel, Clark D. Asay, the Terry Crapo Professor of Law at BYU Law, described how copyright and private ordering have together fostered the innovative collaborative practices of the open source software community. Asay expressed concern, however, about how the non-copyrightability of fully AI-generated software may remove the critical copyright component of open source.[36]

Daniel Gervais, the Milton R. Underwood Chair in Law and Director of the Intellectual Property Program at Vanderbilt Law, provided additional examples of private ordering augmenting the 1976 Act and helping to futureproof it. During the Symposium's closing panel, Gervais focused on how private institutions have contributed to the voluntary licensing infrastructure (sometimes backed up by compulsory licenses and/or consent decrees) that makes exchange of rights possible. As Gervais puts it in his Article, these institutions—including the Copyright Clearance Center, where he served as Vice-President—"turn rights into actual money in someone's pocket."[37] On the other hand, Jennifer

31. *Panel 2 Transcript*, *supra* note 16.
32. *Id.*
33. *Transcript of Panel 5*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 17, 2026) [hereinafter *Panel 5 Transcript*], https://www.law.berkeley.edu/research/bclt/bclt-legal-analysis/btlj-spring2026-p5/.
34. *Id.*
35. *Id.*
36. *Id.*
37. Daniel J. Gervais, *The Licensing Architecture of the 1976 Copyright Act at Fifty:*

Urban, Clinical Professor of Law and Director of Policy Initiatives at the Samuelson Law, Technology & Public Policy Clinic and Co-Director of the Berkeley Center for Law & Technology, recounted how other types of intermediaries ("the gatekeepers, the insurance companies, the distributors") have contributed to copyright logjams by taking a risk averse approach to orphan works—refusing to insure or distribute works that incorporate preexisting works unless the rights to the preexisting works have been cleared, even though "the definition of an orphan work is that it cannot be cleared."[38]

III.
IMPROVING THE LOT OF INDIVIDUAL CREATORS

Some of the futureproofing skepticism (and enthusiasm) described above links to another recurring question: how well has the Act served the interests of individual creators as opposed to publishers and other intermediaries? As Register Perlmutter explains in her Article, a key goal of the 1976 Act "was to improve the lot of individual creators."[39] The Act "established a more author-centered copyright system, treating copyright as an individual entitlement rather than primarily an institutional asset."[40] For example, federal copyright protection prior to the 1976 Act "was inextricably linked to publication—most unpublished works were not covered by federal copyright, and publication typically required assigning rights to a publisher."[41] By contrast, the 1976 Act protected works from the moment of their creation, making copyright more attainable for individual creators acting without publishers.[42]

Interestingly, speaker Tony Reese upended this conventional wisdom during his remarks by revealing how many unpublished works were protected by under-appreciated provisions of the 1909 Act that made federal protection available for specified categories of unpublished works that were registered and deposited with the Copyright Office.[43] As Reese explained, this provision of the 1909 Act is considered "essentially a footnote in the standard account."[44] But,

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A View from the Inside, with Lessons for AI, 41 BERKELEY TECH. L.J. 879, 881 (2026).

38. *Transcript of Panel 6 & Closing Remarks*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 17, 2026) [hereinafter *Panel 6 Transcript*], https://www.law.berkeley.edu/research/bclt/bclt-legal-analysis/btlj-spring2026-p6/.

39. Perlmutter, *supra* note 1, at 720.

40. *Id.*

41. *Id.*

42. *Id.*

43. 17 U.S.C.A. § 12 (1909).

44. *Transcript of Panel 4*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 16, 2026) [hereinafter *Panel 4 Transcript*], https://www.law.berkeley.edu/research/bclt/bclt-legal-analysis/btlj-spring2026-p4/.

during the decades that Reese studied, over 75% of federally registered works in the covered categories were unpublished works.[45]

This theme of creator empowerment provided a jumping off point for Jane C. Ginsburg, the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law and Faculty Director of Columbia's Kernochan Center for Law, Media and the Arts, who began her remarks by quoting Barbara Ringer, who served as Register of Copyrights from 1973 to 1980 and was one of the leading architects of the 1976 Act.[46] Shortly after passage of the Act, Ringer wrote:

> [T]here has been a shift in the philosophical base on which the copyright law of the United States rests. This change may not be readily apparent. Many people regard the establishment of a single federal system as a purely procedural matter, the change in the term of copyright as merely adding years, and the revisions in the sections on ownership and formalities as mere legalistic tinkering. But, taken as a whole, these changes mark a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.[47]

As Ginsburg explains in her Article exploring the influence of international copyright norms and rules on the 1976 Act, the "new author-centrism of U.S. copyright that Barbara Ringer celebrated may have been more a consequence of pragmatically oriented changes . . . to duration and formalities than an intentional philosophical shift."[48] Even at the level of practicalities (and even at the outset, before the subsequent author-disempowering developments described above) the Act's shift to author-centrism was incomplete. Ginsburg cites as a "notably author-unfavorable feature of the 1976 Copyright Act" the designation of employers and commissioning parties as "authors" and not merely owners of works made for hire.[49]

The issue of the connection, or lack thereof, between individual creativity and authorship as defined under the 1976 Act arose again in remarks by Robert Brauneis, the Michael J. McKeon Professor of Intellectual Property Law at the George Washington University Law School and Faculty Co-Director of the GW Bernard Center for Law and Technology. Brauneis focused on three doctrines

45. *See, e.g.*, *id.* (reporting based on records from 1954 to 1977 that "over 75% of the total registrations in the eight eligible classes were for unpublished works" and "83% of all musical work registrations were for unpublished works").

46. U.S. Copyright Office, *Barbara Ringer: 1925–2009*, COPYRIGHT NOTICES: SPECIAL EDITION (Apr. 2009), https://www.copyright.gov/docs/barabara-ringer-special-edition-2009-04.pdf.

47. *Panel 1 Transcript*, *supra* note 4 (quoting Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 490 (1977)).

48. Jane C. Ginsburg, *The Influence of International Copyright Norms on the Evolution of the 1976 Act*, 41 BERKELEY TECH. L.J. 929, 939 (2026).

49. *Id.* at 945.

that impact the question of *which* creators were and were not recognized as having the status of "authors" under the 1976 Act: fixation, unauthorized derivative works, and joint authorship. He explained that the relevant 1976 Act provisions and their subsequent judicial interpretation have produced mixed results for creators. The broad definition of fixation may have expanded the universe of creators who were recognized as authors by including musicians who could fix their compositions in audio recordings even if they were not skilled at formal written notation, for example. Citing findings that the average number of songwriters credited on top songs has grown over the past decades,[50] Brauneis speculated that "it may be at least partly that more of the people who are actually making creative contributions to the musical work that's embodied in the sound recording are being recognized as authors."[51] He described this speculation as an "optimistic story."[52] His assessment of the 1976 Act's treatment of unauthorized derivative works and joint authorship was markedly more pessimistic in terms of creator empowerment. In both of these cases, Brauneis argued that "there's no doubt that the creators of those works, or parts of those works, are doing exactly the sort of things that authors do. However, those creators are sometimes not recognized as authors."[53] This is true, for example, of creators of derivative works denied copyright protection under 17 U.S.C. § 103, which provides that "protection 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."[54]

Of course, not every *unauthorized* derivative work is an *unlawful* derivative work to which the Copyright Act denies copyright protection under § 103. The fair use doctrine codified by the 1976 Act makes many unauthorized derivative works lawful, to the benefit of both individual derivative work creators and the creative ecosystem. This benefit was stressed by speaker Rebecca Tushnet, the Frank Stanton Professor of the First Amendment and Faculty Co-Director of the Berkman Klein Center for Internet and Society at Harvard Law School. Tushnet described her experience as founder and co-chair of the legal committee of the Organization for Transformative Works (OTW), whose mission is to support and defend non-commercial transformative fan works. OTW's Archive of Our Own hosts over 17 million fan works. Tushnet's talk was a tribute to these works and their importance to our culture. "[N]on-commercial fan works are good," she declared.[55] "They are part of the background of a thriving modern creative

50. *See* Emma Perot, *Music Royalty Splits: Copyright and Music Industry Practices Behind the Increase in Writer Credits and Rights Clearance*, 14 BERKELEY J. ENT. & SPORTS L. 1, 6 (2025); Glynn S. Lunney Jr., *Copyright, Incentives, and Popular Music Composition*, 22 REV. ECON. RSCH. COPYRIGHT Issues 33, 57 (2025).

51. *Panel 2 Transcript*, *supra* note 16.

52. *Id.*

53. *Id.*

54. 17 U.S.C. § 103(a).

55. *Panel 6 Transcript*, *supra* note 38.

ecosystem."[56] And they are enabled by copyright—specifically by the United States' approach to fair use, which Tushnet praised for allowing non-commercial fan works and, more generally, for affirming the "everyday practices" of creative people.[57]

In one sense, this affirmation is attributable to the 1976 Act's addition of fair use to the statute in 17 U.S.C. § 107. But that statutory provision was of course neither the origin of nor the last word on fair use—which was initially developed in the courts before Congress codified it in an open-ended way that invited further judicial development. Fair use is thus the result of an ongoing collaboration between Congress and the courts that is representative of the next recurring theme of the event.

IV.
THE LEGISLATIVE/JUDICIAL DANCE

In her lunchtime keynote, Judge McKeown gave her "view from the bench" of how the 1976 Act addressed changing technology—taking the first step in what she called a "dance between Congress and the courts."[58] This legislative step was necessary, as Judge McKeown documents in her Article for this issue, because "courts had been pushed to their interpretive limits" in trying to apply the 1909 Act.[59] "Technologies like cable, photocopying, sound recording, broadcasting, and early computing made the 1909 Act look outdated and conceptually brittle."[60] The problem was that the 1909 Act's protections "were too often tied to medium-specific formalities, too often depended on publication, too often relied on judicial patchwork regimes, and were too poorly equipped to govern emerging forms of transmission, storage, and exploitation."[61] By contrast, the abstraction and flexibility of the 1976 Act invited courts to participate in shaping the law to fit unforeseen facts. And courts accepted the invitation: "The early landmark decisions suggest that judges understood what Congress was doing and tried to give voice to the Act's text to adapt, within the acceptable bounds of the judicial power, to new circumstances and demands."[62]

The theme of the dance between Congress and the courts, and how the text of the 1976 Act invited it, resonated throughout the event. During the panel on exclusive rights and enforcement, Christopher Sprigman, the Murray and Kathleen Bring Professor of Law at NYU School of Law and Co-Director of NYU Law's Engelberg Center on Innovation Law and Policy, hit on this theme in describing the relationship between the text of the Act and courts' role in

56. *Id.*
57. *Id.*
58. McKeown, *supra* note 3, at 732.
59. *Id.*
60. *Id.* at 730–31.
61. *Id.*
62. *Id.* at 733.

adapting it. He explained that Congress left "ample room for judicial interpretation" by writing some provisions (fair use, for example) in ways that invite case-by-case adjudication and by saying "next to nothing" in the statute about key concepts like the definition of an author and even the standard by which infringement is to be judged.[63] In Sprigman's view, "it is copyright law's hybrid nature enabled by the spaces that Congress purposefully left open that have kept the Copyright Act viable through waves of technological change over our lifetimes."[64]

Despite their appreciation for the collaboration between Congress and the courts, and the adaptability it has produced, neither Professor Sprigman nor Judge McKeown argued that the courts always dance to the right tune. Judge McKeown notes in her Article, for example, the wrong step taken by *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*,[65] the early software case in which the Third Circuit protected the "structure, sequence, and organization" of computer programs in a way that has been jettisoned in subsequent decisions.[66] Sprigman argued that courts should similarly revisit their widespread conclusion—not dictated by the statutory text—that fair use should be treated as an affirmative defense.[67]

Throughout the Symposium, speakers gave mixed reviews of the dance between Congress and the courts. Several presentations resonated with Judge McKeown's observation about how the courts' treatment of software took a wrong turn but then corrected course. Pamela Samuelson, the Richard M. Sherman Distinguished Professor of Law and Information at UC Berkeley and Co-Director of the Berkeley Center for Law & Technology, gave a similar assessment of the software caselaw, crediting the Second Circuit's opinion in *Computer Associates International, Inc. v. Altai, Inc.*,[68] with rejecting *Whelan*'s approach, introducing the "abstraction-filtration-comparison" test, and "basically reinvigorat[ing] certain kinds of defenses in copyright cases involving software" that subsequent courts have applied in ways that Samuelson thinks "made a lot of sense."[69]

Speaker Guy Rub, the Vincent J. Marella Professor of Law at Temple University Beasley School of Law, provided a different example of judicial course correction. Rub traced the courts' treatment of federal preemption of state contract law under the 1976 Act. *ProCD, Inc. v. Zeidenberg* was an influential case that analyzed this question by focusing on whether contract claims are

63. *Transcript of Panel 3*, 29TH ANNUAL BTLJ-BCLT SPRING SYMPOSIUM (Apr. 16, 2026) [hereinafter *Panel 3 Transcript*], https://www.law.berkeley.edu/research/bclt/bclt-legal-analysis/btlj-spring2026-p3/.

64. *Id.*

65. 797 F.2d 1222 (3d Cir. 1986).

66. McKeown, *supra* note 3, at 747 (quoting *Whelan*, 797 F.2d at 1248).

67. *Panel 3 Transcript*, *supra* note 63.

68. 982 F.2d 693 (2d Cir. 1992).

69. *Panel 5 Transcript*, *supra* note 33.

"equivalent to any of the exclusive rights within the general scope of copyright" and therefore expressly preempted under 17 U.S.C. § 301.[70] In Rub's view, recent opinions have improved on this analysis by considering not only the possibility of express preemption under § 301 but also the possibility of conflict preemption under the Supremacy Clause. Pointing to the analysis of conflict preemption in *X Corp. v. Bright Data Ltd*.,[71] which relies on the Second Circuit's conflict preemption analysis of a right of publicity claim *In re Jackson*,[72] Rub argued that conflict preemption analysis is more flexible and ultimately superior to express preemption for determining whether breach of contract claims are preempted.[73]

Shyamkrishna Balganesh, the Sol Goldman Professor of Law at Columbia Law School, also discussed judicial course correction related to preemption. He explained how the widely-cited House Report accompanying the 1976 Act includes a discussion of a clause within the express preemption provision that was not in fact included in the final act. The clause at issue would have listed examples of state law causes of action that would not be expressly preempted because they are not "equivalent to any of the exclusive rights within the general scope of copyright"[74]—namely, "rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation."[75] As Balganesh explained, the House Report misleadingly discusses the intent behind including these examples even though the examples were not included in the final Act. "So there's a fundamental mismatch between the House report and the final bill."[76] Balganesh argued that courts erroneously relied on this misleading legislative history in support of their resurrection of the misappropriation doctrine starting with the Second Circuit's 1997 opinion in *National Basketball Ass'n v. Motorola, Inc.*[77] Balganesh also credits the Second Circuit with some subsequent course correction when it revisited *NBA* in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*[78] (where Judge Raggi, concurring, explained the problem with the House Report and observed that "it is not clear what weight the Report excerpt quoted in *NBA* can bear"[79]). But Balganesh expressed continued

70. 86 F.3d 1447, 1453 (7th Cir. 1996).

71. 733 F. Supp. 3d 832 (N.D. Cal. 2024).

72. 972 F.3d 25 (2d Cir. 2020).

73. *Panel 4 Transcript*, *supra* note 44 ("I think it's a better framework. I think it allows us to ask questions that are more relevant than the formalistic 'is it equivalent or not?' . . . You can open the door when you create a flexible framework like conflict preemption versus section 301. . . .").

74. *Id.*

75. S. 22, 94th Cong., 1st Sess. § 301 (1975) (as amended in committee), *reported in* S. Rep. No. 473, 94th Cong., 1st Sess. 20 (1975), *and in* H.R. Rep. No. 1476, 95th Cong., 2d Sess. 24 (1976).

76. *Panel 4 Transcript*, *supra* note 44.

77. 105 F.3d 841 (2d Cir. 1997).

78. 650 F.3d 876 (2d Cir. 2011).

79. *Id.* at 910 (Raggi, J., concurring).

concern with courts in other jurisdictions that have followed *NBA* and thus have "indirectly relied on the wrong legislative history" and have not been corrected.[80]

While Balganesh critiqued courts for over-reliance on misleading legislative history, other speakers critiqued judicial wrong turns that set clear legislative history aside. For example, Justin Hughes, the Honorable William Matthew Byrne, Jr. Distinguished Professor of Law and Fulbright-Hanken Distinguished Chair in Business and Economics at Loyola LMU Loyola Law School, observed that the Supreme Court's unanimous opinion in *Cox Communications, Inc. v. Sony Music Entertainment*[81] "sharply curtails the range of contributory liability fact patterns" despite legislative history from both the House and Senate showing that the inclusion of "to authorize" in connection with the exclusive rights afforded to copyright owners under the 1976 Act was "intended to avoid any questions as to the liability of contributory infringers."[82]

Laura Heymann, the James G. Cutler Professor of Law at William & Mary Law School, traced judicial missteps related to secondary liability back further, to the Court's importation of the patent-law concept of "staple article of commerce" in *Sony Corp. of America v. Universal City Studios, Inc*.[83] Heymann questioned whether this "technical judge-made doctrine of patent law based in part on considerations irrelevant to the field of copyright should be imported wholesale into copyright law."[84] Yet, once that importation happened, it would prove hard to reverse: "[T]he problem is that we have path dependence and precedent, and so once the Court has borrowed that phrase in *Sony*, it then becomes entrenched, which allows the Court in *Cox* not to re-examine that question of the borrowing . . . [.] [T]he fact that the Court once said it is good enough."[85]

Some speakers offered examples of missteps they hope are not too entrenched to be corrected. For example, Oren Bracha, the William C. Conner Chair in Law at the University of Texas at Austin School of Law, critiqued the tests courts have developed to identify copyright infringement, characterizing the doctrinal development since the 1976 Act as "a consistent process of erosion and dilution" in which infringement has been detached from its central conception that a defendant only infringes by providing an expressive substitute for the plaintiff's work.[86] Instead, infringement depends on "a sort of a nebulous frictionless idea of substantial similarity."[87] To limit this boundless expansion of infringement, courts have turned to the limiting doctrine of fair use. To Bracha, that puts too much burden on "the too narrow shoulders" of fair use, which he

80. *Panel 4 Transcript*, *supra* note 44.
81. 146 S. Ct. 959 (2026).
82. *Panel 3 Transcript*, *supra* note 63.
83. 464 U.S. 417, 442 (1984).
84. *Panel 3 Transcript*, *supra* note 63.
85. *Id.*
86. *Id.*
87. *Id.*

characterized as a doctrine "whose structure and design and conceptual content is about being a backend safeguard of last resort."[88] Bracha's prescription would correct both missteps: tightening the infringement test to focus on substitution and then cutting fair use down to size to do the work it is capable of and designed to do.[89]

The kind of doctrinal indeterminacy, incoherence, and inconsistency that Bracha associated with infringement can be an occasion for Congress to retake the dance floor. R. Anthony Reese, the Chancellor's Professor of Law at UC Irvine School of Law, explained how the history of the 1976 Act itself provides one example. Prior to the 1976 Act, the concept of "publication" was important but undefined by the Copyright Act. It was important because state common law protection was available for unpublished works, federal statutory protection could be triggered by publication, and publication without required formalities released works into the public domain. But because the concept of publication was undefined by the statute, judicial definitions proliferated—providing part of the impetus for the 1976 Act's establishment of a uniform national system of protection for all fixed works regardless of publication status. Reese quoted the 1965 Register's Supplemental Report for the proposition that an advantage of a uniform system was that it would "clear up the confusion, uncertainty, and capriciousness that results under the present law"—specifically, the current "imbroglio of 'publication.'"[90] Reese went on in his remarks to document the series of post-1976 amendments that have continued the project of "removal of the last bit of rubble from the 1976 Act's destruction of the wall between federal and state copyright protection based on publication."[91]

Are we on the brink of another round of statutory change to intervene in definitional imbroglios and clear out doctrinal rubble and will release the pressure placed on the copyright regime by the rise of artificial intelligence push us over the edge? As the next Section explains, that is the final recurring question that shaped the Symposium conversation.

V.
ARTIFICIAL INTELLIGENCE TESTS THE INTERPRETIVE LIMITS OF THE 1976 ACT.

Throughout the event, speakers discussed the challenge posed by artificial intelligence—the latest and arguably most dramatic technology to test the interpretive limits of the 1976 Act. Register Perlmutter started this conversation on a relatively optimistic note. She elaborates in her Article:

> In my view, the statute can and should continue to evolve but does not

88. *Id.*
89. *Id.*
90. H. Comm. on the Judiciary, 88th Cong., Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill 82 (Comm. Print 1965).
91. *Panel 4 Transcript*, *supra* note 44.

> need wholesale revision. The basic framework, the building blocks, remain sound. And, in addition, as a pragmatic matter . . . the statute has now become embedded in a wider global infrastructure of laws, treaties and business arrangements . . . .
>
> The question of the day . . . is whether [artificial intelligence] is simply the current iteration of the constant technological challenges that the statute has dealt with, or whether it is simply too cataclysmic a disruption for the Act's structure to survive. So far, the structure seems up to the task. . . . [T]he copyrightability issues [raised by AI] can be resolved by existing standards of authorship and originality. The infringement issues can be resolved by the [application of] exclusive rights . . . contained and limited by the fair use doctrine, and tools such as extended collective licensing . . . are available to address any areas of market failure that may arise. So I believe the Act will survive the AI revolution, as it survived the past revolutions . . . with its fundamental building blocks adaptable, adapted, and supplemented as needed.[92]

The question of whether artificial intelligence disputes can be resolved "by the [application of] exclusive rights . . . contained and limited by the fair use doctrine"[93] was explored in detail by several subsequent speakers including A. Feder Cooper, Assistant Professor in the Department of Computer Science at Yale University, whose co-authored Article with Mark Lemley[94] is included in this issue.

Cooper and Lemley focus, in particular, on the uncertain application of the 1976 Act's definition of "copy" to generative AI models from which it is possible but not certain for copyrighted works to be "perceived, reproduced, or otherwise communicated."[95] As they put it in their Article, the 1976 Act's definition of "copy" was "intended to encompass technologies that were just emerging at the time, including computers."[96] "But Congress didn't have in mind, and didn't address, the sorts of nondeterministic behavior we see with today's generative AI models."[97] And so the best they can say about "the question whether a model that memorizes content from a work is itself a copy of that work" is "it depends."[98] Although they concede that this is not a very satisfying answer,[99] they are hesitant to advocate for clarification by Congress: "In an ideal world, we might rewrite the law to limit copyright to covering copies that actually reach or communicate to people," which would "exclude the actual models as copies,

92. *Panel 1 Transcript*, *supra* note 4.

93. *Id.*

94. William H. Neukom Professor of Law at Stanford Law School and the Director of the Stanford Program in Law, Science and Technology.

95. Mark A. Lemley & A. Feder Cooper, *Probabilistic "Copies" in Generative AI Models*, 41 BERKELEY TECH. L.J. 837, 859 (2026).

96. *Id.* at 876.

97. *Id.*

98. *Id.* at 877.

99. *Id.*

but would still encompass model output that is substantially similar to a copyrighted work."[100] But in our non-ideal world, they worry that legislative reform to revisit the structure of the Copyright Act would just make things worse.[101]

Matthew Sag, the Jonas Robitscher Professor of Law in Artificial Intelligence, Machine Learning, and Data Science at Emory Law struck a slightly more optimistic note in his discussion of fair use and AI training. Sag praised courts' general approach to fair use as applied to AI training and other examples of what he describes as "nonexpressive uses" that do not communicate copyrightable expression to end users.[102] He concluded that courts have "done a pretty reasonable job with the nonexpressive use cases starting with *Hathi Trust*, *Google Books* and the recent gen AI cases."[103] At the same time, Sag acknowledged that this judicial approach could usefully be confirmed and reinforced by Congress: "There is no reason why a functional Congress could not step in and legislate to provide additional clarity on this area."[104] Specifically, he proposed that section 107 be amended "to simply recognize that copying works to extract unprotected information or enable nonexpressive computational functions is highly transformative."[105]

Do we have a functional Congress that could contribute again to the copyright dance? Cooper and Lemley are obviously skeptical. Register Perlmutter predicted that the Act would continue to be "supplemented as needed" following the "topic-by-topic" approach of recent decades.[106] But she conceded that the type of expert-driven approach to *comprehensive* reform undertaken to draft the 1976 Act "is hard to imagine replicating today."[107]

Judge McKeown's assessment of the state of the dance between Congress and the courts mixes optimism about courts' ability to continue to adapt within the limits of the statute; recognition that AI may test those limits; and skepticism about contemporary Congress's capacity to helpfully intervene. Her cause for optimism is that the courts have applied copyright law to "disruptive innovation" in the past.[108] "It therefore may be an overstatement to treat AI as a rupture of copyright history, rather than a continuation of it."[109] But, she acknowledges, "courts can only go so far."[110] Systematic solutions like compulsory collective licensing, which some have proposed as a solution to conflicts over AI training,

100. *Id.* at 876.
101. *Id.*
102. *Panel 6 Transcript*, *supra* note 38.
103. *Id.*
104. *Id.*
105. *Id.*
106. Perlmutter, *supra* note 1, at 727–28.
107. *Id.* at 717.
108. McKeown, *supra* note 3, at 729.
109. *Id.* at 748.
110. *Id.*

"is the kind of question that Congress, not the courts, is well equipped to answer."[111] Well-equipped, perhaps, but apparently not willing. She goes on to observe that Congress has been silent, failing to enact major federal copyright legislation since the Music Modernization Act of 2018. If AI requires major copyright reform, we are at an impasse, as "courts cannot rewrite the statute and write on a broad slate, and Congress likely will not."[112]

Not every speaker was ready to give up on the prospect of serious federal statutory reform. Professor Sprigman took issue with "the idea that we could never do something like the 76 Act again,"[113] expressing the hope that the current Congress is at the nadir of its functionality: "I think throughout the American history, there have been these great waves of decline and then reform. I think we are hopefully near the bottom of a period of decline, and we are on the precipice of a period of reform."[114]

Of course, Congress and the courts are not the only actors on the scene. Judge McKeown's Article describes an AI-related executive order, AI regulation in the European Union, and AI legislation introduced in all fifty U.S. states (and already on the books in 38).[115] Symposium speaker Marketa Trimble, the Samuel S. Lionel Professor of Intellectual Property Law at UNLV William S. Boyd School of Law, provided additional evidence of states' appetite for legislating about a range of copyright-related topics, including AI.[116] As Judge McKeown puts it, "the dance has expanded."[117]

VI.
CONCLUSION

As Daniel Gervais observes in his Article, fifty years is "a long time for a statute to remain operative in a field this technologically dynamic."[118] The Articles in this issue, capturing the themes that emerged throughout the Symposium, present a range of views on whether the futureproofing the 1976 Act's drafters attempted has succeeded over those fifty years, whether individual authors have realized the benefits the drafters purported to bestow upon them, and whether the Act's silences and interstices have invited the courts to augment or misunderstand it. All agree that the 1976 Act has governed during decades of remarkable technological change, and that the current moment may exceed its interpretive limits.

In 1977, Barbara Ringer also wrote a Symposium preface, entitled *The Unfinished Business of Copyright Revision*. She wrote that "[a]fter so long a wait

111. *Id.*
112. *Id.*
113. *Panel 3 Transcript*, *supra* note 63.
114. *Id.*
115. McKeown, *supra* note 3, at 749.
116. *Panel 4 Transcript*, *supra* note 44.
117. McKeown, *supra* note 3, at 749.
118. Gervais, *supra* note 37, at 905.

for a new copyright law, it may seem untimely, if not ungrateful, to call attention to work that clearly remains to be done."[119] One could say the same fifty years later, when the work of the 1976 Act has been augmented by decades of amendments, judicial interpretations, and private ordering. And yet, the 1976 Act's intentional strategy of making a law "flexible enough to allow the copyright law of the United States room enough to blossom, to grow, and to mature"[120] means that there remains unfinished copyright business to be done. Reflecting during events like this one on the work of Ringer, her contemporaries, and the generations since then is one step toward doing it.

119. Barbara Ringer, *The Unfinished Business of Copyright Revision*, 24 UCLA L. REV. 951, 955 (1977).

120. *Id.*

The Copyright Act at 50: Evolution and Impact

Shira Perlmutter*

ABSTRACT

When Congress enacted the Copyright Act of 1976, it sought not merely to modernize copyright law, but to establish a framework capable of adapting to a changing world. The product of more than two decades of deliberation and expert input, the Act pursued three major goals: "future-proofing" the law to adapt to technological change, enabling full U.S. participation in the international copyright community, and improving the situation of individual creators.

Fifty years later, the Act has proved remarkably resilient in responding to the challenges of new technologies. Its flexible provisions, particularly the open-ended fair use doctrine, have allowed copyright law to respond to technological developments far beyond those contemplated in 1976, such as artificial intelligence (AI), with possible adaptations as needed. The Act also laid the groundwork for U.S. accession to the Berne Convention and subsequent leadership in international copyright policy. Although its more author-centered approach significantly improved the position of individual creators, subsequent amendments (such as establishment of the copyright small claims tribunal) have been necessary to address gaps in protection and enforcement.

Today, a broader range of stakeholder voices and heightened political and economic stakes have made copyright policymaking more complex, but also more representative. While further reforms may be needed to address emerging challenges, the fundamental framework of the Copyright Act of 1976 remains sound. Wholesale revision is not necessary.

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I. INTRODUCTION

It's an honor to join today in celebrating, and examining, the legacy of the 1976 Copyright Act. Over the year there will be multiple events honoring this milestone. This symposium, with its selection of critical topics and roster of impressive speakers, promises to make an exceptionally rich and meaningful contribution.

It's sobering to realize how different the world was fifty years ago when the '76 Act took effect.[1] When President Ford signed it into law,[2] music came on vinyl records and eight-track tapes. The only "Perfect 10" was Nadia Comaneci's performance at the Olympics.[3] The idea that someone could, in their bedroom, perform a song they'd written and distribute it to millions around the world was as far out as landing on Mars. But we did land on Mars, and the clear pictures the Viking 1 Rover transmitted to Earth showed us what was possible.[4] And that was only the beginning of a period of extraordinary technical achievements.

I'll set the stage for today's conversation by looking at the birth of the '76 Act and the extent to which it has achieved the goals of its drafters. Those goals have been taken further in the half century since its enactment, although there is always more to be done. We can never stop questioning the need for change—the copyright law must not remain static.

To understand what the '76 Act accomplished, it's important to consider what it replaced. The 1909 Act, signed into law by Teddy Roosevelt on his last

1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 and 44 U.S.C.).

2. *Id.*

3. *Nadia Comaneci*, INT'L OLYMPIC COMM., https://www.olympics.com/en/athletes/nadia-comaneci [https://perma.cc/39W3-K53G] (last visited Aug. 29, 2026).

4. *Viking Project*, NASA (July 20, 2026), https://science.nasa.gov/mission/viking [https://perma.cc/7JDS-GW83].

day in office,[5] was ill-equipped for the world of the twentieth century. As early as the 1940s, it was clear that it needed updating.[6] I've always loved the colorful image drawn by Zechariah Chafee in his 1945 article, Reflections on the Law of Copyright, explaining why revision was badly needed: "Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball."[7] And that ball continues today!

As the legendary former Register Barbara Ringer explained, the 1976 revision was "intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act."[8] The process itself was extraordinary from today's vantage point. It took more than two decades[9] and produced a complete rewrite of the existing statute.[10] Most strikingly, it was a highly deliberative, carefully planned project, relying on expert input and drafting.[11] It was led by the Copyright Office, with input from academics and practitioners as well as representatives of major copyright industries, authors, libraries and educators.[12] In Barbara's words, the Act "besp[oke] concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society."[13]

The Copyright Office began the process of revision in 1955 by commissioning dozens of comprehensive studies from current and former staff and distinguished professors, which were submitted for comment to a General

5. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, *repealed by*, Copyright Act of 1976.

6. Zechariah Chafee, Jr., *Reflections on the Law of Copyright* (pt. 1), 45 COLUM. L. REV. 503, 515–520 (1945) (explaining "[t]he unsatisfactory state of our copyright law").

7. *Id.* at 503.

8. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

9. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) ("The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.").

10. *See* Ringer, *supra* note 8, at 479.

11. *See* Litman, *supra* note 9, at 861, 880; Ringer, *supra* note 8, at 481–82.

12. *See* MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1–1:2 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf [https://perma.cc/N3LA-EJZ9]; Litman, *supra* note 9, at 861, 869, 875–76; *see also Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. 96 (1975) [hereinafter *Hearings on H.R. 2223*] (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.), *reprinted in* 14 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001) [hereinafter OMNIBUS].

13. *See* Ringer, *supra* note 8, at 482.

Revision Panel appointed by the Library of Congress.[14] In 1961, Register Abraham Kaminstein published a detailed report with his recommendations.[15] After numerous meetings and consultations with the copyright bar and stakeholders,[16] the Copyright Office produced a preliminary draft in 1963.[17] Multiple versions followed, with both the House and the Senate holding extensive hearings and convening negotiations.[18] Finally, enough compromises were reached on the outstanding issues to enable passage, and the new law came into being on October 19, 1976.[19]

Such an expert-driven and Office-directed process is hard to imagine replicating today.

II.
"PROBLEMS UNDREAMED OF": TECHNOLOGICAL CHANGE

What was different in the new law? The drafters had several ambitious goals. Chief among them was a desire to make the statute more flexible—able to respond to evolving technology without the need for constant amendment.[20] They made a deliberate effort to "futureproof" its provisions.[21] As to the subject matter of copyright, they replaced the 1909 Act's coverage of "all the writings of an author"[22] with "original works of authorship fixed in *any* tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[23] This language explicitly covers any future formats and recognizes that technology might be needed to perceive them. As a legislative drafter, I admire its construction. Already it has been able to encompass video games,[24] software,[25] and GIFs.[26]

14. Litman, *supra* note 9, at 865, 872; PETERS, *supra* note 12, at 1:1; H.R. REP. NO. 94-1476, at 47 (1976); 1 HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT § 1:32, Westlaw (database updated Oct. 2025).

15. STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) [hereinafter REGISTER'S REPORT], *reprinted in* 3 OMNIBUS, *supra* note 12.

16. *See* PETERS, *supra* note 12, at 1:2.

17. *See* Ringer, *supra* note 8, at 478 n.4.

18. *See* Litman, *supra* note 9, at 865.

19. Ringer, *supra* note 8, at 478, 481–82.

20. *See Hearings on H.R. 2223*, *supra* note 12, at 92 (statement of John G. Lorenz, Acting Libr. of Cong.).

21. *See id.* at 96 (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.).

22. Copyright Act of 1909, § 4, Pub. L. No. 60-349, 35 Stat. 1075, 1076 (repealed 1976).

23. 17 U.S.C. § 102(a) (emphasis added).

24. *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878, 882 (D.C. Cir. 1989) ("Video games, case law confirms, rank as 'audiovisual works' that may qualify for copyright protection.").

25. *See, e.g.*, Montgomery v. Noga, 168 F.3d 1282, 1288 (11th Cir. 1999) ("The Copyright Act of 1976 provides protection for computer programs." (citation omitted)).

26. *See* Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 508–09 (N.D. Ohio 1997) (establishing valid copyright ownership in photographs embodied as GIFs).

The exclusive rights provided to copyright owners were also simplified.. Much of the detail in the 1909 Act was abandoned or approached instead as elements of exceptions and limitations.[27] As set out in section 106, the rights have been capacious enough to cover many new means of copying and sharing copyright works, from photocopying[28] to streaming.[29] Arguably, however, the drafters didn't go far enough to ensure adaptability—they still relied on a specific list of rights rather than establishing a general right to exploit the work publicly, as Chafee recommended[30] and some countries have legislated.[31] Doing so would have obviated the need for continued parsing of the scope of each right., like in subsequent debates over public performance rights for sound recordings[32] and the implementation of the making available right required by international treaties.[33] Chafee's approach would not necessarily give copyright owners greater control; the borders of each right could then be delineated through policy judgments embodied in the crafting of exceptions and limitations.

And critically, the fair use doctrine was codified for the first time in section 107, drawing on decades of judicial analysis.[34] The drafters resisted the temptation to provide greater specificity and left the doctrine open-ended to allow courts to continue its development.[35] This decision proved to be very wise, and key to the Act's ability to accommodate technological change.

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27. *See* Ringer, *supra* note 8, at 484.

28. The exceptions for libraries and archives and their users in 17 U.S.C. § 108 make clear that photocopying implicates the section 106(1) right of reproduction.

29. The Copyright Office concluded after a comprehensive study that streaming implicates the section 106(4) right of public performance. *See* U.S. COPYRIGHT OFF., THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 74 (2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf [https://perma.cc/K859-9QLX].

30. Chafee, Jr., *supra* note 6, at 505 ("The essential principle is the author's right to control all the channels through which his work or any fragments of his work reach the market. It should be one right, and not just a bundle of separate rights to copy, to perform, to make phonograph records, and so on.").

31. This includes France, Switzerland, and Brazil. *See* Code de la propriété intellectuelle [C.P.I.] [Intellectual Property Code] art. L111-1 (Fr.) ("The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons."); URHEBERRECHTSGESETZ [URG], LOI SUR LE DROIT D'AUTEUR [LDA], LEGGE SUL DIRITTO D'AUTORE [LDA] [COPYRIGHT ACT] Oct. 9, 1992, AS 1789 (1993), art. 10 (Switz.) ("The author has the exclusive right to decide whether, when, and how his work is used."); Decreto No. 9.610, de 19 de Fevereiro de 1998, Diário Oficial da União [D.O.U.] de 19.2.1998 (Braz.) ("The author has the exclusive right to use, enjoy and dispose of the literary, artistic or scientific work.").

32. *See, e.g.*, H.R. REP. NO. 117-693, at 6 (2022) ("Controversy has always existed over whether the 'bundle of rights' to a sound recording should include a public performance right.").

33. *See, e.g.*, U.S. COPYRIGHT OFF., *supra* note 29, at 8–9.

34. *See* H.R. REP. NO. 94-1476, at 65 (1976) ("The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it.").

35. *See id.* at 66 ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-

III.
PARTICIPATION IN THE INTERNATIONAL COPYRIGHT COMMUNITY

A second major revision goal was to enable the United States to participate fully in the international copyright community.[36] Under the 1909 Act, our idiosyncratic copyright system made us an outlier, excluded from membership in the preeminent multilateral treaty, the Berne Convention.[37] While we championed an alternative treaty—the Universal Copyright Convention—it never gained significant adherence.[38] The 1976 Act laid the groundwork to join Berne by abandoning most formalities, phasing out the protectionist manufacturing clause, and adopting a unitary term based on the author's life.[39]

IV.
COPYRIGHT FOR ALL

The third goal was to improve the lot of individual creators.[40] The Act established a more author-centered copyright system, treating copyright as an individual entitlement rather than primarily an institutional asset.[41] Previously, protection was inextricably linked to publication—most unpublished works were not covered by federal copyright, and publication typically required assigning rights to a publisher.[42] And copyright protection was easy to lose, as it hinged on technical formalities, and mistakes could have drastic consequences.[43]

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case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.").

36. *See, e.g.*, S. REP. NO. 94-473, at 113, 118 (1975).

37. *See* S. REP. NO. 100-352, at 5 (1988) ("For almost one hundred years, differences between U.S. law and Berne Convention standards kept our nation from joining the Convention. However, in the last two decades, changes in American law and in the Berne standards have narrowed that gap.").

38. *See* WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO 16 (2d ed. 2026); Shira Perlmutter, *Copyright Then and Now: A Half-Century of Change*, 50 AIPLA Q.J. 559, 564–65 (2022).

39. *See Harmonizing Copyright's Internationalization with Domestic Constitutional Constraints*, 121 HARV. L. REV. 1798, 1805 (2008) (citing Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487–88 (2004)) ("In order to comply with the Berne Convention, the 1976 Act began a process — completed by subsequent acts — of largely eliminating formalities . . . ."); MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 6:13, Westlaw (database updated Nov. 2025) ("The 1976 Act amended and narrowed, but continued, the manufacturing clause."); PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 7 (1st ed. 2001) ("[T]he prospect of Berne membership explains the decision in the 1976 Act to extend the general term of copyright to the Berne minimum term of fifty years after the author's death.").

40. *See* Ringer, *supra* note 8, at 492 ("The shift in direction toward the individual author and away from the publisher or other initial disseminator of the work can be seen throughout the sections of the new law dealing with ownership.").

41. *Id.* at 492–93.

42. *Id.* at 491–92.

43. *See* 4 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 16:281 (3d ed. 2025) ("The old system of formalities involved copyright notice, deposit and registration, recordation of transfers and licenses of copyright ownership, and United States manufacture, among other things. In general, while retaining formalities, the 1976 law reduced

In contrast, by protecting works from the moment of their creation, published or not, virtually everyone became not only a user but also an author. This change had far-reaching consequences, as it brought the average consumer more directly into the copyright system.

The Act also provided authors with a guaranteed second bite at the apple in the form of termination rights, enabling them to take back prior grants and renegotiate for better terms.[44] These provisions were designed to address problems with the renewal system under the 1909 Act,[45] which Congress described as "[o]ne of [its] worst features."[46] To avoid allowing termination rights to be similarly signed away in advance, the drafters made them inalienable.[47] In addition, the Act's work-made-for-hire definition narrowed common law interpretations that had eliminated author's rights in commissioned works.[48]

V.
HOW WELL HAVE THESE GOALS BEEN REALIZED?

Despite the drafters' best future-proofing efforts, the statute has since been amended multiple times. The Copyright Office's Circular 92 has thickened considerably! To what extent have all these changes furthered the drafters' three goals?

A. Technology

Overall, the 1976 Act has proven remarkably resilient. The past fifty years have brought dramatic technological innovations, transforming the way works are created and distributed, as well as accelerating the speed and scale of change. The Act's flexible provisions have by and large proven up to the task of meeting the resulting challenges.

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the chances of mistakes, softened the consequences of errors and omissions, and allowed for the correction of errors."); Sprigman, *supra* note 39, at 491–94 ("[T]he early U.S. copyright laws are remarkable for the variety of hurdles that an author was made to clear to gain and maintain the protection of the law.").

44. *See* 3 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 11.01 n.17 (2026) (citing STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 71 (Comm. Print 1965), *reprinted in* 4 OMNIBUS, *supra* note 12).

45. *See id.*

46. *See* H.R. REP. NO. 94-1476, at 134 (1976).

47. 17 U.S.C. § 304(c)(5).

48. *Id.* § 101; I.T. Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y 210, 230–31 (1988) ("The 1909 statute had made clear that the 'employer' of an 'employee' would have the right to obtain copyright in the employee's works. The common law developed a corresponding presumption that, at least under certain circumstances, one who commissioned, but did not 'employ,' another to create copyrightable works was the party who would obtain and own the resulting federal copyrights.").

Nevertheless, the law has seen a series of changes, some of them extensive. The amendments have built on the Act's foundational provisions in sections 102, 103, 106 and 107, but have also supplemented or clarified them. Several have added mechanisms to ensure the continued effectiveness of those provisions, given new means of delivery of content and the growing number and roles of intermediaries.[49] Others have aimed to reverse court decisions that Congress found misguided.[50]

Important amendments have included new performance rights and compulsory licenses for the late-to-federal-copyright category of sound recordings,[51] and the updating of exceptions, notably the TEACH Act of 2002 that expanded the educational exemption to cover digital distance education.[52]

The most far-reaching change was the Digital Millennium Copyright Act (DMCA) of 1998. Its safe harbor provision immunized online service providers who cooperated in curbing infringement from monetary liability for their users' acts.[53] Rather than codifying common law secondary liability principles as was initially proposed,[54] the final version was instead detailed and technology-

49. *See, e.g.*, Digital Performance Right in Sound Recordings Act of 1995, 17 U.S.C. §§ 106, 114–115 (granting owners of sound recordings the right to perform publicly through digital transmission in certain instances); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 and 28 U.S.C.) (addressing issues raised by digital networked technology, including conditional safe harbors against liability for online service providers, and adjuncts to copyright to protect the use of technological protection measures and the integrity of copyright management information (CMI)); Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 and 28 U.S.C.) (replacing the song-by-song compulsory license for making and distributing musical works with a blanket license for digital phonorecord deliveries).

50. *See* Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107), adding to the end of the section 107 fair use factors the following: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." This amendment was in response to a line of Second Circuit cases that appeared to draw a bright line against a finding of fair use for unpublished works. 4 NIMMER & NIMMER, *supra* note 44, § 13F.06[B][2] (citing H.R. REP. NO. 102-836 (1992)); *see also* 2 *id.* § 8.18[B] (citing H.R. REP. NO. 94-1476, at 88–89 (1976)) (describing how Congress in the '76 Act "clearly intended to modify [*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974)] by bringing secondary transmissions within the copyright orbit.").

51. *See* Digital Performance Right in Sound Recordings Act of 1995 § 2 (adding section 106(6), the exclusive right to perform sound recordings "publicly by means of a digital audio transmission," and language in section 114 limiting this new right by providing for statutory licensing of sound recordings in certain circumstances).

52. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1910 (codified as amended at 17 U.S.C. §§ 110(2), 112(f)); *see also* Legislative Branch Appropriations Act § 316, 17 U.S.C. § 121 (adding section 121, limitations on exclusive rights: reproduction for blind or other persons with disabilities, known as the Chafee Amendment).

53. Digital Millennium Copyright Act § 202 (establishing the section 512 notice-and-takedown safe harbor system).

54. H.R. REP. NO. 105-551, at 11 (1998) ("Title II of this [prior House version of the] bill codifies the core of current case law dealing with the liability of on-line service providers, while narrowing and clarifying the law in other respects. It offers the advantage of incorporating and building on those judicial applications of existing copyright law to the digital environment that have been widely

specific, conditioning responsibilities on four different types of online services.[55] In addition to being less durable as business models evolve, this choice may have unforeseen consequences given the recent Supreme Court decision in *Cox v. Sony*.[56]

The DMCA also sought to substitute for physical world safeguards in the online environment by establishing technological adjuncts to copyright. Portions of the prohibition on circumvention in section 1201 are highly technical,[57] and some may have already become outmoded.[58] But the rulemaking process it established entails a flexible fair use-based determination, which has served to produce new exceptions every three years.[59] And by allowing copyright owners to rely more securely on technical protection measures to control the terms of use for their works, it ultimately enabled the celestial jukebox foreseen by Paul Goldstein as early as 1994.[60] What seemed speculative thirty years ago is the world we now take for granted, with the proliferation of streaming platforms, digital marketplaces, and cloud libraries.

Throughout, fair use has played a critical role as a flexible judicial tool, ensuring an essential balance in the copyright system. It has allowed a range of uses undreamed of in 1976, such as home recording of television broadcasts,[61] thumbnail images in search results,[62] and the mass digitization of books to enable searchability.[63] In my view, its success is due to its continued generality—apart from an ill-conceived amendment in the 1990s intended to reverse a judicial gloss on unpublished works.[64] Since then, the provision's language has remained untouched (although a discussion draft circulating in Congress

accepted as fair and reasonable."); S. REP. NO. 105-190, at 19 (1998) ("Rather than embarking upon a wholesale clarification of [contributory and vicarious liability], the Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers.").

55. Digital Millennium Copyright Act § 202.

56. Cox Commc'ns, Inc. v. Sony Music Ent., 146 S. Ct. 959 (2026) (narrowing grounds for contributory infringement by internet service providers).

57. *See, e.g.*, 17 U.S.C. § 1201(g) (encryption research); § 1201(j) (security testing).

58. *See, e.g.*, 17 U.S.C. § 1201(k) (setting out detailed technical requirements for analog devices); U.S. COPYRIGHT OFF., SECTION 1201 OF TITLE 17, at 152 (2017), https://www.copyright.gov/policy/1201/section-1201-full-report.pdf [https://perma.cc/5DBQ-4PEA].

59. *See Rulemaking Proceedings Under Section 1201 of Title 17*, U.S. COPYRIGHT OFF., https://www.copyright.gov/1201/ [https://perma.cc/L635-S848] (last visited Sep. 7, 2026) (linking to final determinations and background materials for every section 1201 triennial rulemaking).

60. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994).

61. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

62. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

63. *See* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

64. *See* Digital Performance Right in Sound Recordings Act of 1995, 17 U.S.C. §§ 106, 114–115. This amendment has not been much cited or applied, and has been made less relevant by the Supreme Court's holding in *Campbell v. Acuff-Rose Music, Inc.* that no one fair use factor is dispositive. *See* 510 U.S. 569, 583–84 (1994).

would add another sentence specific to the use of copyrighted works in AI systems).[65]

B. International Relations

It was a mere 13 years after the Act's enactment that the United States finally did become a member of the Berne Convention.[66] This step enabled us to play more of a leadership role in the global copyright community. We had joined the club, and could now fully leverage the influence of our cutting-edge technologies and internationally successful copyright industries. And that meant that our up-to-date statute began to influence international developments in far-reaching ways.

Just a few years after joining Berne, the United States proposed updating it to address emerging digital technology, which ultimately led to the two WIPO Internet Treaties in 1996.[67] Around the same time, we began incorporating copyright obligations into our trade agenda, generally based on the framework of the 1976 Act and later the DMCA.[68] We have since negotiated multiple bilateral and plurilateral copyright agreements that export elements of U.S. law

65. *See* Press Release, Sen. Marsha Blackburn, Blackburn Releases Discussion Draft of National Policy Framework for Artificial Intelligence (Mar. 18, 2026), https://www.blackburn.senate.gov/2026/3/technology/blackburn-releases-discussion-draft-of-national-policy-framework-for-artificial-intelligence/3b3b6458-b6c7-478b-9859-374949586765 [https://perma.cc/UF9J-A4RM] (stating the draft "[m]akes clear that an AI model's unauthorized reproduction, copying, or processing of copyrighted works for the purpose of training, fine-tuning, developing, or creating AI does not constitute fair use under the Copyright Act").

66. Berne Convention for the Protection of Literary and Artistic Works, Sep. 28, 1979, S. TREATY DOC NO. 99-27.

67. *See* S. EXEC. REP. NO. 105-25, at 2–3 (1998).

68. *See* Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 979 (2014) ("Over the past decade, the United States has exported detailed intellectual property ('IP') law in its free trade agreements. These agreements add substantive IP protections and enforcement measures to existing international law. From an international perspective, these agreements have been understood as exporting U.S. IP law to other countries." (footnote omitted) (citing Andrew Christie, Sophie Waller & Kimberlee Weatherall, *Exporting the DMCA Through Free Trade Agreements*, *in* 4 INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS 211, 211 (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (noting that "such IP Chapters are often based closely on the equivalent legislation in the US, and this is exemplified by the *Digital Millennium Copyright Act* (DMCA) provisions which the US now routinely includes in its FTAs . . . [effectively] exporting the DMCA into the national law of other countries"))); Lisa Peets & Mark Young, *Internet Piracy 10 Years On: Online Enforcement and the DMCA*, 1 LANDSLIDE, no. 4, 2009, at 40, 41 ("The U.S. government's push to incorporate DMCA-style copyright provisions and activity-specific safe harbors for service providers in free trade agreements (FTAs) with countries around the world, including Australia, Bahrain, Chile, and Singapore means that the DMCA notice and takedown regime is becoming a global norm." (footnotes omitted)).

around the world.[69] These have included aspects of sections 512 and 1201,[70] as well as an obligation to incorporate balance through exceptions in national laws.[71] One WIPO treaty requires countries to adopt an exception based on our 1997 Chafee amendment, allowing the making and distribution of accessible format copies for the blind and visually impaired.[72] The Marrakesh Treaty has been tremendously successful in ameliorating the international book famine, and now counts over 100 members who are sharing accessible format copies.[73]

Even apart from treaty obligations, the 1976 Act has served as a model to other countries drafting or revising their copyright laws. In addition to mirroring its overall structure, some have adopted similar exceptions, including fair use-style exceptions.[74]

C. Focus on the Author

While the 1976 framework improved the lot of individual creators, significant challenges remained: particularly, the unintentional forfeiture of rights due to renewal formalities[75] and the lack of a practical enforcement mechanism for those who could not afford the cost of federal litigation (which

69. *See, e.g.*, United States–Colombia Trade Promotion Agreement, U.S.-Colom., arts. 16.7.4, 16.11.29, Nov. 22, 2006, WIPO Lex. No. TRT/CO-US/001; Australia–United States Free Trade Agreement, Intellectual Property, Austl.-U.S., arts. 17:4.7, 17:11.29, May 18, 2004, 43 I.L.M. 1248; United States–Bahrain Free Trade Agreement, U.S.-Bahr., art. 14:10.29, Sep. 14, 2004, 44 I.L.M. 544; Dominican Republic–Central America–United States Free Trade Agreement arts. 15.5.7, 15.11.27, Aug. 5, 2004, 43 I.L.M. 514; United States–Chile Free Trade Agreement, U.S.-Chile, arts. 17.7.5, 17.11.23, June 6, 2003, 42 I.L.M. 1026.

70. *See* sources cited *supra* note 69.

71. Trans-Pacific Partnership art. 18.66, Feb. 4, 2016, WIPO Lex. No. TRT/TPP/001.

72. *See* Shae Fitzpatrick, *Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities*, 37 B.C. INT'L & COMPAR. L. REV. 139, 163 (2014); Brian Wentz, Jonathan Lazar, Paul T. Jaeger & Ursula Gorham, *A Socio-Legal Framework for Improving the Accessibility of Research Articles for People with Disabilities*, 16 J. BUS. & TECH. L. 223, 240 (2021) ("Article 4 of the Marrakesh treaty requires the types of copyright exemptions that are already available in Chafee Amendment to the U.S. Copyright Act." (footnote omitted)).

73. *Marrakesh Treaty & Access to Information*, WORLD BLIND UNION, https://wbu.ngo/what-we-do/marrakesh-treaty-access-to-information [https://perma.cc/G9W7-FU9G] (last visited Aug. 29, 2026).

74. This includes the copyright laws of Israel, South Korea, Liberia, Malaysia, the Philippines, and Singapore. *See* § 19, Copyright Law, 5768–2007, SH 2119 38, as amended (Isr.); Jeojakgwonbeob [Copyright Act] art. 35-5, *amended by* Act No. 21336, Feb. 10, 2026 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, http://elaw.klri.re.kr/eng_service/main.do (search required); LIBERIA INTELLECTUAL PROPERTY ACT § 9.8 (2016), https://www.wipo.int/wipolex/en/legislation/details/16994 [https://perma.cc/8WH3-CNEE]; Copyright Act 1987 [*Act 332*] s 13 (Malay.); INTELLECTUAL PROPERTY CODE, § 185, Rep. Act 8293 (Phil.); Copyright Act 2021 ss 191–194 (Sing.).

75. *See, e.g.*, H.R. REP. No. 94-1476, at 134 (1976) ("One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright."). While the renewal system was replaced with a life plus 50 years term for works fixed in 1978 or later, for earlier works the 1976 Act left the renewal system in place.

has only increased over the decades).[76] These challenges were addressed by removing renewal formalities in the Copyright Renewal Act of 1992[77] and by establishing a new forum to adjudicate copyright small claims in the CASE Act of 2020.[78]

One continuing challenge is the complexity of the termination process, which can serve as a barrier to authors making use of this valuable option.[79] This is an area deserving further attention.

VI.
LOOKING TO THE FUTURE

Do we need to rewrite the 1976 Act? Back in 2013, when the Act was a relatively youthful 37 years old, my predecessor Maria Pallante urged enactment of The Next Great Copyright Act.[80] She identified multiple areas where the statute was outdated or fell short, and Congress followed up with extensive hearings.[81] At the end of the day, rather than a comprehensive revision, what emerged was a series of segment- and industry-specific solutions. The process sparked enactment of felony streaming penalties,[82] the CASE Act,[83] and the Music Modernization Act.[84] Such a topic-by-topic approach was not surprising, given how much has changed since the revision effort of the 1960s and 70s—particularly the tremendous range of interests to be considered.

An even wider range of voices than the "every conceivable segment of . . . society" described by Barbara Ringer participate in copyright policy discussions

76. *See generally* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (2013). https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf [https://perma.cc/3QCP-B43D] ("Unfortunately, and perhaps ironically, as the rate of infringement has increased, so too have the barriers to pursuing copyright claims in the federal courts. These barriers are largely practical: federal litigation is expensive and time-consuming, and therefore out of reach for many copyright owners.").

77. Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 102, 106 Stat. 264, 264–66 (codified as amended in 17 U.S.C. § 304).

78. Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020, 17 U.S.C. §§ 1501–1511 (establishing the Copyright Claims Board (CCB)).

79. *See, e.g.*, Kevin J. Greene, *The Future Is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC'Y 45, 57 (2020) ("The complexity of the termination process is mind dizzying, including correctly selecting the date in which the grant can be terminated.").

80. *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) for an extended version of the Twenty-Sixth Horace S. Manges Lecture delivered on March 4, 2013, at Columbia Law School.

81. *See Congressional Hearings and Statements to Congress*, U.S. COPYRIGHT OFF., www.copyright.gov/laws/hearings/ [https://perma.cc/4UUF-W8H5] (last visited Aug. 29, 2026) (collecting links to twenty copyright review hearing records under "Copyright Review Hearings, 2013-2015," including transcripts and statements).

82. Protecting Lawful Streaming Act of 2020, 18 U.S.C. § 2319C.

83. Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020.

84. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 and 28 U.S.C.).

today.[85] They include technology companies and other intermediaries, as well as consumer and public interest groups.[86] Individual creators have become better organized and more sophisticated about the policy-making process.[87] There is greater public attention paid to copyright, with members of the public more aware of its existence and impact.[88] There is also more money at stake, with the copyright-intensive industries now major contributors to the economy.[89] And all of these factors add up to a more intense *political* spotlight.

This expansion has made achieving results more complex and difficult. But it has also resulted in a richer, more representative debate, and hopefully in balanced and durable solutions.

VII.
CONCLUSION

In my view, the statute can and should continue to evolve but does not need wholesale revision. The basic framework remains sound. In addition, as a pragmatic matter, it has become embedded in a wider global infrastructure of laws, treaties and business arrangements.

The question of the day is whether artificial intelligence is simply the current iteration of past technological challenges, or whether it is too cataclysmic a disruption for the Act's structure to survive. So far, that structure seems up to the task. The copyrightability issues raised by AI can be resolved by existing standards of authorship and originality;[90] the infringement issues can be resolved by the application of exclusive rights cabined by fair use;[91] and tools such as extended collective licensing are available to address any areas of market failure that may arise.[92] I believe the Act will survive the AI revolution as well as the technological leaps of the past, with its fundamental building blocks adapted and supplemented as needed.

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85. *See* Ringer, *supra* note 8, at 482.

86. Perlmutter, *supra* note 38, at 575.

87. *Id.* at 575–76.

88. *See id.* at 576.

89. *See, e.g.*, JÉSSICA DUTRA & ROBERT STONER, INT'L INTELL. PROP. ALL., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 2024 REPORT 1 (2025), https://www.iipa.org/files/uploads/2025/02/IIPA-Copyright-Industries-in-the-U.S.-Economy-Report-2024_ONLINE_FINAL.pdf [https://perma.cc/ZA2H-QER4] (stating that the core copyright industries added $2.09 trillion dollars of value to U.S. GDP, accounting for 7.66% of the entire U.S. economy).

90. *See* Thaler v. Perlmutter, 130 F.4th 1039, 1044 (D.C. Cir. 2025) (holding that "the Copyright Act requires all work to be authored in the first instance by a human being."), *cert. denied*, 146 S. Ct. 1777 (2026); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 41 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/ZG5D-UC7E].

91. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 3: GENERATIVE AI TRAINING 74 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf [https://perma.cc/7GRZ-75UR].

92. *See id.* at 99–100, 105.

A View from the Bench: The 1976 Copyright Act

Hon. M. Margaret McKeown*

ABSTRACT

Copyright law has always been a law of the future. It protects works in the present while setting up rules that will govern future technologies, markets, and forms of expression. New technologies have often challenged existing doctrines and generated both excitement and anxiety in the process. The recurring temptation is to treat each disruptive innovation as unprecedented. But judicial experience and the history of the Copyright Act of 1976 counsel a more measured perspective. A view from the bench shows that copyright law works best when Congress and the courts collaborate consistent with their constitutionally assigned roles: courts decide the cases that new technologies produce, and Congress amends the Act based on the challenges that new technologies and cases reveal. The Act's fifty-year history demonstrates its remarkable capacity to absorb many major transformational technologies, including software and the internet, even as the rapid development of generative artificial intelligence may push courts to step in first. This institutional review helps to bring copyright's normative commitments—a set of stories that we tell about how copyright serves the public good—into sharper focus. Those commitments show how Congress and the courts have turned to copyright not only to promote creativity and innovation, but also to mediate claims about free speech, dignity, privacy, and cultural authority. In the end, the view from the bench offers chastened confidence in copyright's future, not because new technologies will not be challenging, but because copyright law can adapt without abandoning its public purpose.

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I. INTRODUCTION

It is an honor to be part of this symposium on the fiftieth anniversary of the 1976 Copyright Act. I have been involved in copyright for about fifty years—just a fraction of copyright's 316-year history—but coinciding with the lifetime of the 1976 Act, whose golden jubilee we are celebrating today.

An anniversary like this one invites a certain kind of story. We tend to speak of major statutes as if they were inevitable. The old law had run its course, Congress finally acted, and the new framework took its place. The Copyright Act can look that way now. It is the statute that we inherit, the statute that we teach, the statute that we interpret as if it were always going to have its present form. But nothing about the 1976 Act was inevitable. The old law had certainly become, in Benjamin Kaplan's memorable phrase, a text of "maddeningly casual prolixity and imprecision,"[1] and courts had spent decades patching, stretching, and improvising just to keep the system serviceable.[2]

How the Act was made matters, though I would put that point with some restraint. The statute, as some here have written, did not emerge fully formed from a single legislative vision.[3] It came out of a long revision process in which Congress, the Copyright Office, and affected industries struggled to turn accumulated dissatisfaction with the 1909 Act into durable statutory language.[4] The pressures for revision came from the convergence of new media and old categories. Technologies like cable, photocopying, sound recording, broadcasting, and early computing made the 1909 Act look outdated and

1. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 40 (1967).

2. *See* Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 206, 214–15 (2014) (arguing that developments under the 1909 Act "caused the judges interpreting it to stretch the statutory language to its limits").

3. *See* Peter S. Menell, *The Making of the Copyright Act of 1976: Part I—Technocracy and Compromise*, 41 BERKELEY TECH. L.J. 753, 757 (2026) (offering "a more institutionally grounded and public-regarding account" of the Act's drafting); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (describing the drafting as an "anomalous legislative process designed to force special interest groups to negotiate with one another" and arguing that "the substantive content of the [final] statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright").

4. *See* Litman, *supra* note 3, at 862, 875–78.

conceptually brittle.[5] Its protections were too often tied to medium-specific formalities, too often depended on publication, too often relied on judicial patchwork regimes, and were too often poorly equipped to govern emerging forms of transmission, storage, and exploitation.[6]

What seems most striking, as I look back, is that the 1976 Act's drafters understood, with an unusual clarity, the challenges of writing copyright for a future that could not yet be clearly seen. To be sure, like its predecessors, the 1976 Act was an effort at modernizing copyright to adapt to emerging technologies and forms of exploitation.[7] But it was more than that. The drafters were aware that the Act would have to apply to new technologies and media that were, in the statute's language, "now known or later developed."[8] The House Report summarized it this way:

> Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent.[9]

The way I read it, the Report is saying: "We don't know what we don't know." In this passage, Congress displays a remarkable self-awareness about the uncertainty of the future. This history seems to me the right place to start, because it captures both the Act's prescience and its limits, its ambition and its self-restraint.

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5. MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1 (1977) ("Significant changes in technology have resulted in a wide range of new communications techniques that were unknown in 1909--for example, radio, television, communications satellites, cable television, computers, photocopying machines, videotape recorders, etc., and there are promises of even greater changes in the future. This growth in technology made revision of the Act of 1909 imperative.").

6. *See, e.g.*, Copyright Act of 1909, Pub. L. No. 60-349, §§ 9, 11–12, 35 Stat. 1075, 1077–78, 1080 (repealed 1976) (granting copyright secured through "publication . . . with the notice of copyright," requiring, for certain unpublished works, deposit of "one complete copy" if the work is a "lecture or similar production or a dramatic or musical composition" or "a photographic print if the work [is] a photograph" or "a photograph or other identifying reproduction . . . if it [is] a work of art or a plastic work or drawing").

7. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology."); H.R. REP. NO. 94-1476, at 51 (1976) ("[S]cientific discoveries and technological developments have made possible new forms of creative expression that never existed before.").

8. 17 U.S.C. § 102(a); *see* H.R. REP. NO. 94-1476, at 61–64 (explaining that Section 106 states copyright owners' rights in "broad terms" and that public performance may occur through devices, processes, electronic retrieval systems, and techniques "not yet in use or even invented"); Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977) ("The New Act is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act.").

9. H.R. REP. NO. 94-1476, at 51.

Another way to put it is: The Act represented a step in what I call the dance between Congress and the courts.[10] By the time of enactment, courts had been pushed to their interpretive limits. And so, Congress acted. This sequence presents a familiar division of labor. Courts address only particular aspects of a law as they arise against the backdrop of specific facts and in a particular controversy.[11] Congress writes laws on a broad slate. Or, as Justice Holmes once remarked: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule . . . ."[12] Copyright, more than most fields, resists that backward-looking register. It is a field deeply preoccupied with the future: with incentives for works not yet created, markets not yet formed, and technologies whose parameters are not yet determined. Case-by-case adjudication is the bread and butter of the courts, but it is often too constraining as a way to articulate governing rules. And while writing for the future is always challenging, Congress was also writing for media and technologies "now known or later developed."[13] And so, its job was doubly challenging. In that sense, Congress undertook to do something harder than just modernization.

One early outgrowth of the 1976 Act was the work of the National Commission on New Technological Uses of Copyrighted Works (CONTU), which concluded that computer programs could be protected under copyright as "original works of authorship."[14] Congress largely adopted these conclusions in the 1980 Computer Software Copyright Act.[15] And so the dance continued with whirlwind force. Amid dozens of landmark court decisions, Congress amended the 1976 Act seventy-nine times.[16] Some amendments were major, like the Digital Millennium Copyright Act (DMCA), and others significant but smaller.[17]

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10. *See* M. Margaret McKeown, *Happy Birthday Statute of Anne: The Dance Between the Courts and Congress*, 25 BERKELEY TECH. L.J. 1145, 1146 (2010).

11. *See id.* at 1148–49.

12. Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908).

13. 17 U.S.C. § 102(a).

14. NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 1, 12–16 (1978) [hereinafter CONTU REPORT] ("The new copyright law should be amended . . . to make it explicit that computer programs, to the extent that they embody an author's original creation, are proper subject matter of copyright . . . .").

15. Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (codified as amended at 17 U.S.C. §§ 101, 117) (adding a definition of "computer program" to Section 101 and adding limitations on exclusive rights in computer programs in Section 117).

16. Eric Harbeson, *The Copyright Act Turns 50 (So We're Reading the Whole Thing)*, AUTHORS ALL. (Jan. 16, 2026), https://www.authorsalliance.org/2026/01/16/celebrating-the-copyright-act-at-50/ [https://perma.cc/TLF5-58S9].

17. *See generally* Digital Millennium Copyright Act, Pub. L. No. 105-304, tits. I–II, 112 Stat. 2860, 2861–86 (1998) (implementing two treaties from the World Intellectual Property Organization, establishing anticircumvention protections, and limiting online service providers' liability).

But think about this—the last major amendment was eight years ago in 2018 with the Orrin Hatch–Bob Goodlatte Music Modernization Act.[18] Perhaps it is no accident that Senator Hatch, who was a key leader on the Judiciary Subcommittee on Intellectual Property and was a country-western song composer, had a personal interest in copyright.[19] Alas, he passed in 2022, and Congress has changed in recent years. At least forty-four unique copyright bills have been introduced but have gone nowhere.[20]

To be sure, legislative history has its limits, and we need not rehearse those here.[21] But it is a useful point of departure to consider how the 1976 Act fared as courts began to interpret it—what happens when legislative aspirations meet the constraints of legal application. The early landmark decisions suggest that judges understood what Congress was doing and tried to give voice to the Act's text to adapt, within the acceptable bounds of the judicial power, to new circumstances and demands.[22]

And that, I think, makes the Act so fascinating at fifty. The drafters were, in some respects, remarkably prescient. They understood that copyright could not remain too closely tied to the technologies of the moment. They understood that there is value in a certain degree of abstraction, which would make the language adaptable to future circumstances.[23] But it is also remarkable what they did not, and could not, predict: the internet, platform distribution, synthetic media, and generative and agentic artificial intelligence. So, the question is not whether the Copyright Act of 1976 got the future right. No law could do that. The more interesting questions are what kinds of change the statute was equipped to absorb, and whether the limits of the Act's legal imagination have begun to show.

Here, I want to address three major technological transformations: one that the drafters anticipated (software), and two that they did not and could not (the

18. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (revising digital-music licensing, protecting pre-1972 sound recordings, and addressing producer royalties).

19. *See Orrin Hatch Takes His Songs to the People*, WIRED (Dec. 17, 1997, at 15:19 PT), https://www.wired.com/1997/12/orrin-hatch-takes-his-songs-to-the-people [https://perma.cc/8BV6-XKCJ].

20. *Legislative Developments*, U.S. COPYRIGHT OFF., https://www.copyright.gov/legislation/ [https://perma.cc/BY23-ZEMY] (last visited Aug. 30, 2026).

21. *See* Litman, *supra* note 3, at 863 ("The legislative history of the 1976 Act contains little evidence of Congress's specific intent on any substantive issue."); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 127 (2012) ("[T]here is a great risk in picking out losers' history as authoritative history without determining whether it is simply a reflection of a superminority's opposition.").

22. *See, e.g.*, WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 627–28 (7th Cir. 1982) (suggesting that Congress "probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared").

23. *See* H.R. REP. NO. 94-1476, at 51 (1976); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551 (2007) ("The drafters of the Copyright Act of 1976 . . . intended it to be flexible and adaptable as new technologies enabled the creation of new kinds of works.").

internet and generative AI). The 1976 Act has, in my view, proved remarkably adaptable at absorbing these technologies. These developments began to press on the statute's deeper assumptions about copying, dissemination, and authorship, as well as about remedies. That is why the Act still looks, fifty years later, both unusually farsighted and necessarily unfinished.

II.
SOFTWARE

Software was the first big test for the Act. Software was plainly important and technologically novel, and yet it was also awkwardly situated between language and machine function.[24] Congress could see the problem coming. The House Report listed "computer programs" among the new forms that might come into copyright's protection.[25] But rather than settle the treatment of computer program uses outright, Congress turned to CONTU for additional study.[26] CONTU's recommendation was both modest and consequential. It concluded that computer programs could be protected under copyright as "original works of authorship," while also recognizing the practical reality that computing requires copying code into a machine and adapting it.[27] CONTU therefore coupled copyrightability with a narrow operational privilege that became the revised Section 117, which in turn allowed the owner of a copy to make or adapt another copy when that step is "an essential step" in using the program with a computer.[28] Congress adopted that basic framework in the Software Copyright Act of 1980.[29]

The initial disagreements in the courts over that statute's meaning were largely settled with the Third Circuit's decision in *Apple v. Franklin*.[30] Franklin copied Apple's operating system in order to make its computers Apple-compatible, and it argued that the object code should not be copyrightable because human beings could not read it.[31] This argument had a familiar feel because it echoed the older instinct that copyright should protect only forms of

24. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524 (9th Cir. 1992) (explaining that "[c]omputer programs pose unique problems for the application of the 'idea/expression distinction'" but that they "are, in essence, utilitarian articles").

25. *See* H.R. REP. NO. 94-1476, at 51.

26. 17 U.S.C. §§ 101, 117; *see also* J. Corey Asay, *Patching the Loophole: How Copyright Can Help Solve § 271(f)'s Patently Obvious Problem with Computer Software*, 17 U. BALT. INTELL. PROP. L.J. 1, 14 (2008) ("The Copyright Office began accepting computer programs for registration in 1964, but it was not until Congress appointed the National Commission of New Technological Uses of Copyrighted Works ('CONTU') that the process of codifying the copyrightability of software began." (footnote omitted)).

27. CONTU REPORT, *supra* note 14, at 1, 12–13, 21–22; *Sega*, 977 F.2d at 1519–20.

28. 17 U.S.C. § 117(a)(1); Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10(b), 94 Stat. 3015, 3028 (codified as amended at 17 U.S.C. § 117); *see also Sega*, 977 F.2d at 1520.

29. § 10, 94 Stat. at 3028.

30. Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240 (3d Cir. 1983).

31. *Id.* at 1242–45, 1247–48.

expression directly legible to human perception.[32] The Third Circuit rejected that view. According to the court, there was no basis in the statute for distinguishing between source code and object code.[33] The Act had deliberately broad language: works fixed in a medium "now known or later developed," perceptible "either directly or with the aid of a machine or device."[34] In short, the Third Circuit took Congress at its word.

The decision in *Apple v. Franklin* showed that the 1976 Act and the 1980 amendment had effected a major change. The refusal to tie protection too closely to any single medium or mode of perception made the Act robust enough to absorb software. But the case also marked the beginning, not the end, of the challenges that courts would face. Once software was brought inside copyright, other questions arose: where to draw the line between expression and function, how far protection should extend beyond literal code (such as code structure, organization, or other elements not copied word for word), and how copyright should accommodate compatibility and interoperability. Software became both a success story and an early warning. The language of the Act was sufficiently open-textured that it could absorb new technological forms, but it could not do all the conceptual work by itself.

As some have written, one of the most persistent issues was how to distinguish expression from function in a medium where the two are unusually entangled.[35] Software is expressive in the sense that in a textual form it is authored by humans and records instructions in words, symbols, and structure, but it is also functional because those instructions direct a computer to perform operations and produce results.[36] Courts struggled to decide which elements of a program were protected expression and which were excluded under Section 102(b) as ideas, processes, systems, or methods of operation.[37] Bringing software inside copyright answered one relatively easy question, but it did not answer the harder one: what exactly did copyright protect once it embraced software?

The Ninth Circuit encountered a related issue in *Sega v. Accolade*.[38] In that case, Accolade was accused not simply of pirating Sega's finished games, but also of making intermediate copies of Sega's code in order to reverse engineer the interface requirements needed to make Genesis-compatible games.[39] The

32. *Id.* at 1248.

33. *Id.*

34. 17 U.S.C. § 102(a); *Apple*, 714 F.2d at 1248.

35. *See, e.g.*, Pamela Samuelson, *Functionality and Expression in Computer Programs: Refining the Tests for Software Copyright Infringement*, 31 BERKELEY TECH. L.J. 1215, 1284–99 (2016) (discussing the difficulties immanent in distinguishing between code functionality and expression in copyright cases).

36. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524–26 (9th Cir. 1992); Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198–99 (2021).

37. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 703–12 (2d Cir. 1992).

38. *See* 977 F.2d at 1514–15.

39. *Id.* at 1514–16, 1525–26.

novel issue was whether copyright would permit the copying necessary to reach the unprotected functional requirements for compatibility. The Ninth Circuit resolved this problem by resorting to fair use.[40] Accolade's purpose was to discover the interface specifications necessary to make its games compatible with the Genesis console, and those functional requirements were not themselves protected by copyright.[41] The court determined that the disassembly of copyrighted object code was a necessary step in its examination of the unprotected ideas and functional concepts embodied in the code.[42] Because disassembly was the only means of gaining access to those unprotected ideas and concepts, and because Accolade had a legitimate reason for seeking access, the disassembly was fair use.[43] In its analysis, the court seems to have understood that software is different from other works because one cannot inspect the functional features of a program without making temporary copies along the way.[44] The court also contrasted the fair use logic of the seminal case of *Harper & Row*, where the defendant had infringed by printing excerpts from President Ford's memoirs verbatim with the stated purpose of "scooping" a *Time* magazine review of the book.[45] In this case, Accolade had sought only to become "a legitimate competitor" in the field of Genesis-compatible video games.[46] The case was an early signal that software copyright would have to be read with an eye toward competition.[47]

A few years ago, the Supreme Court again endorsed this view in *Google v. Oracle*.[48] That case insistently tied fair use to copyright's own justifications.[49] Because exclusive rights can produce negative consequences when they are rigidly construed, both Congress and the courts have long imposed limits to keep copyright from undermining the Constitution's empowerment of Congress to "promote the Progress of Science and useful Arts."[50] Justice Breyer reiterated that fair use, as an "equitable rule of reason . . . permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[51] Fair use, in Justice Breyer's

40. *Id.* at 1520–28.
41. *Id.* at 1522, 1525–26.
42. *Id.* at 1525–26.
43. *Id.* at 1527–28.
44. *See id.* at 1525–26.
45. *Id.* at 1523 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).
46. *Id.*
47. *Cf.* Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability after* Google v. Oracle, 100 TEX. L. REV. 1, 16 (2021) (explaining that *Sega* treated reverse engineering for compatibility as a legitimate issue because otherwise Sega would receive a *de facto* monopoly over the functional elements of its programs).
48. *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198 (2021).
49. *See, e.g.*, *id.* ("In a word, [fair use] can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds.").
50. *See id.* at 16–21; U.S. CONST. art. I, § 8, cl. 8.
51. *Google*, 141 S. Ct. at 1196 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

account, was there to keep the Act from overshooting the reason why we have it. The decision spends real time explaining why the "declaring code" at issue in the case was "inextricably bound together" with systems, ideas, and uses that are uncopyrightable, or with code that was not copied.[52] It also vindicated a longstanding view, endorsed by the Ninth Circuit in *Sega*, that any application of copyright to software must be sensitive to functionality, interoperability, and the need to "allow users to put their accrued talents to work" in new and transformative programs.[53]

This history illustrates the effectiveness of the dance between Congress and the courts. Congress passed the 1976 Act, commissioned recommendations from CONTU, and brought computer programs into the fold of copyright protection. But that legislative settlement did not answer what protection meant for a functional, interoperable technology. The courts then stepped in. In *Apple*, *Sega*, and eventually *Google*, courts gave effect to Congress's choice while also preserving copyright's limits, in order to keep protection for code from becoming control over function, interface, and compatibility. That dance would repeat, at greater speed and scale, with the rise of the internet.

III.
THE INTERNET

When it comes to the internet, the story of copyright is a story of scale. The internet changed the ways that a work would circulate. When the world came online, copying started to happen in the blink of an eye. It was decentralized, cheap, and global. Because of these changes, infringement issues took on a structural character.[54] The internet either introduced or intensified a number of issues that continue to be relevant for copyright adjudication: decentralized sharing, search and indexing, cloud storage, platform moderation, takedown, and global visibility of allegedly infringing works.[55] The old questions of copying and distribution did not disappear. They took on a new valence because of the scale of reproduction and dissemination, and because the practical stakes encompassed the ability to access, circulate, or remove a work.

Courts had to adapt copyright doctrine to that scale. And so they got to work. Before we knew about platform architecture and user-generated content,

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52. *Id.* at 1201.

53. *See id.* at 1208–09 (citing Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992)).

54. S. REP. NO. 105-190, at 8 (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."); Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L.J. 801, 806 (2009) ("[T]he Internet has expanded exponentially the amount of copyright infringement occurring online.").

55. S. REP. NO. 105-190, at 8; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159–77 (9th Cir. 2007) (addressing copyright liability and fair use in the context of search-engine indexing and thumbnail images); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27–32 (2d Cir. 2012) (describing DMCA safe-harbor issues for user-generated videos and takedown obligations).

in 1993 the courts confronted the first case involving the internet and copyright—*Playboy Enterprises, Inc. v. Frena*.[56] The internet was just inching into the mainstream with 6.8 million users.[57] Today internet users number over 6 billion.[58] The *Frena* case involved a subscription computer bulletin board, quaintly accessed by telephone modem, where customers could download 170 Playboy images.[59] Finding direct copyright infringement via distribution and display rights was not a rocket-science conclusion.[60] But it was also possible to read the opinion as suggesting that an online intermediary could be liable for infringement under a theory that resembled strict liability. The court in *Frena* wrote, "Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement."[61]

Around the same time, in 1995, a district court in San Francisco decided *Religious Technology Center v. Netcom On-Line Communications Services*.[62] That case also centered on a bulletin board service operator, Netcom, that allowed users to upload copyrighted material belonging to the Church of Scientology.[63] There, however, the court concluded that Netcom could not be held directly liable for infringement.[64] Netcom's making of temporary copies in order to operate the bulletin board service did not mean that it "caused the copying."[65] The court explained that "it is not unlike that of the owner of a copying machine who lets the public make copies with it."[66] The court still held, however, that Netcom's liability was better analyzed under the rubric of contributory or vicarious infringement.[67]

Because the decisions in *Frena* and *Netcom* pointed in different directions, they set the stage for the continuing dance with Congress, which stepped in and enacted the DMCA in 1998.[68] The Senate Report notes that Congress considered both cases in its enactment of Section 512.[69] That provision, which seems to embrace parts of *Netcom*, limits the exposure of Internet Service Providers (ISPs)

56. *See* 839 F. Supp. 1552, 1554 (M.D. Fla. 1993), *superseded by statute*, Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877–86 (1998).

57. Hannah Ritchie, Edouard Mathieu, Max Roser & Esteban Ortiz-Ospina, *Internet*, OUR WORLD IN DATA, https://ourworldindata.org/internet [https://perma.cc/FH3D-TCLG] (last visited Aug. 31, 2026) (click on the chart "Number of People Using the Internet"; then download the full dataset; then open the downloaded .csv file; then filter the "Year" column to 1993 only; then sum all values in the "Number of people using the internet" column for the filtered 1993 data).

58. *Id.* (click on the chart "Number of People Using the Internet"; then display as table; then scroll until "Country or Region" row selected is "World").

59. *See* 839 F. Supp. at 1554.

60. *See id.* at 1556–57.

61. *Id.* at 1559.

62. 907 F. Supp. 1361 (N.D. Cal. 1995).

63. *See id.* at 1366–68.

64. *See id.* at 1368–70.

65. *Id.* at 1369.

66. *Id.*

67. *Id.* at 1369, 1374–77.

68. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

69. *See* S. REP. NO. 105-190, at 19 n.20 (1998).

to financial damages and sets out the DMCA's conditional safe harbors, while leaving ordinary doctrines of direct, contributory, and vicarious infringement intact.[70] These provisions provide an escape hatch from the kind of expansive liability that the court in *Frena* seemed to bless.

The problems presented by *Frena* and *Netcom* were relatively easy and partially remedied by the DMCA. But the harder cases came with the reality of peer-to-peer distribution services. In other words: What to do when the alleged infringer supplies a global infrastructure by which others circulate copyrighted content? In *A&M Records, Inc. v. Napster*, the Ninth Circuit held that a music-sharing service could be liable for contributory and vicarious infringement, described the service as a facilitator of an unauthorized exchange of copyrighted music, and found no fair use in what was ultimately a total retransmission in a new medium.[71] The Supreme Court's decision in *MGM Studios, Inc. v. Grokster* pushed the doctrine further. The Court held that a distributor of software could be liable for inducing infringement where its business model and promotional conduct showed an objective of fostering unlawful copying.[72] Congress did not step in after *Grokster* to offer a rewrite on secondary liability. And, interestingly, around the same time, an effort by Senator Hatch to define intentional inducement failed.[73] Instead, the subsequent years focused on strengthening criminal and civil enforcement tools and addressing digital piracy problems. Digital piracy led to the expanded criminalization of copyright infringement, such as the Family Entertainment and Copyright Act of 2005 and the Prioritizing

70. Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 992 (2007) ("Two of the DMCA safe harbors are codifications of the *Netcom* ruling: section 512(a) exempts service providers from liability for incidental copies made in the course of network transmission of digital content on behalf of users; and section 512(c) exempts copies made in storing information for users except when providers have received proper notice of infringement from the copyright owner and failed to investigate the charges and remove infringing materials." (footnote omitted)); Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1461 (2006) ("Though *Netcom* represented a step back from the reach of *MAPHIA* and *Frena*, it still threatened crippling liability for ISPs. In an attempt to help protect ISPs from this threat while maintaining copyright holders' ability to safeguard their interests, Congress included a series of safe harbors in the DMCA that limit the exposure of ISPs to financial damages for direct, contributory, and vicarious infringement."); H.R. REP. NO. 105-551, pt. 2, at 64 (1998) (explaining that an ISP's liability outside the safe harbors "would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute, which are unchanged by new Section 512").

71. A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1014–24 (9th Cir. 2001).

72. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 918–19, 936–41 (2005).

73. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. § 2 (2004); Brief Amici Curiae of United States Senator Patrick Leahy and United States Senator Orrin G. Hatch in Support of Neither Party at 2, *Grokster*, 545 U.S. 913 (No. 04-480), 2005 WL 152923, at *2 (describing bill S. 2560 as "a bill to codify the doctrine of secondary liability for inducement in the copyright realm").

Resources and Organization for Intellectual Property Act of 2008.[74] And now, the Supreme Court's recent decision in *Cox Communications*, *Inc. v. Sony Music Entertainment* has crystallized the doctrine.[75] In reversing a $1 billion jury award, the Court held that Cox was not liable for willful infringement just because it knew users were infringing and did not terminate their access.[76] The decision in *Cox* froze vicarious liability doctrine and held that an internet service provider is contributorily liable for users' copyright infringement "*only* if the party induced the infringement or the provided service [was] tailored to that infringement."[77] The Court appeared to close the door to other potential theories of contributory infringement but left lots of questions unanswered. So, in these instances, the Supreme Court, not Congress, has stepped in to resolve lower court conflicts and rulings.

Taken together, those cases suggest that the internet's first challenge to copyright lay in the scale at which infringement was occurring. They also suggest that the primary challenge was to identify where liability should lie in an environment where there was more than one way to be an intermediary. Once infringement happened through networks and access providers rather than through visible actors, courts were left to decide how much the intermediary must know, how much it must do, and when inaction becomes participation.

Sixteen years ago, we celebrated the 300th birthday of the Statute of Anne at a gathering much like this one. I remarked then that *Napster*, *Grokster*, and their progeny would, before long, be historical references in some treatise.[78] Indeed, the debates that they occasioned are no longer front and center. But as *Cox* demonstrates, the issues that they presented are no less relevant to today's internet. Still, in the last sixteen years, some of the more interesting questions at the intersection of copyright and the internet have come up in the context of free speech. Those cases have tested the background principles of copyright law and raised questions about how the injury alleged needs to relate to the remedy sought.

The Ninth Circuit's en banc opinion in *Garcia v. Google* is illustrative.[79] There, Cindy Lee Garcia appeared for five seconds and delivered two lines in a trailer for a film called the *Innocence of Muslims*.[80] She was almost certainly

74. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, §§ 102–104, 119 Stat. 218, 218–23 (imposing criminal penalties for unauthorized camcording of motion pictures in theaters and addressing prerelease distribution of copyrighted works); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, §§ 205–206, 208, 301, 401–404, 122 Stat. 4256, 4261–66, 4271–77 (enhancing forfeiture and criminal enforcement mechanisms and creating the Intellectual Property Enforcement Coordinator).

75. Cox Commc'ns, Inc. v. Sony Music Ent., 146 S. Ct. 959 (2026).

76. *See id*. at 964.

77. *Id.* at 967 (emphasis added).

78. McKeown, *supra* note 10, at 1174.

79. Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc). In the interest of full transparency, I authored the en banc opinion in this case.

80. *Id*. at 737.

tricked by the filmmaker, who claimed to be making an action movie.[81] He instead made an anti-Islam film.[82] A 14-minute trailer of the film was translated into Arabic and uploaded to YouTube.[83] The trailer sparked outrage and violent protests across the Middle East, including the issuance of a fatwa against anyone associated with the film, and was purportedly a trigger for the bombing of the United States embassy in Libya.[84]

Garcia tried, unsuccessfully, to get Google to remove the film, "asserting [that] it was hate speech [that] violated her state law rights to privacy and to control her likeness."[85] She also sent takedown notices under the DMCA, claiming that YouTube's broadcast of *Innocence of Muslims* "infringed her copyright in her 'audio-visual dramatic performance.'"[86] However, "Google declined to remove the film."[87] After Garcia's state-law claims got nowhere, she turned to copyright and sought a preliminary injunction requiring Google and YouTube to remove the film.[88] A divided Ninth Circuit panel agreed.[89] It issued a secret takedown ordering Google to remove all copies of *Innocence of Muslims* within 24 hours and not to disclose the existence of the order.[90] It then narrowed its order to include only versions of the film featuring Garcia's performance.[91] Predictably, the whole film came off the internet, to the extent that was even a feasible remedy.[92]

Rehearing the case en banc, the Ninth Circuit dissolved the injunction.[93] We held that Garcia was not likely to succeed because she could assert no copyright harm.[94] We further held that Garcia's five-second performance in the trailer was not a "work" within the meaning of the Copyright Act.[95] There was also no irreparable harm in the copyright sense. In fact, the claimed harm of death threats and reputational harm did not match the purpose of the copyright laws, which is to stimulate creative expression, and not to protect privacy.[96] And ultimately, a weak copyright claim could not hijack the First Amendment. The initial panel's takedown order had given short shrift to the First Amendment values at stake: "The mandatory injunction censored and suppressed a politically

81. *Id.* at 736–37.
82. *Id.* at 737.
83. *Id.* at 737–38.
84. *Id.* at 738.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 738–39.
89. *Id.*
90. *Id.* at 739.
91. *Id.*
92. *Id.* at 747.
93. *Id.* at 746–47.
94. *See id.* at 744–46.
95. *Id.* at 740–44.
96. *Id.* at 745–46.

significant film—based upon a dubious and unprecedented theory of copyright."[97]

What *Garcia* demonstrates is that the internet magnified a preexisting tension between copyright and free speech principles. The Supreme Court famously said that copyright is meant to function as a vehicle of free expression.[98] But copyright also restricts speech, and some have described it as a monopoly that stifles creativity.[99] Nonetheless, the Supreme Court—notably in *Harper & Row v. Nation Enterprises* and *Eldred v. Ashcroft*—has consistently recognized that copyright is compatible with the First Amendment because it provides an economic incentive for creative works.[100] As the Court wrote: "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[101] There is no one-size-fits-all solution to this tension. In *Garcia*, the solution came by way of analyzing the statutory language (what does the Act mean by "work"?) and the relationship between the harm and the remedy.[102] In other cases, the tension might be resolved differently.

Garcia also highlights that the internet, as a global infrastructure of circulation, is not pegged to jurisdictional boundaries. Copyright is a national regime, though the United States is party to a number of international treaties and conventions.[103] Remedies are issued by particular courts against particular defendants. But the story of *Garcia* illustrates how internet circulation transcends those borders. Courts operate as domestic arbiters in a digital world that is both territorialized and globalized. Copyright enforcement beyond national borders is

97. *See id.* at 747. The tension between copyright and the First Amendment, so strikingly enunciated in *Garcia*, has also been on full display in a number of other cases. *See* Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012) (holding that harm to Hulk Hogan's privacy and professional image was not irreparable harm in the context of copyright infringement); Monge v. Maya Mags., Inc., 688 F.3d 1164, 1168 (9th Cir. 2012) (rejecting fair use for publication of unpublished celebrity wedding photographs). In the interest of full transparency, I authored the opinion in *Monge v. Maya Magazines, Inc.*

98. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (similar).

99. *See* Golan v. Holder, 565 U.S. 302, 359 (2012) (Breyer, J., dissenting) ("Taken together, these speech-related harms (*e.g.*, restricting use of previously available material; reversing payment expectations; rewarding rent-seekers at the public's expense) at least show the presence of a First Amendment interest. And that is enough."); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 2 (2000) ("[C]opyright raises real and troubling free speech issues and why the standard responses to those concerns are inadequate.").

100. *Eldred*, 537 U.S. at 219; Harper & Row, 471 U.S. at 558.

101. *Eldred*, 537 U.S. at 219.

102. 786 F.3d at 740–46.

103. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Sep. 28, 1979, S. TREATY DOC. NO. 99-27.

fraught with practical and legal difficulties. That is a challenge courts are constantly grappling with, but with few firm guardrails.

IV.
GENERATIVE ARTIFICIAL INTELLIGENCE

Let me turn to a more recent technological revolution in copyright. While the internet taught us that circulation could no longer be neatly contained by jurisdiction, generative AI is putting pressure on some of copyright's fundamental assumptions. There is little doubt that generative AI is a textbook example of a "disruptive innovation," a term invoked by Harvard Business School professor Clayton Christensen.[104] Indeed, some might describe it as black box magic. Be that as it may, it is causing conniptions in the copyright world.

Generative AI is teaching us that other categories that copyright law has taken for granted may need to be reexamined. To begin, the Constitution speaks of "Authors."[105] The 1976 Act protects "original works of authorship."[106] Yet the House Report says far more about originality than about authorship itself. "Original works of authorship," it tells us, is "purposely left undefined," in part to preserve room for future developments and to avoid exhausting Congress's power under the Constitution.[107] That silence may have once looked insignificant. For most of copyright's history, the law could assume a human participant without needing to say much about it.

I can't leave without at least mentioning one of my favorite Ninth Circuit cases, *Naruto v. Slater*, where, in 2018, we held that a monkey lacks statutory standing to pursue copyright for a selfie.[108] We wrote that the Act's discussion of inheritance, and specifically the terms "children," "grandchildren," "legitimate," "widow," and "widower," implied humanity and necessarily excluded animals that do not marry and do not have heirs entitled to property by law.[109] In 2023, the Copyright Office published registration guidance on works containing material generated by AI, and relied on *Naruto* to explain the contours of the human authorship requirement.[110] The story of generative AI suggests that

104. *See* Clayton M. Christensen, Michael Raynor & Rory McDonald, *What Is Disruptive Innovation?*, HARV. BUS. REV., Dec. 2015 (explaining that disruptive innovations begin in markets that incumbents overlook, either because they serve less-demanding customers with a good enough product or turn nonconsumers into consumers); Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. 1484, 1484 (2024) (discussing "new and unexpected uses of copyrighted works enabled by technological advances" and identifying past copyright disputes involving photocopying, home taping, and computational uses as "disruptive technology cases").

105. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to secure "exclusive Right[s]" to "Authors" to their "Writings").

106. 17 U.S.C. § 102(a).

107. H.R. REP. NO. 94-1476, at 51 (1976).

108. *See* Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

109. *Id.* at 426.

110. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) ("Relying on [*Naruto*] among others, the

the assumption of human authorship may have been more load-bearing than we thought. To be sure, it is possible to overstate that point. From another perspective, generative AI does not displace human expression as much as it mediates it, aggregates it, and recombines it at an unprecedented scale.[111] Nonetheless, the question remains: If generative systems can produce text, images, music, and code that look enough like human-authored works to compete with them, then the category of "authorship" is no longer a constitutional background, but a normative demand: What sort of human creative agency is copyright trying to honor, preserve, or privilege? And what kinds of markets is copyright imagining?

While the assumption of human authorship is one of the key conceptual pressure points the Act currently faces, doctrinally, the harder questions are really about fair use.

It is easy to say what fair use means under the Act. Section 107 defines the fair use factors as (1) purpose and character of use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used, and (4) effect of the use on the potential market.[112] Easy to state, much harder to apply. Indeed, that is where the court battles have been fought in the past and where they likely will be fought in future cases. The Supreme Court has added texture to the statute in three key cases: *Harper & Row*,[113] *Google v. Oracle*,[114] and *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.[115]

How these principles will play out in the pending suits will drive the development of both copyright doctrine and the shape of AI technologies. So far,

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Office's existing registration guidance has long required that works be the product of human authorship.").

111. *See id.* ("In other cases, however, a work containing AI-generated material will also contain sufficient human authorship to support a copyright claim. For example, a human may select or arrange AI-generated material in a sufficiently creative way that 'the resulting work as a whole constitutes an original work of authorship.'" (quoting 17 U.S.C. § 101)); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY, at iii (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/4CAE-5ASK] ("Human authors are entitled to copyright in their works of authorship that are perceptible in AI-generated outputs, as well as the creative selection, coordination, or arrangement of material in the outputs, or creative modifications of the outputs.").

112. 17 U.S.C. § 107.

113. 471 U.S. 539, 566 (1985) ("[The market effects] factor is undoubtedly the single most important element of fair use.").

114. 141 S. Ct. 1183, 1196 (2021) ("We have described the 'fair use' doctrine, originating in the courts, as an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))); *see also id.* at 1203 ("To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative 'progress' that is the basic constitutional objective of copyright itself.").

115. 143 S. Ct. 1258, 1277 (2023) ("If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.").

about 80 generative AI cases have been filed.[116] Most of them are class action suits.[117] A review of the cases suggests that the docket is fragmenting by medium, which is no surprise.[118] And to date, most of the decisions focus on training of large language models ("LLMs") rather than output, which is the next frontier.

The recent decision in *Bartz v. Anthropic* represents an effort in line drawing and is the easiest to discuss, since it settled for a whopping $1.5 billion and is not subject to appeal.[119] There, Anthropic downloaded and digitized millions of copyrighted books from pirate sites on the internet, and also purchased copyrighted books (some overlapping with those that were pirated).[120] The goal was to amass a central library of "all the books in the world" that Anthropic sought to retain "forever."[121] Anthropic then used various sets and subsets of those books to train Claude, its LLM.[122]

The decision is interesting because it illustrates the challenges that courts face in applying the Act to specific instances of generative AI use. Instead of saying that all AI training constitutes infringement or fair use, Judge Alsup separated Anthropic's conduct into distinct uses or buckets, which he then treated differently.[123] Training Anthropic's LLMs on lawfully purchased and digitized books was justified as fair use.[124] The training on pirated books was not.[125]

The harder question that the opinion grapples with is how far one can push the first fair use factor and how the fourth factor slots in. Judge Alsup characterized the purpose and character of using copyrighted works to train LLMs to generate new texts as "quintessentially transformative."[126] In fact, he described the technology as "among the most transformative many of us will see

116. Rachel Kim, *Top Noteworthy Copyright Stories from February 2026*, COPYRIGHT ALL. (Mar. 4, 2026), https://copyrightalliance.org/copyright-stories-february-2026/ [https://perma.cc/YD6N-5BGP].

117. *See id.*

118. *See* Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956 (N.D. Cal. 2024) (images); Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007 (N.D. Cal. 2025) (literary works); Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026 (N.D. Cal. 2025) (same); N.Y. Times Co. v. Microsoft Corp., 777 F. Supp. 3d 283 (S.D.N.Y. 2025) (news articles); Doe 1 v. GitHub, Inc., 672 F. Supp. 3d 837 (N.D. Cal. 2023) (code); Lehrman v. Lovo, Inc., 790 F. Supp. 3d 348 (S.D.N.Y. 2025) (audio).

119. Matt O'Brien, *Anthropic to Pay Authors $1.5 Billion to Settle Lawsuit over Pirated Books Used to Train AI Chatbots*, AP NEWS (Sep. 6, 2025, at 14:15 PT), https://apnews.com/article/anthropic-copyright-authors-settlement-training-f294266bc79a16ec90d2ddccdf435164 [https://perma.cc/2LAU-6RJB].

120. *Bartz*, 787 F. Supp. 3d at 1014.

121. *Id.*

122. *Id.* at 1016–18.

123. *See, e.g.*, *id.* at 1033–34 (distinguishing between purchased and pirated copies, and copies used and not used for training).

124. *Id.* at 1033.

125. *Id.*

126. *Id.* at 1021–22.

in our lifetimes."[127] He reasoned that Anthropic's transformative use of copies to train its LLMs was akin to a reader aspiring to be a writer: Just as readers study texts to learn how to create original works, LLMs "read" texts to produce fundamentally different works.[128] Also, he found that scanning purchased print copies into digital format was sufficiently transformative because the "format change itself added no new copies" (the print versions were destroyed after scanning), it "eased storage and enabled searchability," and it "was not done for purposes trenching upon the copyright [holder's] rightful interests."[129]

Anthropic's argument, at least in broad outline, was that because training is fair use, the existence of an enormous, pirated library should not matter very much.[130] Judge Alsup rejected that argument because fair use is use-specific. The doctrine does not offer up a free-floating entitlement to copy first and justify later.[131]

There is a line drawn in the opinion between transformation and stockpiling, between fair use as a doctrine tied to particular purposes, and a much broader contention that AI developers should be allowed to treat all copyrighted books as raw material for whatever comes next. We can debate whether the decision goes too far or not far enough, but it is probably safe to say that it represents a rejection of AI exceptionalism in copyright law.

The *Anthropic* decision is also notable for what it does *not* do. Judge Alsup rejected the argument that generative AI will flood the market with competing books. On training copies, he explained that the authors' complaint "is no different than it would be if they complained that training schoolchildren to write well would result in an explosion of competing works," and that "[t]his is not the kind of competitive or creative displacement that concerns the Copyright Act."[132]

Some might, and have, disagreed.[133] Judge Chhabria's summary judgment decision in *Kadrey v. Meta* is a useful counterweight because it is unusually clear about what is new in the generative AI context. Judge Chhabria held that Meta's use of books from Library Genesis, z-Library, Anna's Archive, and other sources was fair use on the record before him.[134] But he was also quick to highlight that this holding did not establish the general legality of LLM training. He took seriously the Supreme Court's instruction from *Harper & Row* that the market effect factor is the most important one.[135] And what made the case novel, in his view, was that LLM training combines two features not previously seen at this scale: what he saw as a deeply transformative use of copyrighted works as

127. *Id.* at 1033.
128. *Id.* at 1022.
129. *Id.* at 1023.
130. *See id.* at 1026.
131. *Id.* at 1026–27.
132. *Id.* at 1031–32.
133. *See, e.g.*, Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026, 1036 (N.D. Cal. 2025).
134. *Id.* at 1040–42, 1059–60.
135. *Id.* at 1038.

training inputs, and the potential to flood markets with machine-generated substitutes.[136]

The current AI cases make the first and fourth factors even more interesting. *Harper & Row* treated the market effects factor in a relatively recognizable way: a scoop that diminishes the value of first publication and directly competes for a share in the market.[137] The question in the generative AI context is more complicated. Does the copyright owner get to complain about the loss of a market for AI training licenses if the challenged use is otherwise transformative? Does the law need to worry about a world in which models trained on copyrighted works generate a flood of substitutes that weaken the incentive to create? The first and fourth factors become the sites where older copyright intuitions about substitution meet newer concerns about originality, technological scale, licensing, and the conditions under which future expression will take place. These cases suggest to me that the fight, currently, is about the kinds of market impact that copyright law is prepared to recognize. Indeed, some courts have suggested that significant market dilution must occur to offset the highly transformative nature of LLM training.

I want to emphasize that there are only a handful of cases with decisions and just two AI-related appellate decisions.[138] One wonders whether, like the early cases in software copyright, one of these cases will become the now-jettisoned "structure, sequence, and organization" test from *Whelan Associates v. Jaslow Dental Laboratory* of the early software era?[139] Although the courts may move swiftly in the injunction phase, which is often the make-or-break phase, analytical development of these principles will take time. I predict that in the case of AI, the courts will be first movers, and Congress will be a more leisurely follower.

These cases also suggest a somewhat different way of describing the current moment. Understood as a "disruptive technology," a technology like photocopying, home video, and computational search and research before it,[140] generative AI presents issues that still turn on a familiar doctrinal axis: the questions raised by the transformativeness and market effects factors. Disruptive

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136. *Id.* at 1059–60 ("No matter how transformative LLM training may be, it's hard to imagine that it can be fair use to use copyrighted books to develop a tool to make billions or trillions of dollars while enabling the creation of a potentially endless stream of competing works that could significantly harm the market for those books.").

137. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) ("The Nation's piece . . . directly competed for a share of the market for prepublication excerpts.").

138. *See* Doe 1 v. GitHub, Inc., No. 24-7700, 2026 WL 2728464 (9th Cir. Sep. 16, 2026); Thomson Reuters Enter. Ctr. GmbH v. ROSS Intel. Inc., No. 25-2153, 2026 WL 2932557, at *1 (3d Cir. Sep. 29, 2026) (noting that while the case "appears to concern the future of AI legal technology," it is, in truth, "no more than an ordinary copyright case").

139. Whelan Assocs., Inc. v. Jaslow Dental Lab'y, Inc., 797 F.2d 1222, 1236, 1248 (3d Cir. 1986); Samuelson, *supra* note 35, at 1220 (describing the *Whelan* test as "first-in-time, but now much discredited").

140. *See* Samuelson, *supra* note 104, at 1484.

technology cases have often been resolved by asking about the market harm and the public benefit, and the evidentiary requirements for both. It therefore may be an overstatement to treat AI as a rupture of copyright history, rather than a continuation of it.

But courts can only go so far. Some of the solutions to these issues will have to be systematic. There is a view, for example, that any solution to the copyright issues occasioned by generative AI must also contain a compulsory and collective licensing regime, and that view has attracted both skepticism and support.[141] This is the kind of question that Congress, not the courts, is well equipped to answer. A legislative act, to borrow another aphorism from Justice Holmes, both looks at the future and sets out "rule[s] of conduct [that] appl[y] to more than a few people."[142] And Congress has been silent. The last major federal copyright legislation was the Music Modernization Act of 2018.[143] That reform was significant, but it may be of little help to courts in the AI context. More recently, in the CASE Act of 2020, Congress created a small claims tribunal for disputes up to $30,000.[144] Again, this legislation is important for the little guy, but it is orthogonal. But courts cannot rewrite the statute and write on a broad slate, and Congress likely will not.

Congress may not be moving, but other institutional players are now important. The states have been legislating aggressively. All fifty states have introduced AI bills, and thirty-eight of them have enacted some kind of AI measure.[145] Colorado's law imposes duties aimed at preventing algorithmic discrimination.[146] California has imposed transparency rules requiring public disclosures about training data and detection tools for AI-generated content.[147]

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141. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 3: GENERATIVE AI TRAINING 85–101 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf [https://perma.cc/H3TT-XFES] (collecting views).

142. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (distinguishing between adjudicative and legislative acts and explaining that the latter are better equipped to consider the views of many stakeholders).

143. Orrin G. Hatch–Bob Goodlatte Music Moderation Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

144. Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020, 17 U.S.C. §§ 1501–1511.

145. *Summary of Artificial Intelligence 2025 Legislation*, NAT'L CONF. ST. LEGISLATURES (July 10, 2025), https://www.ncsl.org/technology-and-communication/artificial-intelligence-2025-legislation [https://perma.cc/R3G6-94JD].

146. *See* COLO. REV. STAT. § 6-1-1703(1) (2026) ("[A] deployer of a high-risk artificial intelligence system shall use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination.").

147. CAL. CIV. CODE § 3111 (West 2026) ("On or before January 1, 2026, and before each time thereafter that a generative artificial intelligence system or service, or a substantial modification to a generative artificial intelligence system or service, released on or after January 1, 2022, is made publicly available to Californians for use, regardless of whether the terms of that use include compensation, the developer of the system or service shall post on the developer's internet website documentation regarding the data used by the developer to train the generative artificial intelligence system or service . . ."); CAL. BUS. & PROF. CODE § 22757.2(a)(1)–(2) (West 2026) (requiring covered providers

These laws may not relate directly to copyright—although that remains to be seen—but they may affect the law's development because they can force disclosure about training inputs, create evidence about developer practices, and shape the record in copyright litigation in other unpredictable ways. At the federal level, the White House has moved in the opposite direction: Executive Order 14179, issued in 2025, pushed toward a minimally burdensome national framework, directed the development of legislative proposals for uniform federal policy, and targeted certain state AI laws that it viewed as obstructive to innovation.[148]

Across the Atlantic, Europe's framework for copyright claims in generative AI is well past its early stages and has had a major impact on businesses and consumers. The European Union's 2019 directive on copyright and related rights in the Digital Single Market introduced copyright exceptions for text and data mining. The exceptions were mandatory for scientific research but subject to opt-outs for other uses.[149] Generative AI turned that structure into a major battleground. The fight in Europe right now is whether model training counts as permissible mining and what the administration of opt-outs looks like.[150] The AI Act of 2024 layers on transparency, safety, and other obligations related to rightsholders' opt-outs.[151] Also, by requiring general-purpose model providers to summarize the content used to train their models, the AI Act has given European copyright law an ex-ante regulatory and compliance dimension. Because the market is global and the internet and generative AI operate atop national boundaries, Europe is a critical player. So, again, the dance has expanded beyond the courts and Congress to the states, the executive, and

to make available a free "AI detection tool" and to provide manifest and latent disclosures for certain AI-generated or AI-altered audio, image, and video content).

148. Removing Barriers to American Leadership in Artificial Intelligence, Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

149. Parliament and Council Directive 2019/790, arts. 3–4, 2019 O.J. (L 130) 92, 113–14 (creating exceptions for text and data mining by research organizations and cultural heritage institutions, and a broader text and data mining exception where rights holders have not expressly reserved their rights).

150. João Pedro Quintais, *Generative AI, Copyright and the AI Act*, 56 COMPUT. L. & SEC. REV., Jan. 29, 2025, art. 106107, at 9 (explaining that the 2024 AI Act, which followed the 2019 directive, "clearly pushes for standardization of opt-outs"); Comm. on Legal Affs., *Generative AI and Copyright: Training Creation, Regulation*, IUST/2025/B/JURI/IC/005 (July 9, 2025) (analyzing "the legal mismatch between AI training practices and current text and data mining exceptions"); *id.* at 68 (arguing that the current "opt-out model imposes a disproportionate and often unmanageable burden on rightsholders—particularly individual creators, educators, and public interest institutions—who may lack the technical or legal means to enforce their preferences effectively").

151. Parliament and Council Regulation 2024/1689, art. 53(1)(c)–(d), 2024 O.J. (L 1689) 1, 84 (requiring general purpose AI model providers to adopt a policy to comply with EU copyright law, including identifying and complying with rights reservations under Article 4(3) of the 2019 directive, and to publish a "sufficiently detailed summary" of training content).

Europe. As to art, it has been said that judges are ill-suited to be art critics.[152] That may be, but as to AI, we may have no choice but to face it head-on.

V.
CONCLUDING OBSERVATIONS

The recurring patterns of the dance between Congress and the courts, in which I have been a longtime participant, help to crystallize a view of what copyright law is for. Copyright is not just economic incentives and doctrinal limits. It is not only an intellectual property doctrine. It is also a field motivated by a set of normative commitments. Those commitments are sustained by stories that we tell ourselves about who authors are, what originality is, what copying is, what exclusive rights are justified, and how all of that is supposed to serve a larger public good. Those stories do a lot of unseen work. They help to make copyright law coherent even when its doctrines get messy, when its compromises leave no one pleased, and when the underlying technologies keep changing.

One overriding commitment is plainly to encourage creativity and the making of new works.[153] That is the familiar constitutional and statutory story, and it remains indispensable.[154] The House Report repeatedly frames revision in terms of preserving a functioning system of creation and exploitation.[155] The notion that expression should be safeguarded and promoted was also a part of the story of *Garcia v. Google*.[156] Copyright law cares, above all else, about preserving the incentive for human beings to create artistic and scientific works. That is why these recent AI cases focus so much on market dilution occasioned by generative AI.[157] But the story about incentives is broader. The law aims to preserve incentives not only to create but also to exploit and disseminate works—to edit, publish, share, license, market, and more.[158] Its north star, the Court has occasionally said, is "not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" thereby suggesting a tension between the incentives of individual authors and other, broader social and economic interests.[159] That story also includes a more fundamental judgment—

152. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1289 (2023) (Gorsuch, J., concurring) ("Nothing in the law requires judges to try their hand at art criticism and assess the aesthetic character of the resulting work.").

153. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

154. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant exclusive rights "[t]o promote the Progress of Science and useful Arts"); 17 U.S.C. § 102(a) (extending copyright to "original works of authorship").

155. *See, e.g.*, H.R. REP. NO. 94-1476, at 50 (1976).

156. *See supra* notes 79–95 and accompanying text.

157. *See supra* notes 120–37 and accompanying text.

158. *Harper & Row*, 471 U.S. at 564 ("The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.").

159. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

that expression is good, and that a world with more expression in it is a better world than one with less. The point of copyright is to "promote"—to use the Constitution's phrase—conditions under which expression can take place, and under which it can be curated, circulated, and consumed.

But copyright's commitments do not stop at incentives. The 1976 Act also aspired to durability across technological change.[160] Congress did not want to write a statute that would have to be rebuilt every time a new device or medium appeared. The House Report says as much. The legislation did not intend to freeze the scope of copyrightable technology, and the new Act repeatedly used broad language in order to reach works fixed in media "now known or later developed," or perceptible "with the aid of a machine or device."[161] The statute was trying to face the future at the level of its basic concepts. With a view toward congressional intent, Courts needed to interpret the Act's definitional provisions flexibly enough to accommodate software, the internet, generative AI, and other innovations without turning every technical shift into a legislative emergency.

Copyright has also insisted on a commitment to its own limits.[162] That story is easy to miss if one focuses only on exclusive rights, but the Act codified just as much by way of restraint as by entitlement. One sees it all over the law: fair use, Section 102(b), specific exemptions, library provisions, compulsory licenses.[163] The statute's final shape came from negotiations over limitations *and* rights. The fair use cases demonstrate that fair use became a general limiting principle in a statute otherwise full of expansive rights.[164] We see a commitment, not just to protecting expression, but also to preserving a domain of ideas, methods, interfaces, and follow-on uses that remain outside of proprietary control.

A related commitment is that of public dissemination and access.[165] Copyright has always justified itself not simply by rewarding authors but by supporting a broader public culture in which works are made available, circulated, and encountered. The 1976 Act's replacement of the old publication-centered regime, and its effort to modernize the rights of performance, display, and transmission, all reflect a statute concerned not just with private ownership but also with how works exist in the world. The law has so often treated fair use as one of copyright's safety valves, and it is why courts and commentators keep

160. *See* Litman, *supra* note 3, at 877.

161. H.R. REP. NO. 94-1476, at 52 (1976).

162. *See* U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant "exclusive Right[s]" only for "limited Times" and to "promote the Progress of Science and useful Arts"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

163. *See* 17 U.S.C. §§ 102(b), 107–108, 110–112, 114–115, 117–122.

164. *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197–98 (2021).

165. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003).

coming back to the idea that copyright is justified only as part of a larger system of public knowledge and cultural exchange.[166] As I have previously written, fair use is not an afterthought.[167] It is part of the legal machinery that keeps copyright from becoming too rigid, censorial, or indifferent to speech values.

What all of this suggests is that we are living through a period when the statute becomes interesting in new ways. The Act's words—originality, authorship, work, copy, market—are all being asked to do new work in different environments unimagined by the drafters. These new circumstances raise both new and familiar questions. Some of those questions will be answered by Congress, and others by the courts through the careful development of doctrine. We also cannot overlook the role that public discourse and international and foreign regulation will play in the process. We are watching copyright law give new meaning to the Act's words in real time. That may be the best evidence of the Act's success. Fifty years on, it continues to give us leeway to argue about what comes next.

166. *See Google*, 141 S. Ct. at 1196 (explaining that fair use "permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity [that the] law is designed to foster" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347 (1996) ("Copyright law provides this support in two fundamental ways. First, through its production function, copyright encourages creative expression on a wide array of political, social, and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society. Second, through its structural function, copyright serves to further the democratic character of public discourse.").

167. *See* M. Margaret McKeown, Keynote Address, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 4, 16 (2016).

The Making of the Copyright Act of 1976: Part I—Technocracy and Compromise

Peter S. Menell*

ABSTRACT

After multiple aborted attempts to reform the 1909 Copyright Act, Congress in 1955 embarked on an unprecedented "experiment in legislative technique," tasking the Copyright Office with researching, drafting, and vetting what it hoped would become the next general revision of the Copyright Act. In recognition of the difficulties and long delay in reforming the 1909 Act and amidst ongoing advances in communications technologies, the drafters of what would become the 1976 Act were especially concerned that copyright reform be resilient to technological change. They wrote in 1965 that "[o]bviously no one can foresee accurately and in detail the evolving patterns in the ways authors' works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of [the] work that materially affect the value of [the] copyright." It would take another decade for the omnibus copyright reform to reach fruition.

As we mark the 50th anniversary of the 1976 Act, it is useful to trace and reflect upon the origins and ramifications of this momentous legislative achievement. This Article reconstructs the drafting and legislative process as the foundation for understanding the meaning and interpretation of the 1976 Act. Although the 1976 Act has been criticized as capitulation to interest group compromises, viewing the Act through a wide-angle lens reveals a much richer, public-regarding story. Contrary to accounts emphasizing unprincipled compromise or industry capture, the 1976 Act exemplifies a deeply engaged, transparent, and inclusive drafting and legislative process in which an

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expert agency carefully studied the issues and focused on society's broader interests, while stakeholders and legislators jointly navigated the tradeoffs in crafting a forward-looking and balanced statutory regime based on what was known.

This Article traces the personnel, key debates, drafting process, hearings, and reports that led to the final bill. This exploration reveals that the making of the Act unfolded over two distinct phases: the first leading to the core principles, architecture, and provisions by the mid-1960s, and the second, unfolding in fits and starts over the next decade, addressing both particular disruptions caused by rapid technological advances and lingering tensions over unresolved issues.

Part II of this project explores the political economy of this experiment in technocratic legislative drafting. Part III investigates the ramifications of the phased legislative history for the interpretation of the 1976 Act and examines the actual practice of interpreting the 1976 Act, revealing an uneven and at times internally inconsistent jurisprudential record.

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I.
INTRODUCTION

After nearly half a century of vast technological, economic, and social change, and multiple abandoned reform efforts, Congress in 1955 set in motion a process aimed at updating the nation's increasingly obsolete copyright law to produce the fourth general copyright revision in the nation's history.[1] Congress tasked the Copyright Office, an arm of the Library of Congress, with leading the effort and authorized funds for a series of studies to guide the drafting of a new copyright law.[2]

After an auspicious start followed by inevitable stakeholder divides and constructive efforts to bridge differences, the reform project was nearly complete by the mid-1960s. But as the House of Representatives was passing the 1967 Bill, the emergence of Community Antenna Television (CATV)—more commonly known today as cable television—brought the reform effort to a halt. As a compulsory license for CATV was being forged over the next several years, further technological disruptions posed by advances in photocopying, information retrieval and storage technology, and computer software threatened to derail the copyright reform effort entirely. After these challenges were pushed aside for later consideration and lingering tensions over educational uses, protection for sound recordings, jukeboxes, and domestic book manufacturing

1. As the first Congress was commencing, President George Washington commented: "[T]here is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness." George Washington, First Annual Address to Congress (Jan. 8, 1790), *reprinted by* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/first-annual-address-congress-0 [https://perma.cc/Z8WJ-SVD7]. Congress obliged, passing the Copyright Act of 1790 as one of its first pieces of legislation. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124, 124 ("An Act for the encouragement of learning, by securing the copies of maps, charts, and books . . . ."). Congress passed three general revisions in roughly 40-year intervals, in 1831, 1870, and 1909. *See* Copyright Act of 1831, ch. 16, 4 Stat. 436; Copyright Act of 1870, ch. 230, 16 Stat. 198; Copyright Act of 1909, ch. 320, 35 Stat. 1075 (Mar. 4, 1909).

2. *See infra* text accompanying note 39.

were ironed out, the omnibus copyright reform legislation came to fruition two decades after the effort began.

Some scholars contend that the 1976 Act, like its 1909 predecessor, was hammered out by interest groups with limited independent scrutiny.[3] On this account, the statute's breadth, ambiguity, and failure to anticipate technological change are the predictable consequences of compromise-driven drafting dominated by organized interests rather than principle or the public interest. While there is no doubt that the 1976 Act has faced strain as new technologies emerged—as its drafters predicted—viewing the drafting of the Act through a longitudinal and wide-angle lens reveals a more institutionally grounded and public-regarding account.

The 50th anniversary of the 1976 Act provides a timely opportunity to revisit the two-decade process that produced the modern copyright regime and to reconsider its interpretive foundations. The project began in a very different era when technologies that we have long taken for granted—television, photocopying, means to reproduce music and video, and computers—were in early stages of development. Moreover, although rhythm and blues was taking off, it was doing so in a segregated America.

It was against this backdrop that Congress and the Copyright Office launched a bold experiment reflecting four critical elements: (1) a technocratic approach to legislative drafting—involving careful study of statutory evolution, jurisprudence, international experience, economics, and technology; (2) the rise of the administrative state, with attendant public involvement and transparency; (3) the unique circumstance of an administrative agency—the Copyright Office—operating within the legislative branch (the Library of Congress); and (4) a broad panel of consultants drawn from all segments of society—publishers, authors, librarians, educators, broadcasters, technology companies, government, and the general public—to participate in crafting the fourth general revision.

A close examination of the legislative chronology indicates that the statute's core architecture—its principal definitions, structure of exclusive rights and limitations, ownership framework, and administrative design—was largely settled by the mid-1960s. The archival record reveals a deeply engaged, transparent, and inclusive drafting and legislative process in which the Copyright Office studied the issues carefully and effectuated innovative and flexible solutions focused on society's broader interests. Stakeholders and government officials jointly navigated the tradeoffs in crafting a forward-looking, relatively flexible, and balanced statutory regime based on what was known, knowable, and politically feasible. The debates of the second decade addressed significant technological and political impasses, but they did not fundamentally reorder the earlier structural framework. While undoubtedly imperfect—as is any complex,

3. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862–75, 902–10 (1987).

divisive legislative package—the 1976 Act was a remarkable legislative achievement.

Although Congress has substantially amended the 1976 Act over the past half century—most notably through the Digital Millennium Copyright Act[4] and the Music Modernization Act[5]—the architecture of the 1976 Act continues to structure contemporary copyright law, particularly through its delineation of exclusive rights and the fair use doctrine. For many judges, practitioners, and scholars, the meaning of these provisions is rooted in an extensive, layered, and not easily navigated legislative record developed during the 1950s, 1960s, and 1970s. There is a risk that, as in Dickens' saga of Jarndyce and Jarndyce, the meaning of the 1976 Act "has, in course of time, become so complicated that no [person] alive knows what it means."[6]

As a foundation for demystifying the 1976 Act, this Article—Part I of a broader project exploring the making and interpretation of the Act—traces the personnel, key debates, drafting process, hearings, and reports that led to the final bill. This exploration reveals that the crafting of the Act unfolded in two distinct phases: the first culminating by the mid-1960s in the settlement of the statute's core principles, structure, and provisions, and the second, unfolding in fits and starts over the next decade, addressing discrete technological disruptions and unresolved political tensions without fundamentally reconstructing the earlier framework.

Part II of this project[7] explores the political economy of this experiment in technocratic legislative drafting. Part III investigates the ramifications of the phased legislative history for interpreting the 1976 Act and examines how courts have interpreted it, revealing an uneven and at times internally inconsistent jurisprudential record.

II.
SETTING THE STAGE: POST-1909 ACT REFORM EFFORTS THROUGH COPYRIGHT REFORM STUDIES (1955–1960)

Even as the 1909 Act was being signed into law, advances in motion pictures, sound recording, coin-operated machines, and wireless technology foretold that the legislation would soon be outdated. Although Congress soon extended copyright protection to motion pictures,[8] further reform efforts faltered,[9] challenging courts, authors, intermediaries, designers, inventors,

4. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

5. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

6. *See* CHARLES DICKENS, BLEAK HOUSE 5 (Wordsworth Classics 1993) (1853).

7. *See* Peter S. Menell, *The Making of the Copyright Act of 1976: Part II—Political Economy*, COLUM. J.L. & ARTS (forthcoming 2026) [hereinafter *Making of the Copyright Act: Part II*].

8. Townsend Amendment of 1912, ch. 356, 37 Stat. 488.

9. *See* Abe A. Goldman, *Study No. 1: The History of U.S.A. Copyright Law Revision from 1901 to 1954*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION:

entrepreneurs, and investors to apply an increasingly obsolete statute to new business and technological realities. The lead-up to the fourth general copyright revision followed the United States orchestrating and joining an international copyright treaty.

A. The Universal Copyright Convention

With the growth of export markets for copyrighted works, the most significant and sustained reform efforts following the 1909 Act sought to pave the way for the United States to join the Berne Convention for the Protection of Literary and Artistic Works.[10] Stark differences between U.S. law and Berne Convention standards, however, proved too great to bridge,[11] especially after the 1928 Rome Revision[12] added features opposed by some American copyright interests and barred adherence with reservations.[13] After multiple efforts to pass compliant legislative reforms, the United States pursued alternative paths to international copyright cooperation.[14] Following World War II, U.S. negotiators led a successful effort to form the Universal Copyright Convention (U.C.C.),[15] a more permissive copyright treaty regime.[16]

B. Copyright Overhaul Takes Center Stage

With the U.C.C. milestone accomplished in 1954,[17] a growing number of bar and trade groups began calling for an overhaul of the 1909 Act.[18] It had been over four decades since the last general revision, and technologies in their infancy then, such as motion pictures and radio, had greatly advanced, and television was just coming into widespread use.[19]

STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST SESSION, STUDIES 1–4, at ix (Comm. Print 1960), *reprinted in* 1 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001) [hereinafter OMNIBUS].

10. *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at x (Comm. Print 1961) [hereinafter REGISTER'S REPORT], *reprinted in* 3 OMNIBUS, *supra* note 9.

11. *See id.*; REG. OF COPYRIGHTS, 80TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1977, at 8 (1978) [hereinafter REG. OF COPYRIGHTS, 80TH ANNUAL REPORT].

12. *See* Berne Convention for the Protection of Literary and Artistic Works art. 27, June 2, 1928, 123 L.N.T.S. 233 (adherence without reservations).

13. REG. OF COPYRIGHTS, 80TH ANNUAL REPORT, *supra* note 11, at 8.

14. *See* Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1059–61 (1968).

15. *See* REGISTER'S REPORT, *supra* note 10, at x.

16. Universal Copyright Convention, Sep. 6, 1952, T.I.A.S. No. 3324, 216 U.N.T.S. 132 (entered into force Sep. 16, 1955).

17. The Universal Copyright Convention was signed at Geneva on September 6, 1952. *Id.* The Senate ratified the treaty on June 25, 1954. 100 CONG. REC. 8945–53 (1954).

18. REG. OF COPYRIGHTS, FIFTY-SIXTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1953, at 4 (1954).

19. *See infra* Section II.C.

Although technological advances would ultimately play a substantial role in copyright reform, the early reform project focused on more prosaic issues. The statute's technical formalities and protection triggers had become bogged down in complex jurisprudence.[20] Notwithstanding U.S. ratification of the U.C.C., the duration of U.S. copyright protection as well as the renewal regime and other aspects of U.S. copyright law were out of step with the laws in many other nations.[21] Moreover, creators and copyright owners sought to address historical anomalies and relics—such as the jukebox exception, which exempted performances on coin-operated machines from the public performance right,[22] and the manufacturing clause, which conditioned full-term copyright for covered English-language books and periodicals on manufacture in the United States.

In 1955, the American Bar Association's Committee on Program for Revision of the Copyright Law recommended that the Copyright Office, with the assistance of an advisory committee of specialists and representatives of the various groups and industries concerned, produce a series of studies to serve as the basis for draft legislation.[23] Congress implemented this proposal, delegating authority to the Copyright Office to scope the terrain and formulate draft legislation that would promote the long-term public interest. It would prove to be one of the most drawn-out experiments in technocratic legislative drafting ever undertaken.

C. The Nascent State of Technology

At the outset of the legislative process, America was entering the television age.[24] By the mid-1950s, approximately half of U.S. households had television sets. Television broadcasting was in its infancy. The cost of a television receiver was about $250, which would be about $3,000 today.

With the emergence of television broadcasting, communities outside of broadcast range engaged in community organizing to erect large reception antennas to receive the signals and then retransmit broadcasts by way of coaxial

20. *See* Herman Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025, 1029, 1054–56 (1956) (observing that "[w]e have seen literary property forfeited because of failure to comply with formalistic requirements which no longer make sense in modern society"); Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 185 (1956) ("The concept of publication has acquired an importance and complexity in the American law of copyright far greater than in any foreign jurisdiction. It has, indeed, become a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term.").

21. *See* Jane C. Ginsburg, *The Influence of International Copyright Norms on the Evolution of the 1976 Act*, 41 BERKELEY TECH. L.J. 929, 933–38 (2026); Finkelstein, *supra* note 20, at 1045–54.

22. *See* Finkelstein, *supra* note 20, at 1059.

23. REG. OF COPYRIGHTS, FIFTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1955, at 5 (1955) [hereinafter REG. OF COPYRIGHTS, 58TH ANNUAL REPORT].

24. *See* Nick Vlku, *The History of Television (or, How Did This Get So Big?)*, TELEVISION & THE PASSIVE CONSUMER (May 7, 2002), https://www.cs.cornell.edu/~pjs54/Teaching/AutomaticLifestyle-S02/Projects/Vlku/history.html [https://perma.cc/SK6Y-BZZN].

cable to homes in the area.[25] This grassroots movement would morph into substantial businesses that would play a large role in the fate of the copyright reform project.[26]

Photocopying was even more primitive than television broadcasting. Xerox's Model A, introduced in 1949, was far from a commercial success.[27] It was expensive and involved numerous manual steps to make a single copy. The prospects for greater success, promoted by the patent system, fueled rapid incremental improvements. The breakthrough product came in 1959 with the introduction of the Xerox 914, the first commercially successful plain paper copier.[28]

The computer industry was also in its infancy. IBM introduced the 704, its first computer with core memory, in 1954.[29] IBM developed FORTRAN (FORmula TRANslation), the first widely used high-level programming language, for the 704, whose 6-bit Binary Coded Decimal character set and 36-bit word length shaped the language's design. IBM produced just 123 such computers between 1955 and 1960.[30]

D. Cultural Change and the Civil Rights Movement

With radio and record industry growth, music played an increasing role in American life, particularly for America's youth. Rhythm and blues was taking off, but in a segregated America.[31] Black performers were popular, but Black audiences were either excluded or required to sit in balconies or other cordoned-off, second-class sections. Even the sale of records was segregated, with Black performers relegated to the "Race" record charts.[32] White artists often copied these works for the mainstream "Popular" record outlets and charts.[33]

25. *See Cable Television in the United States*, WIKIPEDIA (June 10, 2026, at 05:02 UTC), https://en.wikipedia.org/wiki/Cable_television_in_the_United_States [https://perma.cc/D6LZ-MW7R].

26. *See infra* Sections III.E, IV.A.

27. *See Xerox Model A*, PC MAG.: ENCYC., https://www.pcmag.com/encyclopedia/term/xerox-model-a [https://perma.cc/XWS4-6LPD] (last visited July 22, 2026).

28. *See* XEROX, THE STORY OF XEROGRAPHY (1999), https://www.xerox.com/downloads/usa/en/innovation/innovation_storyofxerography.pdf [https://perma.cc/G8PK-GCWN].

29. *See IBM 704*, WIKIPEDIA (June 14, 2026, at 13:58 UTC), https://en.wikipedia.org/wiki/IBM_704 [https://perma.cc/RX7W-FZEK].

30. *See id.*

31. *See* Steve Knopper, *The Rope: The Forgotten History of Segregated Rock & Roll Concerts*, ROLLING STONE (Feb. 22, 2021), https://www.rollingstone.com/music/music-features/the-rope-the-forgotten-history-of-segregated-rock-roll-concerts-126235 (on file with the Berkeley Technology Law Journal).

32. Robert F. Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, *in* THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE 183, 187–88 (Steven D. Jamar & Lateef Mtima eds., 2024).

33. *See id.* at 188–89.

A musical revolution built upon gospel and blues fueled a growing civil rights movement.[34] Pioneering artists, such as Sam Cooke, Ray Charles, Little Richard, Otis Redding, Sam & Dave, and Aretha Franklin led a growing wave of performers who carried rhythm and blues, rock and roll, and gospel-inflected soul into mainstream popular music.[35] Stax Records, founded in Memphis in the late 1950s, synthesized gospel and blues into a distinctive "soul" genre that supplied new anthems for the civil rights movement.[36] And Berry Gordy Jr.'s Detroit-based Motown record label, which would soon top the popular record charts, was just taking off.[37]

It was a hopeful time, and entrepreneurs were taking notice.[38] Performing artists, songwriters, and authors were exciting American youth. The industries supported by copyright were catalyzing cultural and social change.

E. The Technocratic Model

The Legislative Appropriation Act of 1956 authorized $20,000 to the Copyright Office to conduct research over three years in preparation for a general copyright law revision.[39] In describing the reform project, Register of Copyrights

34. *See* Brian Ward, *"People Get Ready": Music and the Civil Rights Movement of the 1950s and 1960s*, GILDER LEHRMAN INST. AM. HIST. (Summer 2006), https://www.gilderlehrman.org/history-resources/essays/people-get-ready-music-and-civil-rights-movement-1950s-and-1960s [https://perma.cc/L8DF-RSY4] (observing that "[f]ew sights or sounds conjure up the passion and purposefulness of the Southern Civil Rights Movement as powerfully as the freedom songs that provided a stirring musical accompaniment to the campaign for racial justice and equality in the region during the late 1950s and early 1960s" and noting that "We Shall Overcome," a gospel hymn, became the "unofficial anthem for the movement").

35. *See generally* PETER GURALNICK, SWEET SOUL MUSIC: RHYTHM AND BLUES AND THE SOUTHERN DREAM OF FREEDOM (1986) (tracing southern soul music to the gospel traditions of the Black church and to the civil rights era in which it took shape); BRIAN WARD, JUST MY SOUL RESPONDING: RHYTHM AND BLUES, BLACK CONSCIOUSNESS, AND RACE RELATIONS (1998) (chronicling the role of Black music in the civil rights movement).

36. *See* ROB BOWMAN, SOULSVILLE, U.S.A.: THE STORY OF STAX RECORDS 127–28 (1997) (tracing the history of Stax Records and the origins of "*Soul Man*"); Sam Moore Est., *Sam & Dave's 1967 Hit Single "Soul Man" Inducted into National Recording Registry of the Library of Congress*, 2911 MEDIA (Mar. 21, 2019), https://2911.us/sam-daves-1967-hit-single-soul-man-inducted-into-national-recording-registry-of-the-library-of-congress [https://perma.cc/VZQ8-LM9K] (noting that "*Soul Man*" became "an anthem in the turmoil of the civil rights movement of the 1960s" and "a danceable declaration of Black Pride").

37. *See Motown*, WIKIPEDIA (July 16, 2026, at 18:43 UTC), https://en.wikipedia.org/wiki/Motown [https://perma.cc/KFP8-6CWY].

38. *See* DOROTHY WADE & JUSTINE PICARDIE, *Black Soul, White Rock*, *in* MUSIC MAN: AHMET ERTEGUN, ATLANTIC RECORDS, AND THE TRIUMPH OF ROCK'N'ROLL 122 (1990). *See generally* ROBERT PALMER, DEEP BLUES: A MUSICAL AND CULTURAL HISTORY OF THE MISSISSIPPI DELTA TO CHICAGO'S SOUTH SIDE TO THE WORLD (1981) (tracing the history of the Chicago blues genre); Bruce Weber, *Jerry Wexler, a Behind-the-Scenes Force in Black Music, Is Dead at 91*, N.Y. TIMES (Aug. 15, 2008), https://www.nytimes.com/2008/08/16/arts/music/16wexler.html (on file with the Berkeley Technology Law Journal) (describing Jerry Wexler's role in propelling the careers of Ray Charles, Wilson Pickett, Otis Redding, and Aretha Franklin).

39. REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 5.

Arthur Fisher contrasted the Office's plan for the fourth general revision with the drafting of the 1909 Act:

> Much care and effort went into the framing of the 1909 law, but essentially it was the product of compromises arrived at in conferences with interested groups, each of which surveyed the field of copyright from its own special and partisan point of view. Similar efforts between 1924 and 1940 to enact a general revision of the 1909 law ended in unreconciled controversies and failure.
>
> General revision is being approached today in a somewhat different manner. For the past 4 years the Copyright Office, with the aid and advice of specialists experienced in the problems of the various groups concerned, has been conducting a program of research and analysis; objective studies of the important problems are being made to elucidate the issues and analyze the possible solutions. The aim is to create a solid foundation of knowledge upon which to erect a new law.
>
> These studies will result in proposals for a new law. It can be anticipated that compromises and adjustments will be needed to reconcile the conflicting interests on many issues, but it is hoped that a new copyright law, reflecting the needs of today and flexible enough to accommodate those of the foreseeable future, can be enacted before long.[40]

Register Fisher tasked Abraham A. Goldman, an experienced legal advisor in the Research Unit, with leading the effort.[41] He implemented an ambitious multi-stage plan:

> (1) Building a database of the various bills, hearings, reports, and legislative proceedings on previous proposals for revision of the copyright law.
>
> (2) Compiling, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), an English-language archive of copyright laws, regulations, treaties, and conventions from around the world.
>
> (3) Commissioning leading scholars, practitioners, and government copyright experts to produce a series of in-depth studies exploring historical, philosophical, economic, legal, international, and comparative law dimensions on the key issues pertinent to a comprehensive reform of copyright law. The studies addressing substantive provisions would follow a template:

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40. REG. OF COPYRIGHTS, SIXTY-SECOND ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1959, at 1–2 (1960).

41. *See* REG. OF COPYRIGHTS, FIFTY-NINTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1956, at 5 (1956) [hereinafter REG. OF COPYRIGHTS, 59TH ANNUAL REPORT].

- trace the historical development of the present law
- summarize the substance of the present law, the problems and gaps with the present law, corresponding foreign and international law
- analyze the issues
- present a summary of alternative possibilities for reform.

(4) Soliciting comments from copyright specialists and publishing the studies and comments for public review.

(5) Developing a report based on these studies, setting forth principles for reforming the existing law with the input of a panel of consultants selected by the Librarian of Congress.

(6) Based on these materials and discussions, drafting a proposed general revision for congressional consideration.[42]

Between July 1955 and 1960, the Copyright Office and its commissioned experts produced 34 studies along with comments from experts, spanning over 1,700 pages and covering a broad range of topics bearing on copyright reform. The Senate Judiciary Committee published the studies in 1960 and 1961.[43] An additional study was completed in 1963.[44] Appendix A lists the studies.

The majority of the studies were prepared by experienced Copyright Office staff. Respected copyright scholars prepared four of the studies, and experienced practitioners contributed three. The studies reflected high professional and research standards and were subjected to transparent peer review.[45] The studies and comments surfaced many of the challenges facing the reform project—from fair use to limitations on transfers—that would confound copyright law for decades to come.[46]

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42. *See* REG. OF COPYRIGHTS, SIXTY-FIRST ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1958, at 6 (1958); *see also* REG. OF COPYRIGHTS, 59TH ANNUAL REPORT, *supra* note 41, at 5 (detailing the expected role in operations for Goldman as a coordinator of the Copyright Office).

43. *See* 1–2 OMNIBUS, *supra* note 9.

44. *See* Marjorie McCannon & Benjamin W. Rudd, *Study No. 35: The Manufacturing Clause of the U.S. Copyright Law*, *in* COPYRIGHT LAW REVISION, at 1 (1963) [hereinafter McCannon & Rudd, *Study No. 35*], *reprinted in* 2A OMNIBUS, *supra* note 9.

45. Study No. 5, for example, covering compulsory provisions, included comments by 20 practitioners and academics reflecting a broad range of perspectives. *See* Harry G. Henn, *Study No. 5: The Compulsory License Provisions of the U.S. Copyright Law* (July 1956), *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST SESSION, STUDIES 5–6, at ix, 63–85 (Comm. Print 1960) [hereinafter STUDIES 5–6], *reprinted in* 1 OMNIBUS, *supra* note 9. Study 6, covering the economic aspects of the compulsory license, included another 4 comments ventilating the issues. *See* William M. Blaisdell, *Study No. 6: The Economic Aspects of the Compulsory License* (Oct. 1958), *in* STUDIES 5–6, *supra*, at 87, 119–25.

46. The renewal study highlighted concerns about the Supreme Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). *See* Barbara A. Ringer, *Study No. 31: Renewal of Copyright* 105, 160–63, 188–90 (June 1960), *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG.,

The preparation of the reform studies overlapped with several parallel reform initiatives. In the aftermath of the Supreme Court's 1954 decision in *Mazer v. Stein*[47]—holding that copyright protection extended to ornamental features of useful articles notwithstanding the overlap with design patent protection—bar groups, in collaboration with the Copyright Office and the Patent Office, established a Design Coordinating Committee to explore legislative proposals for the protection of nonfunctional designs for useful articles.[48] In addition, Congress was actively considering legislation to repeal the so-called jukebox exemption, under which the rendition of a musical composition on a coin-operated machine was not deemed a public performance for profit unless an admission fee was charged to enter the establishment.[49] These narrower legislative battles would continue throughout the general reform project.[50]

III.
PHASE I: CORE PRINCIPLES AND PROVISIONS (1960–1967)

With the bulk of the studies completed by 1960, the Copyright Office turned to drafting the REPORT OF THE REGISTER OF COPYRIGHTS ON THE

COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 29–31, at 105 (Comm. Print 1961) [hereinafter STUDIES 29–31], *reprinted in* 2 OMNIBUS, *supra* note 9. Study 25 covered one of the most significant issues that would arise in the copyright field: indirect liability. *See* Alan Latman & William S. Tager, *Study No. 25: Liability of Innocent Infringers of Copyright* (Jan. 1958), *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 22–25, at 135 (Comm. Print 1960), *reprinted in* 2 OMNIBUS, *supra* note 9. Yet perhaps due to its antiquated title, it would go undiscovered when this issue arose in historic litigation over the videocassette recorder. *See Making of the Copyright Act: Part II*, *supra* note 7.

47. 347 U.S. 201, 214 (1954).

48. *See* REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 3. Giles Rich, who played a prominent role in drafting the Patent Act of 1952 and was appointed to the U.S. Court of Customs and Patent Appeals in 1956, anchored this effort. *See* Giles S. Rich, *Congressional Intent—Or, Who Wrote the Patent Act of 1952?* (discussing Giles Rich's role on the four-person drafting committee), *in* PATENT PROCUREMENT AND EXPLOITATION 61, 67–69 (Sw. Legal Found. ed., 1963), *reprinted in* NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY 1:1 (John F. Witherspoon ed., 1980); *Design Protection: Hearings on S. 1884 Before the Subcomm. on Pats., Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 87th Cong. 2, 27–36 (1961) [hereinafter *Hearings on S. 1884*] (statement of Hon. Giles S. Rich, Judge, U.S. Ct. of Customs & Pat. Appeals) (discussing a bill "to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying").

49. *See* REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 4.

50. *See infra* Section IV.G.

GENERAL REVISION OF THE U.S. COPYRIGHT LAW.[51] Just as this report was being prepared, Register Fisher suddenly passed away.[52]

The Librarian of Congress appointed Register Fisher's trusted Deputy Register, Abraham Kaminstein, to fill this important role. Kaminstein joined the Copyright Office in 1947 as Chief of the Examining Division and was deeply involved with the revision project. The Copyright Office promoted Abe Goldman to General Counsel. Barbara Ringer, Assistant Chief of the Examining Division since 1956, was promoted to Chief of that division. Register Kaminstein would lead the Office during the critical early and middle stages of the drafting and legislative process. Abe Goldman and Barbara Ringer served as the principal drafters of reform legislation,[53] and Barbara Ringer would see the general revision through to passage as Register of Copyrights.

A. Register's Report (1961)

The REGISTER'S REPORT, issued in July 1961, framed the general revision project. Drawing on the first 34 studies and input from the Panel of Consultants—29 copyright specialists appointed by the Librarian of Congress[54]—the 160-page report summarized the existing law, identified problems that had arisen, articulated principles for addressing these concerns, analyzed alternative solutions, and sketched recommendations.[55]

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51. *See* REGISTER'S REPORT, *supra* note 10.

52. *See* REG. OF COPYRIGHTS, SIXTY-FOURTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1961, at 1, 17 (1962) [hereinafter REG. OF COPYRIGHTS, 64TH ANNUAL REPORT].

53. *See* REG. OF COPYRIGHTS, SIXTY-SEVENTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1964, at 2 (1965) [hereinafter REG. OF COPYRIGHTS, 67TH ANNUAL REPORT] ("Miss Ringer and Mr. Goldman were the principal drafters of the revision bill."); *see also* Letter from Abraham L. Kaminstein, Reg. of Copyrights, Libr. of Cong., to Hon. L. Quincy Mumford, Libr. of Cong. (May 13, 1965) (noting that "[t]he very difficult task of [drafting the REGISTER'S REPORT and the SUPPLEMENTARY REPORT] has fallen to the gifted pens of Barbara Ringer and Abe Goldman"), *in* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, at viii (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT], *reprinted in* 4 OMNIBUS, *supra* note 9.

54. The members of the Panel are listed in COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Feb. 1963), *reprinted in* 3 OMNIBUS, at 1–4 (publishing hearings) [hereinafter COPYRIGHT LAW REVISION PART 2]. They were drawn from the major copyright industries (book publishing, music publishing, records, motion pictures, radio and television production, and broadcasting), author groups, music copyright collectives (ASCAP, BMI), librarians (including Joint Libraries Committee on Fair Use in Photocopying), learned societies, university professors, law firms specializing in copyright law, bar associations, and government agencies. They reviewed a tentative draft of the Register's Report sent out on April 18, 1961, and many provided written comments by May 31, 1961. *See, e.g.*, *id.* at 325 (statement of Horace S. Manges) (noting the comment window). Register Kaminstein notes that the Panel of Consultants did "not participate[] in the preparation of [the REGISTER'S REPORT]." *Id.* at xi. Rather, "[t]he opinions and recommendations . . . represent my present thinking and that of the staff of the Copyright Office." *Id.*

55. REGISTER'S REPORT, *supra* note 10, at x–xi.

The REGISTER'S REPORT grounded the general revision project in the American constitutional philosophical tradition: the provision of property-like rights for a limited time primarily to promote "learning and culture for the public welfare."[56] The Register noted that although "[s]ome commentators, particularly in European countries, have characterized copyright as a personal right of the author"—with attendant unassignable moral rights of attribution and protection against distortion of their works—copyright protection in the United States is grounded in an economic framework in which rights are generally assignable, subject to some limitations for the benefit of authors.[57] Register Kaminstein also noted an "important secondary purpose": economic reward to the author for their contribution to society as a vital motivation for authors and intermediaries to invest in creative activities.[58] "While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. . . . [T]heir rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works."[59]

The general reform project aimed to update U.S. copyright law in light of technological change and the expansion of the range of artistic expression, such as architecture, choreography, sound recording, and ornamental designs of useful articles. It also sought to build upon ratification of the Universal Copyright Convention by bringing U.S. law into greater harmony with international standards.

Along these lines, the Copyright Office endeavored to eliminate protectionist measures, such as the manufacturing clause. The manufacturing clause illustrated Register Fisher's criticism of dealmaking in earlier copyright legislation. Prior to the International Copyright Act of 1891, works of foreign authors such as Charles Dickens received no protection in the United States.[60] As a result, their works were widely pirated by U.S. publishers, harming both foreign authors, who received no compensation, and domestic authors, whose works had to compete with pirated works of renowned authors.[61] As part of the deal to protect the works of foreign authors, the domestic printing industry, which derived a large part of its revenue from the piracy of foreign works, held out for and obtained the manufacturing clause: a requirement that books sold in the United States be printed in the United States.[62] The Act also prohibited the

56. *Id.* at 3–6 (discussing theories of copyright).

57. *See id.* at 4–5 (citing H.R. REP. NO. 60-2222 (1909)) (rejecting a natural rights basis for U.S. copyright legislation).

58. *See id.* at 5–6.

59. *See id.* at 6.

60. *See* MEREDITH L. MCGILL, AMERICAN LITERATURE AND THE CULTURE OF REPRINTING, 1834–1853, at 3–5 (2003) (describing the pervasive reprinting of British authors in the United States and its effects on authorship and publishing markets).

61. *See* McCannon & Rudd, *Study No. 35*, *supra* note 44, at 82–85.

62. *See* REGISTER'S REPORT, *supra* note 10, at 119–20. The 1891 provision required that works be *first* printed in the United States to obtain U.S. copyright protection. *See id.* Subsequent legislation

importation of copies of certain types of copyrighted works manufactured abroad.[63]

Implementing these principles, the REGISTER'S REPORT proposed the following provisions:

Table 1: Summary of REGISTER'S REPORT Recommendations

Subject Matter	Define copyrightability as requiring fixation, originality, and creativity Eliminate "all the writings of an author" (1909 Act § 4)—questioning protection for typography, broadcast emissions, and industrial designs—but maintain broad scope Expand express categories to cover: • Architectural drawings and structures, excluding functional features • Choreographic works • Sound recordings Applied Art: copyright protection should terminate if a work is registered as a design patent; sui generis protection should be established for ornamental designs of useful articles
Foreign Works	Extend protection to all foreign works (subject to Presidential restriction)
Rights	Traditional rights of making and publishing copies, making new versions, giving public performances; extending public performance right to motion pictures; and adding a right to make records
Special Rights, Limitations, and Exceptions	Fair Use: should be expressly affirmed in the statute Library Photocopying: single copy permitted under specified conditions Performance Right • not applicable to nondramatic literary or musical works unless performance is "for profit" • applicable to dramatic works and motion pictures whether or not the performance is "for profit" • not applicable to mere public reception of broadcasts except where the receiver charges the public for reception • repeal of jukebox exception Repeal of compulsory license for recording of music (cover license) with one-year delay to facilitate negotiations between music publishers and record companies

relaxed this particularly restrictive requirement, but the manufacturing clause remained part of U.S. law. *See id.*

63. *See* Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106, 1107–08 (restricting importation of foreign-manufactured copies of copyrighted works); Copyright Act of 1909, ch. 320, § 30, 35 Stat. 1075, 1082 (same as the Act of Mar. 3, 1891, with enumerated exceptions).

Ownership	Work made for hire owned by employer where created by an employee within the scope of employment or in the case of composite works Copyrights would be divisible Contributions to Periodicals: publisher would obtain copyright to contributions not separately copyrighted Limitations on Transfers: assignments shall not be effective for more than 20 years from date of execution unless they provide for continuing royalties based on the uses made of the work or the revenues derived from it
Pre-emption Unpublished Works	Common law rights terminate after publication, registration, public performance, or public distribution of sound recordings Common law rights remain for works not publicly disseminated Limited exceptions for public libraries and archives
Duration	Dual term extended to 28 years plus 48 years upon renewal Renewal window extended to last 5 years of original term Provisions for extending copyrighted preexisting works Reversion of extended 20-year term to original author except where assignee is obligated to continue paying royalties to the author All terms run to end of calendar year
Formalities	Notice: retained, but inadvertent omission or errors in the notice should not forfeit the copyright Deposit: retained Registration: retained, but failure to register does not result in forfeiture
Infringement	Registration is a prerequisite for infringement action
Remedies	Injunctions, forfeiture, and destruction of infringing copies available Actual Damages or Profits: clarify that recovery is available for the higher of actual damages or profits Statutory Damages: • available only if registration made within 3 months of first public dissemination • courts have discretion to award at least $250 (unless innocent infringement based on lack of notice) and up to $10,000 for all infringements (not per work) Innocent infringers misled by the omission or error shielded from liability Costs and Attorney's Fees: courts have discretion to award costs and a reasonable attorney's fee to the prevailing party Criminal Liability: retain criminal penalties against willful infringement for profit
International	Eliminate manufacturing clause Retain ban on importation of unauthorized copies

As a key example of how the Copyright Office drew on the studies, the fair use recommendation noted the principal doctrinal examples surveyed in the Fair Use Study[64] and proposed synthesizing four key factors animating the cases:

> (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work. These criteria are interrelated and their relative significance may vary, but the fourth one—the competitive character of the use—is often the most decisive.[65]

Between September 1961 and March 1962, the Copyright Office convened a series of hearings with members of the Panel of Consultants to discuss the reform project.[66] As the reform project proceeded, the Copyright Office "greatly enlarged" the Panel of Consultants to include "anyone with sufficient interest and reason to wish to be heard."[67] The Office also solicited comments from stakeholders more generally and from the public.[68] The Register hoped that the vetting of the studies and "realization that no one interested group can have everything its way, that each must give as well as take, and that the public interest deserves paramount consideration" would coalesce broad support for the proposal.[69]

Any pretense of easy resolution was dashed as the first hearing commenced. After conciliatory gestures,[70] panelists descended into zealous advocacy. Several

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64. Alan Latman, *Study No. 14: Fair Use of Copyrighted Works* (Mar. 1958) [hereinafter Latman, *Study No. 14*], *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 14–16, at 1, 7–14 (Comm. Print 1960) [hereinafter STUDIES 14–16], *reprinted in* 1 OMNIBUS, *supra* note 9.

65. REGISTER'S REPORT, *supra* note 10, at 24–25 (drawing upon Latman, *Study No. 14*, *supra* note 64, at 14–18).

66. *See* COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 1–222. Attendance at the meetings was limited to members of the Panel of Consultants and government officials.

67. *See* Barbara A. Ringer, *Viewpoint of the Copyright Office on General Revision of the Copyright Law*, 11 BULL. COPYRIGHT SOC'Y 37, 38 (1963).

68. *See* COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 223–416 (publishing comments).

69. *See* REG. OF COPYRIGHTS, SIXTY-FIFTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1962, at 1 (1963) [hereinafter REG. OF COPYRIGHTS, 65TH ANNUAL REPORT].

70. *See, e.g.*, COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 5 (statement of John Schulman, Chairman, Am. Pat. L. Ass'n Comm. on Copyright) (noting that he did not intend to discuss the REGISTER'S REPORT framing of general philosophy at the outset of the hearing but then noting copyright law's property nature); *id.* at 6 (statement of Irwin Karp, Authors League of Am.) (postponing critiquing the REGISTER'S REPORT philosophical underpinnings, set forth in his written comments, until discussion of particular recommendations); *id.* (statement of Julian T. Abeles, Music Publishers' Protective Ass'n, Inc.) ("[Telling his Association:] 'Gentlemen, look, you have got to give and take in these things. Everybody can't expect everything. There have been comments made, and everything you are going to say the Register and his staff have considered and considered well and thoroughly and I say this is the outcome of that. There are things we don't like of course but we have got to take it as it is,

panelists took issue with the REPORT's characterization of the threshold for copyright protection: "in order to be copyrightable, [any work] must be fixed in some tangible form and must represent the product of *original creative authorship*."[71] Although the Register's proposal was well within accepted jurisprudence,[72] Herman Finkelstein, representing the American Society of Composers, Authors and Publishers (ASCAP), questioned "the addition of the expression 'creative' authorship."[73] Others joined the chorus.[74]

More fundamentally, the hearings and comments revealed a deep philosophical divide, placing Register Kaminstein in an uncomfortable defensive posture. Irwin Karp, representing the Authors League, led a phalanx of panelists advocating a strict property rights framework.[75] Register Kaminstein blunted the property rights brigade by bringing librarians, professors, and other voices into the discussion.[76]

Over the course of the four hearings, objections to the REGISTER'S REPORT came from multiple sides on many issues, with some expressed as "violent" disagreement.[77] Defending the jukebox exception, an outdated turn-of-the-century loophole,[78] the trade association for jukebox manufacturers, operators, and proprietors of establishments featuring jukeboxes incongruously contended that their devices did not publicly perform music.[79] Similarly, domestic printers

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because we have got to give and take and nobody can expect everything,' and that is the way we feel about it.").

71. *Id.* at 10 (emphasis added).

72. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (holding originality requires independent creation and a minimal quantum of creative authorship); Mazer v. Stein, 347 U.S. 201, 214 (1954); *cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903).

73. COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 9 (statement of Herman Finkelstein, ASCAP).

74. *See id.* at 12–14 (statements of Sydney M. Kaye, BMI, Irwin Karp, Authors League of Am. & Julian T. Abeles, Music Publishers' Protective Ass'n, Inc.) (expressing concern that inclusion of the term "creative" would introduce qualitative standards into copyrightability).

75. *See, e.g.*, *id.* at 85 (statement of John Schulman, Chairman, Am. Pat. L. Ass'n Comm. on Copyright) ("Then again as Irwin Karp has said 'You must look at copyright as property.'"). Yet Mr. Karp also supported the 20-year limitation on the duration of copyright assignments. *See id.* at 319 (written comment of Irwin Karp) (endorsing a 20-year limitation on assignments with an exception for assignments providing for ongoing royalties).

76. *See, e.g.*, *id.* at 32–34, 39–40, 81–82 (statement of Edward G. Freehafer, Dir., N.Y. Pub. Libr.); *id.* at 42 (statement of William P. Fidler, Am. Ass'n of Univ. Professors).

77. *See, e.g.*, *id.* at 35 (statement of Horace S. Manges, Am. Book Publishers Council) (expressing "violent" opposition to authorizing libraries to make single copies of articles for patrons); *id.* at 104 (statement of Thomas J. Robinson, Copyright Comm., Motion Picture Ass'n of Am.) ("I also want to go on record that we are absolutely and violently opposed to [the proposed 20-year limitation on copyright assignments].").

78. *Id.* at 32 ("[T]he jukebox exemption is a historical anomaly . . . placed in the law in 1909 at the last minute with virtually no discussion. The coin-operated music machines of that day were apparently a novelty of little economic consequence. The jukebox industry is now among the largest commercial users of music, with an annual gross revenue of over a half-billion dollars.").

79. *See id.* at 48 (statement of Nicholas E. Allen, Music Operators of Am.) ("The fact is that the individual pays and the individual selects in order to listen, and this is invariably the reason and the basis

and labor unions defended the manufacturing clause on protectionist grounds.[80] Both groups relied on veiled political leverage—dispersed local businesses employing many people collectively throughout the nation in the former case and organized labor in the latter—rather than on copyright policy.[81] When the House Judiciary Committee's counsel cautioned that the "legislative road ahead may be long and it may be hard, and it may be bumpy in spots, and somewhere along the way there may be a detour or two," Register Kaminstein half-jokingly completed the thought with "[a]nd blood."[82]

The issue of library photocopying also surfaced deeply divided reactions. Adapting a 1935 "Gentlemen's Agreement" between the research/library community and the National Association of Book Publishers,[83] the REGISTER'S REPORT proposed permitting

for the performance. Basically it is, I think, a private performance."); *id.* at 224–26 (written comment of Nicholas E. Allen).

80. *See id.* at 194–95 (statement of Malcolm H. Frost, Book Mfrs. Inst.) (defending the manufacturing clause by emphasizing that book publishing is an "essential" American industry); *id.* at 198 (statement of J.H. Sampson, Int'l Allied Printing Trades Ass'n) (speaking as president of an association of major international unions in the graphic arts industry, aligning with Book Manufacturers Institute and suggesting that U.S. law should use this vehicle to protect American workers against competition from European publishers that underpay their workers); *id.* at 411 (written comment of Printing Indus. of Am., Inc.) (joining with Book Manufacturers Institute); *id.* at 180 (statement of Barbara A. Ringer, Copyright Off.) (noting that the Book Manufacturers Institute "vigorously support[ed] retention of and adherence to the manufacturing and import provisions of the present law . . . to fortify protection of the printing industry against what it considered a very serious threat of foreign competition").

81. The Music Operators of America contended that jukeboxes in bars, restaurants, and dance halls did not publicly perform musical compositions. They were backed by the specter of political leverage—500,000 members located across the nation. *See id.*, at 48–50 (statement of Nicholas E. Allen, Music Operators of Am.).

82. *See id.* at 44; *see also* A.L. Kaminstein, *Introduction*, *Viewpoints on the General Revision of the Copyright Law*, 11 BULL. COPYRIGHT SOC'Y 3, 4 (1963) (expressing frustration over the "Grub Street atmosphere" surrounding the copyright reform project while emphasizing that "accommodation among the various competing special interests" is essential to successful copyright law revision).

83. *See* Borge Varmer, *Study No. 15: Photoduplication of Copyrighted Material by Libraries* (May 1959) [hereinafter Varmer, *Study No. 15*], *in* STUDIES 14–16, *supra* note 64, at 45, 51–53, *reprinted in* 1 OMNIBUS, *supra* note 9. The Agreement states: "A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research; provided—(1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law: (2) That such reproduction is made and furnished without profit to itself by the institution making it." *Id.* at 52. Although the "Gentlemen's Agreement" had no binding effect, it served as a standard of conduct governing library copying for many years. In 1940, the American Library Association adopted a "Reproduction of Materials Code" based on the Gentlemen's Agreement. *See* Reproductions of Materials Code, 35 ALA BULL. 84 (1941). *See generally* Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y 545, 548 (2006) (discussing the genesis, role, and limitations of the "Gentlemen's Agreement" and noting that the Agreement "was intended to serve the needs of research scholars, not librarians").

> a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:
>
> (a) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.
>
> (b) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.
>
> (c) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted.[84]

Publishers and authors fulminated, highlighting how the advent of photocopying had shifted the balance against this practice.[85] Libraries emphasized the public benefits of research and educational uses.[86]

A more subtle issue, but one that would loom large in the coming years, concerned the REPORT's discussion of "Public Reception of Broadcasts."[87] The REPORT recommended that the principle of "clearance at the source"—that the use of copyrighted music is cleared upstream, e.g., at the network broadcaster level as opposed to the local station level—"should apply to the reception of broadcasts."[88] Although the REPORT made no mention of CATV—an emerging technology that originated as an engineering solution to weak broadcast reception in rural and mountainous regions[89]—several stakeholders warned that broad application of this principle could create "another jukebox exemption."[90]

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84. *See* REGISTER'S REPORT, *supra* note 10, at 25–26; Varmer, *Study No. 15*, *supra* note 83, at 64–66 (suggesting that the statute "provide in general terms that single photocopies may be made by or for any person for his private use only" with "some limitations" such as nonprofit use, but cautioning that a "broad provision of this character . . . it might open the door to such extensive photocopying as to present the danger of injury to the interests of publishers and copyright owners").

85. *See* COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 35 (statement of Horace S. Manges, Am. Book Publishers Council) ("The publishers' reaction to this is violent. There is nothing we disagree with more completely."); *id.* at 226–27 (written comments of Am Book Publishers Council, Inc. & Am. Textbook Publishers Inst.); *id.* at 256–57 (written comments of The Authors League of Am., Inc.); *id.* at 322–24 (written comment of Irwin Karp).

86. *See id.* at 33–34 (statement of Edward G. Freehafer, Dir., N.Y. Pub. Libr.).

87. REGISTER'S REPORT, *supra* note 10, at 30–31.

88. *Id.* at 31. The REGISTER'S REPORT clarified, however, that the receiver of the broadcast would be required to obtain a performing license if it "ma[de] a charge to the public for the reception of the broadcast—for example, by charging an admission fee, or by requiring a payment for operation of a receiving set." *Id.*

89. Early CATV systems erected a master antenna on elevated terrain, received over-the-air broadcast signals, and distributed them by cable to subscribers who otherwise could not obtain acceptable reception. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 391–93 (1968).

90. *See* COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (1964), *reprinted in* 3 OMNIBUS,

Although early forms of CATV were little more than collective antennas—an extension of private reception rather than a new form of public dissemination—CATV systems had begun to evolve rapidly by the early 1960s in ways that competed with broadcasters.

Following the REPORT's inauspicious reception, Register Kaminstein publicly characterized reactions to the REGISTER'S REPORT as "heartening" and reflecting a "fair-minded, public-spirited attitude."[91] Behind the scenes, however, he recognized that the general revision project was in dire jeopardy. As the Copyright Office's 1963 report to the Librarian of Congress conceded,

> [c]oncentrated discussions of the issues raised by the REPORT . . . during a 3-day period preceding the Annual Meeting of the American Bar Association in San Francisco in August 1962 . . . attended by the Register and the Deputy Register of Copyrights and the General Counsel of the Copyright Office . . . showed the strength of the opposition to, and lack of support for, certain of the REPORT's recommendations. It had become apparent, for example, that the prevailing sentiment favored a single Federal copyright system, with protection commencing upon the creation of a work and ending 50 years after the author's death. This view was in direct conflict with the Register's proposal for copyright to begin with "public dissemination" and to last for a first term of 28 years, renewable for a second term of 48 years.[92]

The comments and hearings revealed significant division on "nearly all" of the proposals.[93] As Register Kaminstein would later acknowledge, the reform effort faced a "serious crisis."[94] The Copyright Office went back to the drawing board to rethink the project's path forward.

B. Interim Term Extension

Recognizing that a general copyright revision would take time and there was broad support for lengthening copyright duration,[95] Representative Emanuel Celler introduced a joint resolution in 1962 to extend, until December 31, 1967,

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at 1–449 (publishing hearings) [hereinafter COPYRIGHT LAW REVISION PART 3], at 238 (statement of Barbara A. Ringer, Copyright Off.).

91. REG. OF COPYRIGHTS, 65TH ANNUAL REPORT, *supra* note 69, at 1.

92. REG. OF COPYRIGHTS, SIXTY-SIXTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1963, at 1 (1964) [hereinafter REG. OF COPYRIGHTS, 66TH ANNUAL REPORT].

93. *See id.* (reporting that "[s]ome of the *Report*'s proposals, as expected, had proved to be extremely controversial, and nearly all of these were criticized for one reason or another"); SUPPLEMENTARY REPORT, *supra* note 53, at x.

94. SUPPLEMENTARY REPORT, *supra* note 53, at x.

95. Even Professor Ralph Brown, Jr., a self-proclaimed copyright minimalist, supported some lengthening of copyright duration. *See* STUDIES 29–31, *supra* note 46, at 95 (written comment of Ralph S. Brown, Jr.) (favoring a "term of life plus 25 to 30 years" to protect "normal widowhood, and the minority of the author's children, and satisf[y] the U.C.C.").

the renewal term of copyrights that would otherwise expire before that date.[96] The House Judiciary Committee passed an amended version of the bill on June 18, 1962, which changed the terminal date of the extension from December 31, 1967, to December 31, 1965.[97] The Senate passed the measure on September 7, 1962,[98] and President Kennedy signed it into law on September 19, 1962.[99]

As drafting and deliberation over the general revision languished, Congress passed eight further stopgap term extensions—a total of nine such measures—leading up to the passage of the Copyright Act of 1976.[100] These extensions ensured that copyrights subsisting at the outset of the revision project would not be lost due to the delay in bringing the omnibus reform to fruition.

C. Preliminary Draft

After a pause, the Copyright Office released a Preliminary Draft in late 1962 rather than a proposed bill. By its title, use of alternative proposals on controversial provisions, and tone,[101] the Preliminary Draft signaled openness and the need for further ventilation. Furthermore, the Office shifted its stance on several contentious issues.[102] Table 2 compares the initial REGISTER'S REPORT recommendations and the Preliminary Draft proposals.

96. H.R.J. Res. 627, 87th Cong. (1962).

97. *See* REG. OF COPYRIGHTS, 65TH ANNUAL REPORT, *supra* note 69, at 5.

98. *See id.* at 5–6.

99. *See id.* at 6.

100. *See* REG. OF COPYRIGHTS, 80TH ANNUAL REPORT, *supra* note 11, at 5.

101. *See* REG. OF COPYRIGHTS, 66TH ANNUAL REPORT, *supra* note 92, at 1 ("[T]here was increased realization of the time and effort needed to produce a bill that has some chance of enactment. Most important, the growth in respect and understanding on both sides improved the atmosphere of accommodation and cooperative effort which . . . is essential to general revision.").

102. *See id.* at 1–2 ("[A]t the outset of the drafting phase of the revision program, the Copyright Office announced that it was prepared to change its position on some debatable questions, and to draft alternative language on others."); *see, e.g.*, COPYRIGHT LAW REVISION PART 3, *supra* note 90, §§ 19–20, at 17–19 (revising recommendations concerning "public dissemination" and the retention of common law protection and offering an alternative duration provision based on a life-plus basis for computing the term).

Table 2: PRELIMINARY DRAFT: Comparison to REGISTER'S REPORT Recommendations

Subject Matter	§ 1(a) "Copyright protection under this title shall be available for an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be visually or aurally perceived, reproduced, performed, or represented, either directly or with the aid of a machine or device . . . ." • broad definition of pictorial, graphic, and sculptural works, but no mention of architectural drawings or structures • § 9 includes right to reproduce the work in useful articles, but does not include the right to make, distribute, or exhibit useful articles of the design • inclusion of choreographic works and sound recordings § 2 Copyright definition of and protection for compilations and derivative works ("translation, arrangement, instrumentation, abridgment, summary, index, dramatization, motion picture version, sound recording, art reproduction, or any other form of adaptation by which the work of an author may be recast or transformed") § 4 Exclusion of U.S. government publications subject to exception for postal stamp illustrations
Foreign Works	§ 3 Alternative provisions regarding national origin that largely carry over REGISTER'S REPORT recommendation
Exclusive Rights	§ 5 Exclusive Rights to copy or record, distribute copies and sound recordings, perform, and exhibit. The right to copy or record includes the right to make any derivative work.
Fair Use	§ 6 "All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work."
Library Photocopying	§ 7 Limitations on Exclusive Rights: Copying and Recording by Libraries— (a) The library shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or

	periodical issue, or to supply a copy or sound recording of a similarly small part of any other copyrighted work. (b) The library shall be entitled to supply a copy or sound recording of an entire work, or of more than a relatively small part of it, if the library has first determined, on the basis of a reasonable investigation that a copy or sound recording of the copyrighted work cannot readily be obtained from trade sources. (c) The library shall attach to the copy a warning that the work appears to be copyrighted.
Performance Right	§ 5(c)(1) • Alternative A: Copyright in nondramatic literary and musical works shall include the exclusive right to perform the work publicly for profit • Alternative B does not have a nonprofit exclusion. § 5(c)(2), (3): broad definition of "performed publicly" • § 8(c) (to be used with § 5(c) Alternative B): exemption for "performance of the work without any expectation of direct or indirect commercial advantage and without any payment to the performers for their services: (1) if there is no direct or indirect admission charge, or (2) if the proceeds, after deducting the reasonable costs of the performance, are used exclusively for educational, religious, or charitable purposes and not for private gain."
Broadcasting and Diffusion	§ 13. Scope of Exclusive Rights with Respect to Broadcasting and Diffusion— (a) Subject to exclusions in (b), right to transmit by broadcasting, rebroadcasting, diffusing, rediffusion, or otherwise communicating to public (b) Exclusion for: (1) transmission to a single individual or specific group of individuals; (2) rebroadcasting or rediffusion for reception by ordinary home receiving sets where signals are merely being strengthened without being altered and where the program is not being retransmitted to the subscribers to a rediffusion service; (3) communication to guests in private rooms of a public establishment by means of a loudspeaker system, unless the person responsible for such communications exercises control; and (4) reception in (i) a private place including the private guest rooms of a public establishment, or (ii) in a public place, including the public rooms of such an establishment, unless a direct admission fee is charged to see or hear the program, unless the receiving apparatus is coin-operated, or unless the program is publicly communicated by means of a loudspeaker system.

Teaching/ Religious Exemption	§ 8 exemptions for (a) an instructor or pupil in the course of normal research activities and (b) religious services at a place of worship
Jukebox Exception	• no formal proposal as the topic is the subject of pending bills
Compulsory License for Recording of Music	§ 11 • Alternative A would repeal the compulsory license for recording of music after a 5-year transition. • Alternative B would retain the compulsory license for recording of music and specified royalty provisions (8% of retail price of recordings). • Alternative C would retain the compulsory license for recording of music and specified other royalty provisions (3/4¢ per minute of playing time).
Ownership Work Made for Hire	§ 14(c): grants rights to the employer • defines "work made for hire" "as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."
Limitations on Transfer of Copyright Ownership	§ 16 Limitations on Transfers of Copyright Ownership • Alternative A: 25-year limit to assignments (other than in the case of works made for hire); exception for derivative works prepared under the authority of a terminated transfer, but shall not extend to making of other derivative works • Alternative B: termination of transfers after 20 years where "the profits are strikingly disproportionate to the compensation, consideration, or share received by the author"
Preemption Unpublished Works	All common law or state statutory rights in the nature of copyright protection replaced by federal protection
Other State Rights	Breaches of trust, invasion of privacy, or deceptive trade practices including passing off and false representation retained
Duration	§ 20. Duration of Copyright: Works Created After [Effective Date of this Act] • Alternative A: 75 years from the year of registration in unpublished form or of first publication or 100 years from the year of creation, whichever expires first • Alternative B: Life of the author plus 50 years or, in the case of anonymous works, pseudonymous works, or works made for hire, 75 years from the year of registration in unpublished form or of first publication or 100 years from the year of creation, whichever expires first

	§ 22. Duration of Copyright: Subsisting Copyrights Subsisting copyrights granted 75 years (increased from 56 years) with termination right available to original author (or legal representatives) to claim the additional 19 years. Derivative works prepared under the terminated transfer continue to be utilized under the terms of the transfer, but this privilege does not extend to the making of other derivative works employing the work covered.
Manufacturing Clause	§ 43 • Alternative A: eliminate manufacturing clause • Alternative B: manufacturing clause narrowed

The Preliminary Draft simplified the threshold for copyright protection to fixation and originality, removing the reference to "creativity."[103] Of perhaps greatest significance, the Copyright Office shifted to an exclusive federal protection regime with a unitary term of protection commencing upon creation of a work.[104] The Preliminary Draft floated two duration alternatives: (A) a term of seventy-five years or (B) life plus fifty years (both subject to caveats relating to whether the work was first registered or published).[105] It also offered alternatives for limitations on the duration of assignments: (A) a 25-year limit (other than for works made for hire) or (B) a termination of transfers after 20 years where "the profits . . . are strikingly disproportionate to the compensation, consideration, or share received by the author."[106] This unprecedented feature opened up additional questions, such as the definition of works made for hire,[107] the mechanics of termination, and the practicality of a "strikingly disproportionate" standard.

Regarding special rights, limitations, and exceptions, the Preliminary Draft carried over an express limitation permitting libraries to make single copies under specified conditions. The Copyright Office floated three alternatives relating to the compulsory license for musical compositions: repeal or adopt one of two specified royalty rates.[108] The Copyright Office refrained from addressing the jukebox exception in recognition of pending bills.[109]

103. *See Preliminary Draft for Revised U.S. Copyright Law* § 1(a), COPYRIGHT LAW REVISION PART 3, *supra* note 90 [hereinafter *Preliminary Draft*] at 1 ("Copyright protection under this title shall be available for an original work of authorship fixed in any tangible medium of expression . . . .").

104. *See id.* § 19, at 18 (preempting common law and state law protection prospectively).

105. *See id.* § 20, at 18–19; *see also id.* § 22, at 20–21 (extending the term of subsisting copyrights to 75 years with termination right available to original author (or legal representatives) to claim the additional 19 years).

106. *See id.* § 16, at 15–16.

107. The Preliminary Draft excluded works on special order or commission, *see id.* § 14(c), at 15, an issue that would spark opposition, *see infra* text accompanying notes 131–41.

108. *See Preliminary Draft*, *supra* note 103, § 11, at 8–13.

109. *See id.* § 12, at 13 & n.8.

The Preliminary Draft directly addressed the CATV issue for the first time. Acknowledging that the REGISTER'S REPORT discussion of "Public Reception of Broadcasts" had overlooked the complexities of the issue and conceding the Office's "present stage of ignorance,"[110] the Preliminary Draft extended the public performance right to "broadcasting, rebroadcasting, diffusing, rediffusing, or otherwise publicly communicating" a performance of a work.[111] Section 13 distinguished infringing public performances from non-infringing reception by authorizing certain communications of broadcasts, such as transmission to private rooms of hotels, reception on a single home-type apparatus, and signal strengthening without alteration.[112]

Notwithstanding its continued support for repealing the manufacturing clause,[113] the Copyright Office advanced two alternatives, one of which would not eliminate the clause entirely: (A) elimination of the manufacturing clause and the related importation prohibitions; and (B) replacement of the 1909 Act's domestic-production condition—applicable to "printed book or periodical"[114] classes and extending to specified illustrations—with an importation-based regime, prohibiting the importation into the United States of foreign-manufactured copies unless the relevant portions were wholly manufactured domestically.[115] Alternative B kept the clause but would substantially narrow its scope by limiting coverage to visual copies of works consisting preponderantly of nondramatic literary material in the English language and by exempting cases in which the author of any substantial part was neither a United States citizen nor a United States domiciliary.[116] It also provided an exemption for the importation

110. COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 238.

111. *Id.* at 248 (citing Preliminary Draft, *supra* note 103, § 13(c)(4), at 14 (defining rediffusing as "the simultaneous retransmission, as part of a rediffusion service such as a community antenna system or cable service, of electromagnetic signals, received from another source, to subscribers who require special apparatus to receive them, and who pay for reception of the signals")).

112. *See* Preliminary Draft, *supra* note 103, § 13(b)(2), at 13 (excluding from public performance right liability "[r]ebroadcasting or rediffusion of the program, over wires or otherwise, for reception on ordinary home receiving sets, where the broadcast signals are merely being strengthened in power without being altered in wavelength or content, and where the program is not being retransmitted to the subscribers to a rediffusion service").

113. *See* COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW (Dec. 1964), *reprinted in* 3 OMNIBUS, *supra* note 9, at 179–81 (statement of Barbara A. Ringer, Copyright Off.) (discussing §§ 43–53) [hereinafter COPYRIGHT LAW REVISION PART 4].

114. Copyright Act of 1909, ch. 320, § 15, 35 Stat. 1075, 1078.

115. *Preliminary Draft*, *supra* note 103, § 43, at 31–32.

116. *See id.* The 1909 Act's manufacturing clause operated as a broad condition of copyright protection, requiring domestic manufacture of covered works as a prerequisite to protection and expressly extending that requirement to specified illustrations and certain separate lithographs or photoengravings. *See* Copyright Act of 1909, ch. 320, § 16, 35 Stat. 1075, 1078–79. By contrast, Preliminary Draft Alternative B recast the policy as a border-control rule, triggered by importation into the United States, and further narrowed its reach by substituting a functional content test ("preponderantly of nondramatic literary material . . . in the English language") for the 1909 Act's categorical "printed book or periodical" classes. *Preliminary Draft*, *supra* note 103, § 43, at 31 (Alternative B).

of up to 1,500 copies where such works were first published abroad.[117] In presenting the Preliminary Draft, Copyright Office officials emphasized that the manufacturing clause had become problematic as a production-side mandate and that Alternative B was designed to confine the rule's operation to importation, rather than condition copyright protection itself.[118]

The Copyright Office received over 150 written comments from a wide range of stakeholders and the public at large.[119] Over the course of seven day-long hearings, a two-day hearing, and other meetings,[120] Copyright Office leaders and witnesses[121] debated the pros and cons of alternative formulations and explored the rationale and meaning behind the proposed provisions. The hearings on the Preliminary Draft proved to be far more conciliatory and constructive than the REGISTER'S REPORT hearings. Register Kaminstein called upon General Counsel Goldman and Chief of the Examining Division Ringer to introduce and lead the discussions. The hearings moved methodically through the draft, with illuminating discussion of the intent behind the provisions as well as key word choices.

The discussion surrounding the drafting of the exclusive rights (Section 5) illustrates the insights. Edward Sargoy, the ABA's representative, commented that

> I would also be inclined, at the very start of the opening clause, to add an "authorization" provision—something in the second clause of section 5 to the effect that: "copyright under this title shall consist cumulatively of the exclusive right to do or authorize the doing of any of the following." Perhaps our case law in this country makes contributory infringers liable. However, I do not see that it would do any harm to make that very clear in the statute.[122]

This drafting suggestion would be incorporated into the 1964 Revision Bill and subsequent legislation.[123]

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117. *See Preliminary Draft*, *supra* note 103, § 43, at 31 (Alternative B).

118. *See* COPYRIGHT LAW REVISION PART 4, *supra* note 113, at 181 (statement of Barbara A, Ringer, Copyright Off.) (explaining the shift from a manufacturing condition to an importation prohibition).

119. *See id.* at 243–471.

120. Copyright Office officials also participated in programs organized by the American Bar Association Committee on the Program for General Revision of the Copyright Law and several ad hoc committees formed to discuss particular points in issue. *See* REG. OF COPYRIGHTS, 66TH ANNUAL REPORT, *supra* note 92, at 2.

121. Unlike the REGISTER'S REPORT meetings, which were limited to members of the Panel of Consultants and government officials, the Preliminary Draft meetings had much larger participation. For example, the first hearing had approximately eighty attendees. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 37–38 (listing attendees).

122. *Id.* at 112 (statement of Edward A. Sargoy, A.B.A.).

123. *See 1964 Revision Bill*, 89th Cong. 1st Sess. [hereinafter *1964 Revision Bill*], COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSION AND COMMENTS U.S. COPYRIGHT OFFICE 1964 REVISION BILL 1, 4 (Comm. Print 1965), *reprinted in* 4 OMNIBUS *supra* note 9 [hereinafter

As the discussion of Section 5(a) unfolded, several panelists questioned the omission of rights to publish and vend.[124] Register Kaminstein postponed addressing this point until the discussion of Section 5(b), where General Counsel Goldman explained that

> Subsection [5](b), I believe, would cover everything that's covered in section 1(a) of the present law [the exclusive rights "[t]o print, reprint, publish, copy, and vend the copyrighted work"] by reference to the terms "publish" and "vend"—broadened, I would say, to avoid any questions as to whether "publish" or "vend" is used in such a narrow sense that there might be forms of distribution not covered. I think the draft covers virtually all forms of distribution.[125]

Further discussion would clarify the rationale for substituting "distribute" for "publish." Echoing concerns raised in the preparatory studies and academic literature,[126] Edward Sargoy explained:

> I think that the use of the words "publication" or "published," in hundreds of common law and statutory cases, dissertations, and otherwise, has made the terms archaic today in the light of our recent technological progress. Reference to such materials where the word derived its meaning from conditions existing in the 18th, 19th, and early part of the 20th century, will only lead to confusion. I think it is an excellent idea to use the word "distribute" and, just as the draft here has done, have "distribute" expressly include the right "to sell," (which is strictly one of the rights of publication), "or otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of the work."[127]

COPYRIGHT LAW REVISION PART 5] ("[T]he owner of copyright under this title has the exclusive rights to do or to authorize any of the following . . . ."); 17 U.S.C. § 106 (same). The authorization formulation was drawn from Canadian and British copyright law and was intended to clarify the liability of contributory infringers. *See* COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 24 (statement of Edward A. Sargoy, A.B.A.) (proposing a provision modeled on Canadian and British law under which authorizing an exclusive act would itself constitute infringement); Copyright Act 1956, 4 & 5 Eliz. 2 c. 74, § 1(1) (UK) (defining copyright as the exclusive right "to do, and to authorise other persons to do," the specified acts).

124. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 112 (statement of Herman Finkelstein, ASCAP) (responding that "I do think that we have to have the word 'publish,' for this reason" to Register Kaminstein's question: "[d]o others feel that there's any question as to whether 'copy or record' could exclude printing or publishing?"; General Counsel Goldman interceded: "May I suggest that 'publish' really belongs under (b) rather than (a)? You're talking about distributing copies rather than the right to 'copy or record.'"); *id.* at 117 (statement of John Schulman) ("I would be inclined to follow the suggestion of Herman Finkelstein to use the word 'publish,' because the right to publish goes back to the first copyright statute.").

125. *See id.* at 110.

126. *See* Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 488–89 (1955); Nimmer, *supra* note 20, at 185.

127. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 128.

The hearing testimony and comments also revealed valuable information about custom and practice in various creative industries. A prime example relates to affording libraries authority to provide single photocopies for research use. For publishers, the growing use of rapidly improving photocopying technology threatened their operation,[128] nullifying the 1935 "Gentlemen's Agreement," whereas libraries and researchers took this opportunity to assert that photocopying of articles for research is a paradigmatic fair use.[129] This fundamental divide between libraries/researchers and publishers would smolder throughout the general revision project.[130]

The testimony and comments addressing the Copyright Office's proposed definition of "work made for hire" surfaced important information and perspectives on custom. The Preliminary Draft defined a "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."[131] Several panelists objected to the exclusion of commissioned works, noting that it would upset long-established practice and economic realities in the motion picture, magazine publishing, and music publishing industries.[132] Irwin Karp, representing literary authors, responded that

> the draft as written reflects and clarifies what is sound practice in the publishing field. Actually, the publisher takes copyright in individual contributions to collective works only because of a disinclination to put copyright notices on the bottom of the first page of each article or story. Every reputable publisher that I know of willingly reassigns to the author, immediately after publication of the periodical, all rights except first periodical or first serial rights.[133]

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128. *See* COPYRIGHT LAW REVISION PART 4, *supra* note 113, at 251–58 (written comment of Am. Book Publishers Council, Inc.).

129. *See id.* at 293–99 (written comment of Edward G. Freehafer, Dir., N.Y. Pub. Libr., *Joint Libraries Committee on Fair Use in Photocopying: Summary Statement of Policy*).

130. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 26 ("Opposition to the [single research copy] provision was equally strong on both sides but for exactly opposite reasons, with one side arguing that the provision would permit things that are illegal now and the other side maintaining that it would prevent things that are legal now. Both agreed on one thing: that the section should be dropped entirely. . . . As important as it is, library copying is only one aspect of the much larger problem of changing technology, and we [the Copyright Office] feel the statute should deal with it in terms of broad fundamental concepts that can be adapted to future developments."); SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 59–103 (1975) [hereinafter SECOND SUPPLEMENTARY REPORT].

131. *See Preliminary Draft*, *supra* note 103, § 14(c), at 15 & n.11.

132. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 259–61 (statement of Julian T. Abeles, Music Publishers' Protective Ass'n, Inc.); *id.* at 259 (statement of Horace S. Manges, Am. Book Publishers Council); *id.* at 260–61 (statement of John R. Peterson, A.B.A.); *id.* at 261, 274 (statement of Bella Linden) (highlighting the difficulties surrounding composite works, such as encyclopedias).

133. *Id.* at 261 (statement of Irwin Karp, Authors League of Am.); *see also id.* at 269, 272–73 (ridiculing corporate "authorship" of works of art, music, theater, and film based on commissioning a work, stating that "[t]he author writes, and if there isn't any author there isn't going to be anything written").

He pointed out that the real "concern[]" surrounding the work made for hire doctrine was not in whose name the copyright was registered but rather proposed limits on the duration of assignments.[134]

To improve authors' bargaining position and protect against unremunerative transfers, the Copyright Office sought to limit the duration of assignments.[135] This change would correct a perceived imbalance created by the 1943 Supreme Court decision upholding advance assignment of renewal rights.[136] With the shift to a unitary term, the correction required a statutory limit on freedom of contract.

As Barbara Ringer noted in introducing the topic, the REGISTER'S REPORT recommendation for a 20-year limitation on assignments "proved to be one of the two or three most controversial recommendations."[137] Nonetheless, the Copyright Office persisted in seeking a mechanism for protecting authors from unremunerative transfers.[138] One of the alternative proposals exempted works made for hire.[139] The discussion that unfolded raised the concern that disagreement over this issue could doom the entire general revision project.[140] It also hinted that tinkering with the definition of work made for hire might be the linchpin for resolving the impasse.[141]

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134. *See id.* at 262.

135. *See Preliminary Draft*, *supra* note 103, § 16, at 15–16 (Limitations on Transfers of Copyright Ownership).

136. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).

137. COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 277 (statement of Barbara A. Ringer, Copyright Off.).

138. *See id.* ("[A]fter reviewing all the comments received . . . , we believe that the support for the basic principle of some sort of time limitation on transfers of copyright ownership may be as strong and deep-seated as the opposition. This at least encourages us to hope that a meeting of the minds can eventually be achieved on this very, very difficult issue.").

139. *See Preliminary Draft*, *supra* note 103, § 16, at 15–16 (Alternative A). Alternative B did not exempt works made for hire.

140. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 278–81 (statement of Richard Colby, Copyright Comm., Motion Picture Ass'n of Am.) ("We will oppose this provision and if it is to be included in the draft submitted to the Congress, we must take the position that a bill should not pass with either of these alternatives."); *id.* at 281 (statement of Horace S. Manges, Am. Book Publishers Council) (stating that "in my opinion either one of these alternatives would be devastating insofar as they apply to book publishers"); *id.* at 283 (statement of Julian T. Abeles, Music Publishers' Protective Ass'n, Inc.) (warning that limiting the duration of transfers to 25 years was a "radical revision" leading him to conclude that "under such circumstances, it would be definitely advisable to retain the copyright act in its present form"); *id.* at 286 (statement of Irwin Karp, Authors League of Am.) ("The authors are in ardent support of a reversion clause. If we are going to balance threats, why don't we say that if there is no reversion provision the authors will oppose the amendment of the copyright act? And by God, they will.").

141. *See id.* at 297 (statement of Bella Linden) ("Am I to assume, or am I being too hopeful, that Mr. Karp and the authors recognize the economics and the practice of other areas of the book publishing fields?"); *id.* (statement of Irwin Karp, Authors League of Am.) ("[T]here are different categories of works. I think a dictionary is in the same category as a motion picture. I wouldn't expect that every man who wrote the definition of a single word would get back his definition at the end of 25 or 20 years. I think he probably would be an employee-for-hire, for one thing; and, even if he weren't, I could see a

The Preliminary Draft's treatment of CATV failed to quell controversy. Testimony and written comments revealed deep confusion about whether Section 13 exempted CATV systems, reclassified them as mere reception, or left them fully subject to the performance right.[142] As Barbara Ringer would later acknowledge, Preliminary Draft Section 13 was "a running jump at the problem," adding that "the nicest thing anyone said about it was that it was 'confusing.'"[143]

Thus, the discussions and written comments clarified the principal areas of division, sounded alarms, and provided the drafters with insights and ideas for charting a pragmatic path that served the public interest.[144] They also brought vital information about new and emerging technologies—CATV,[145] information storage and retrieval systems,[146] and computer software—to the drafters' attention.

D. 1964 Revision Bill

Following the extensive vetting of the Preliminary Draft, the Copyright Office conducted a thorough review of the comments and testimony in preparing a full legislative bill.[147] Although the 1964 Revision Bill was formally introduced in both chambers of Congress in July of that year,[148] the Copyright Office did not expect the bill to receive consideration in the 88th Congress,

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logical definition of the types of derivative works that could continue to be published or exhibited under Alternative A which would include dictionaries."); *cf. supra* text accompanying notes 133 and 134 (suggesting the connection between the definition of work made for hire and limitations on transfer).

142. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 241–54 (presenting numerous interpretive and substantive criticisms); *id.* at 360–61, 363–70, 374, 404–06, 419–33, 441 (collecting written comments criticizing CATV treatment).

143. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 119.

144. *See, e.g.*, COPYRIGHT LAW REVISION PART 2, *supra* note 54, at 224–26 (written comment of Nicholas E. Allen) (arguing that the mechanical royalty for musical compositions is a sufficient compensation for composers while signaling that the jukebox industry would prefer a compulsory license if any additional royalty is needed and "not left to the fantasy of so-called free negotiation"; expressing practical concern that "phonograph operators are small businessmen; they cannot possibly bargain on even terms with the huge performance rights organizations, financed as they are by millions of dollars of capital behind them, and capable as they are of dealing with and picking off the operators one by one, and so bargaining them to death").

145. *See, e.g.*, COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 241–44 (statement of George Schiffer).

146. *See, e.g.*, *id.* at 123–24 (statement of James E. Skipper, Ass'n of Rsch. Librs.) (explaining the Cornell English Department's use of computers to analyze literary works: "[w]ith the potential of optical scanners, with the potential of indexing in depth for information retrieval, it is becoming increasingly necessary to feed the whole text in to the computer apparatus. But what you're getting out is an analysis. You're indexing literature; you're not printing out the whole text. ¶ I like very much the suggestion . . . that some consideration of fair use be given, especially with respect to the print-out phase of this information retrieval problem.").

147. *See* REG. OF COPYRIGHTS, 67TH ANNUAL REPORT, *supra* note 53, at 1–2; SUPPLEMENTARY REPORT, *supra* note 53, at xi.

148. *See* REG. OF COPYRIGHTS, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 1–2 (1966) [hereinafter REG. OF COPYRIGHTS, 68TH ANNUAL REPORT].

which was nearing completion.[149] Rather the Copyright Office floated the bill as a further incremental step for soliciting feedback, exploring solutions, and bridging divides.

The 1964 Revision Bill[150] incorporated—and to some extent tightened—many of the recommendations set forth in the Preliminary Draft. Table 3 summarizes how the bill resolved the most significant remaining areas of controversy:

Table 3: 1964 Revision Bill: Significant Controversial Issues

Exclusive Rights	§ 5 (a) General scope of copyright: Subject to sections 6 through 13, the owner of copyright under this title has the exclusive rights to do or to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, to perform the copyrighted work publicly; (5) in the case of pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.
Fair Use	§ 6 Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

149. *See id.*

150. Identical versions were introduced during the second session of the 88th Congress on July 20, 1964: "S. 3008 (Mr. McClellan) and H.R. 11947 (Mr. Celler)." *1964 Revision Bill*, *supra* note 123, at 1.

Library Photocopying	Dropped authorization for single research copy under specified conditions
Mechanical Compulsory License	§ 11(a). "In the case of nondramatic musical works, the exclusive rights . . . to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section . . . ."; (c)(2) "With respect to each work embodied in the phonorecord, the royalty shall be either three cents, or one cent per minute of playing time or fraction thereof, whichever amount is larger . . ."
Jukebox	§ 12. The proprietor of an establishment in which a copyrighted nondramatic musical work is performed publicly by means of a coin-operated machine is not an infringer unless: (1) alone or jointly with others he owns the machine or has power to exercise primary control over it; or (2) he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it.
Public Communications of Broadcasts	§ 13. Notwithstanding the provisions of section 5, the following are not infringements of the exclusive right to perform or exhibit a copyrighted work: (1) communication of a broadcast embodying a performance or exhibition of the work to the private rooms of a public establishment by means of a system of loudspeakers or other devices, unless the person responsible for the communication or the operator of the establishment alters or adds to the content of the material included in the broadcast; (2) reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is coin-operated.
Work Made for Hire	§ 54. Definitions. A work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire.
Limitations on Transfer of	§ 16(a)(1) At any time after 35 years from the date of its execution, the transfer may be terminated by the author

Copyright Ownership	who executed it or, if he is dead, by his legal representatives, legatees, or heirs. The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer . . .
Preemption Unpublished Works	§ 19 (a) All common law or state statutory rights in the nature of copyright protection replaced by federal protection.
Other State Rights	(b) breaches of contract, breaches of trust, invasion of privacy, defamation, or deceptive trade practices including passing off and false representation retained
Duration	§ 20. Life of the author plus 50 years.
Manufacturing Clause	§ 43. Manufacture and importation of certain copies Largely adopted Alternative B from the Preliminary Draft with further narrowing

The 1964 Revision Bill established the structure and main contours of the exclusive rights that would appear in the 1976 Act. Regarding exceptions and limitations, it carried over the four-factor fair use framework of the Preliminary Draft and added a list of illustrative categories—"criticism, comment, news reporting, teaching, scholarship, or research"—in the preamble. It dropped the express library authorization to provide single copies of articles for research use, leaving that question entirely for the courts under the fair use doctrine. The 1964 Revision Bill opted for a mechanical compulsory license for nondramatic musical works with a statutorily set license rate.

On the highly conflictual issue of limitations on transfer of copyright ownership, the 1964 Revision Bill struck an innovative compromise. It established an inalienable right to terminate transfers of copyright ownership 35 years after assignment with an exemption for works made for hire. Relatedly, the bill expanded the definition of work made for hire to include commissioned works where the parties expressly agree in writing that it shall be considered a work made for hire. This expansion afforded motion picture studios, encyclopedia publishers, newspapers, and other entities that commission composite works certainty over continued exploitation of such works for the full duration of copyright protection.

The 1964 Revision Bill retreated from the 1909 Act's blanket jukebox exemption by largely shielding proprietors of establishments in which jukeboxes were located from liability, except where the proprietor owned the machine or had the power to exercise primary control over it, or failed—after receipt of a written request by registered or certified mail from a copyright owner—to

disclose the identity of the person who owned or controlled the jukebox.[151] This allocation of liability redirected enforcement away from tavern and restaurant owners and toward the entity exercising control over the jukebox itself, encouraging copyright owners to seek clearance earlier in the jukebox distribution chain while stopping short of prescribing any licensing mechanism or royalty structure.

Music publishers, composers, and performing-rights societies generally supported the 1964 Revision Bill's approach as an important step toward enabling copyright owners to participate in the commercial value generated by jukebox performances and viewed the disclosure-based regime as a constructive means of restoring compensation.[152] This liability-based approach without a predictable clearance mechanism, however, risked fragmented negotiations, selective enforcement, and increased pressure to litigate.[153] Predictably, jukebox operators sharply opposed the bill's approach.[154]

On the similarly divisive issue of domestic book manufacturing and importation restrictions, the 1964 Revision Bill largely adopted the approach set out in Preliminary Draft Section 43, Alternative B, confirming the decision to replace the 1909 Act's manufacturing clause as a condition of protection with an importation-based restriction. As in the Preliminary Draft, the 1964 Revision Bill prohibited the importation into the United States of foreign-manufactured copies of works consisting preponderantly of nondramatic literary material in the English language unless the relevant portions were manufactured domestically, and it retained the exemption for works in which the author of any substantial part was neither a United States citizen nor a United States domiciliary.[155] The principal changes between the Preliminary Draft and the 1964 Bill were refinements rather than expansions: the Bill regularized the provision by eliminating the explicit "Alternative" framing and broadened the import exemption from 1,500 to 3,500 copies where a work was first published abroad.[156]

The 1964 Revision Bill did not make any progress on the emerging CATV challenge. The Section 13 revision exempted "reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is

151. *See id.* § 12, at 8–9 (coin-operated machines).

152. *See 1964 Revision Bill*, *supra* note 123, at 71–73 (statement of Herman Finkelstein, Am. Soc'y of Composers, Authors & Publishers).

153. *See* COPYRIGHT LAW REVISION PART 3, *supra* note 90, at 100–03 (summarizing publisher testimony cautioning that repeal of the exemption without an administrable clearance mechanism could lead to uneven enforcement and increased litigation pressure).

154. *See 1964 Revision Bill*, *supra* note 123, at 68–71 (statement of Nicholas E. Allen, Music Operators of Am.).

155. *See 1964 Revision Bill*, *supra* note 123, § 43, at 24–25.

156. *See id.* § 43(b)(2), at 25.

coin-operated" and dropped any mention of "rebroadcasting" and "rediffusing." As Barbara Ringer later noted, "[t]he bill contained no explicit provision on CATV, although the drafters assumed that cable retransmissions were fully covered by the copyright owner's exclusive right to 'perform.'"[157]

The Copyright Office acknowledged that significant conflicts remained to be resolved, noting, in particular, "questions of Government publications; educational uses of copyrighted material, including educational broadcasting; the status of community antenna systems; the status of jukebox performances; the scope of 'works made for hire'; the provision allowing termination of transfers of copyright ownership; and manufacturing requirements."[158] In August 1964, the Copyright Office convened two day-long meetings with the expanded Panel of Consultants. With more than 150 people in attendance, witnesses proposed amendments and debated everything from the most controversial issues to technical wording choices.[159]

The meetings and written comments revealed that substantial progress had been made toward a balanced bill, but divisions remained.[160] As a prime example, on the contentious issue of limitations on assignments, the drafters crafted a two-part compromise: an inalienable termination of transfer right available 35 years after the transfer of copyright for works other than those made for hire in conjunction with an expanded work made for hire definition (including commissioned works where both parties agreed to such classification in writing).[161] This framework afforded motion picture studios, encyclopedia publishers, and other commissioning parties the ability to opt out of the termination of transfer provision with author consent. Irwin Karp, the lead author representative, reluctantly acknowledged that authors could live with the 35-year reversionary term but strongly objected to the expanded breadth of the work made for hire exception.[162]

Karp and book publishers were less sanguine about reaching consensus on fair use and library photocopying. In a particularly dramatic exchange, Charles F. Gosnell of the American Library Association testified that "I certainly assume that [the fair use provision] covers photocopying as it is practiced and advocated by the library people in their statement on the doctrine of fair use,"[163] to which the Authors League's Irwin Karp responded:

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157. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 119.

158. REG. OF COPYRIGHTS, 67TH ANNUAL REPORT, *supra* note 53, at 2.

159. *See Transcript of Meeting on 1964 Revision Bill* (meeting in New York, N.Y., Aug. 6, 1964), *in* COPYRIGHT LAW REVISION PART 5, *supra* note 123, at 33–36; *Transcript of Meeting on 1964 Revision Bill* (meeting in New York, N.Y., Aug. 7, 1964), *in* COPYRIGHT LAW REVISION PART 5, *supra* note 123, at 139–42.

160. *See* SUPPLEMENTARY REPORT, *supra* note 53, at xii.

161. *See id.* at 67–68, 71–76.

162. *See 1964 Revision Bill*, *supra* note 123, at 156 (testimony of Irwin Karp, Authors League of Am.).

163. *See id.* at 103.

> Just so that somebody doesn't go picking over the record of these proceedings ten years hence and find that Mr. Gosnell's statement went unchallenged, let me point out that his assumptions about the relationship of fair use to photocopying are entirely gratuitous and completely erroneous. Fair use doesn't cover photocopying, and I don't think that any court would hold that it did . . . . all of this discussion simply indicates that the doctrine of fair use is much better left to the courts . . . .[164]

E. 1965 Revision Bill and SUPPLEMENTARY REPORT

After the 1964 Revision Bill hearings, the Copyright Office refined the legislation with the goal of substantive legislative action in the 89th Congress. In conjunction with the 1965 Revision Bill, the Copyright Office issued the SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW; 1965 REVISION BILL.[165] This 163-page report presented the most detailed explanation of the meaning and intent behind the 1965 Revision Bill.

Register Kaminstein emphasized that the bill was written "without direct consultation with anyone outside the Government" with the aim of considering the full range of viewpoints.[166] As he further explained,

> [m]ost of the changes in the bill were made because the Copyright Office was persuaded that, on balance, the arguments for them were valid. Other changes represent carefully worked-out compromises in the public interest, between legitimate but opposing points of view; while they may not represent the ideal solution to a particular problem, I believe that these compromises are necessary, desirable, and worthy of support. I also hope I am correct in my conviction that all the changes reflect, not vacillation or indifference, but a painstaking, persistent, open-minded effort to achieve the best copyright statute we can get.[167]

The 1965 Revision Bill[168] largely tracked the 1964 Revision Bill with the substitution of the modern numbering system. Table 4 summarizes the alterations.

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164. *See id.*

165. *See* SUPPLEMENTARY REPORT, *supra* note 53.

166. *See* Abraham L. Kaminstein, *Preface*, *in id.* at ix, xii–xiii.

167. *Id.*

168. *See Appendix B: Comparative Table*, *in* SUPPLEMENTARY REPORT, *supra* note 53, at 167 [hereinafter *1965 Revision Bill*]. The 1965 Revision Bill went through various revisions. Table 4 reflects the Copyright Office's initial version.

Table 4: Initial 1965 Revision Bill: New and Significant Controversial Issues

Work Made for Hire	§ 101. Definitions "(1) a work prepared by an employee within the scope of his employment; or *(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work* shall be considered a work made for hire."
Supplementary Work	§ 101. Definitions a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work, such as forewords, introductions, prefaces, pictorial illustrations, maps, charts, tables, editorial notes, tests and answers, bibliographies, appendixes, and indexes.
U.S. Government Works	§ 105 Subject matter of copyright: United States Government works. (a) Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise. (b) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment.
Exclusive Rights	§ 106—nearly identical; expansion of exhibition right to include "*literary, musical, dramatic, and choreographic works, pantomimes,* and pictorial, graphic, or sculptural works"
Fair Use	§ 107. Limitations on exclusive rights: Fair use. Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.
Library Photocopying	Continued no authorization for providing single copy for research use under specified conditions, leaving that to fair use.
Public Communications of Broadcasts	§ 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions. Notwithstanding the provisions of section 106, the following are not infringements of copyright. . . . (5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original

	transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission; (6) the further transmitting of a transmission embodying a performance or exhibition of a work by relaying it to the private rooms of a hotel or other public establishment through a system of loudspeakers or other devices in such rooms, unless the person responsible for relaying the transmission or the operator of the establishment: (A) alters or adds to the content of the transmission; or (B) makes a separate charge to the occupants of the private rooms directly to see or hear the transmission; (7) communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless: (A) a direct charge is made to see or hear the transmissions; or (B) the transmission thus received is further transmitted to the public.
Ephemeral Recordings	§ 110. Limitations on exclusive rights: Ephemeral recordings. Notwithstanding the provisions of section 106, it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to make no more than one copy or phonorecord of the work solely for purposes of the organization's own lawful transmissions or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only.
Mechanical Compulsory License	§ 113. Substantively the same as 1964 Revision Bill § 11
Jukebox	§ 114. Same as 1964 Revision Bill § 12
Limitations on Transfers	§ 203. Substantively the same as 1964 Revision Bill § 16
Preemption Unpublished Works	§ 301 Same as 1964 Revision Bill § 9(a)
Other State Rights	Expanded 1964 Revision Bill § 19(b) to include breaches of contract and defamation

Duration	§ 302. Same as 1964 Revision Bill § 20
Manufacturing Clause	§ 601. Substantively the same as 1964 Revision Bill § 43 Expansion of "importation" prohibition to "importation or public distribution"

The 1965 Revision Bill implemented the limitation on transfers/work made for hire compromise, addressing authors' concerns with a broad exemption by limiting the commissioned works that would be eligible for work made for hire treatment to contributions to collective works, motion pictures, translations, and supplementary works. This secured an inalienable termination right for many authors and artists, effectively overruling the Supreme Court's *Fred Fisher Music* decision.[169]

The 1965 Revision Bill retained a statutory fair use provision but removed the explicit four-factor test from the statutory text, stating sparely that "the fair use of a copyrighted work is not an infringement."[170] The SUPPLEMENTARY REPORT explained that this change was pragmatic rather than substantive. The Office did not repudiate the factors; rather, it sought to preserve flexibility and avoid ossifying fair use at a moment when copying technologies were evolving rapidly. The REPORT emphasized that fair use should continue to develop through judicial application informed by legislative history, rather than through rigid statutory formulae.[171] At the same time, the SUPPLEMENTARY REPORT acknowledged growing unease among publishers—particularly scientific, technical, and medical publishers—about the increasing scale of photocopying in educational settings.[172]

The 1965 Revision Bill and the SUPPLEMENTARY REPORT substantively weighed in on the treatment of retransmission of broadcast signals via community antenna television. Recognizing valid arguments on both sides of the CATV issue—that CATV operators face difficult clearance issues but that retransmission of performances results in "profit which in fairness the copyright owner should share"[173]—the bill declined to exempt CATV systems from public performance liability.[174] It did, however, exempt those who installed or operated a nonprofit "translator," "booster," or similar equipment which merely amplified broadcast signals and retransmitted them to everyone in an area for free reception.[175]

169. *See* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).
170. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 28.
171. *See id.* at 27–28.
172. *See id.* at 35–37.
173. *Id.* at 42.
174. *See id.*
175. *See id.* at 42–43.

In a more modest adjustment, the 1965 Revision Bill excluded works of the U.S. government, defined as any "work prepared by an officer or employee of the United States Government within the scope of his official duties or employment."[176] Prior drafts had authorized copyright protection for federal government works designated by the Postal Office Department (e.g., postal stamps) and other exceptional cases.[177]

The introduction of the 1965 Revision Bill in Congress on February 4, 1965, the very outset of the 89th Congress, marked a new, "final" phase in the general revision process.[178] With so much accomplished, House Judiciary Subcommittee No. 3 on Courts, Civil Liberties, and the Administration of Justice, chaired by Representative Robert Kastenmeier, was motivated to move the bill to the House floor as soon as possible. Over the course of the 89th Congress, the Subcommittee worked intensively to hear from the public and iron out remaining tensions surrounding the 1965 Revision Bill. Beginning in late May and continuing through early September of 1965, the Subcommittee convened 22 hearings, heard from 163 witnesses, and received 150 written statements reflecting "the widest spectrum of public and private interests."[179]

Hopes for completion of the reform effort were running high by mid-1966,[180] although several impasses remained. In conjunction with the Copyright Office, the legislative staff deployed a variety of approaches in the second legislative session of the 89th Congress to push the general reform project over the finish line. The legislative staff ultimately cleared impasses relating to jukeboxes and the manufacturing importation prohibition and restored the fair use codification in conjunction with providing greater leeway for educational uses and library photocopying. Nonetheless, the reform project hit an impasse over CATV. At the outset of the 90th Congress, the House of Representatives passed the reform bill without the CATV provision—thereby exposing CATV systems to copyright infringement liability. This would lead to a standoff at the Senate Judiciary Committee.[181]

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176. *See 1965 Revision Bill*, *supra* note 168, § 105, at 182.

177. *See 1964 Revision Bill*, *supra* note 123, § 4(b)–(c), at 4.

178. REG. OF COPYRIGHTS, 68TH ANNUAL REPORT, *supra* note 148, at 1. "Final" is in quotation marks because it would take Congress more than a decade to pass the legislation.

179. *See id.* at 2–3 ("As the fiscal year closed, general copyright law revision in the United States seemed nearer than it had been for decades, but it was increasingly obvious that a great deal remained to be done in working out adjustments on several important and difficult substantive issues. Foremost among these are: the question of fair use and the reproduction of copyrighted works for educational and research purposes; the jukebox exemption; the liability of community antenna television systems for use of copyrighted materials; the royalty rate to be paid under the compulsory license for recording music; and the manufacturing requirement with respect to English-language books and periodicals.").

180. *See* REG. OF COPYRIGHTS, SIXTY-NINTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1966, at 1 (1967) (reporting "by far the greatest progress of [the reform effort's] 11-year history during fiscal 1966").

181. *See* REG. OF COPYRIGHTS, 70TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1967, at 2–3 (1968) [hereinafter REG. OF COPYRIGHTS, 70TH ANNUAL REPORT].

1. Jukebox Compulsory License

The jukebox issue represented one of the greatest obstacles to the general revision project,[182] with legislators publicly taking sides.[183] Hearings on the initial 1965 Revision Bill—which carried forward the 1964 liability-allocation framework for jukebox operators—revealed that the disclosure-and-control model posed substantial burdens and risks to the industry. Jukebox operators testified that if the jukebox exemption were removed, the bill's reliance on private ordering would expose them to high transaction costs and strategic uncertainty because clearance would require negotiating with multiple copyright owners and performing-rights societies under the threat of injunctions.[184] Music performance rights organizations, while continuing to support repeal of the exemption and the bill's focus on assigning responsibility to the party exercising control over the machine, acknowledged that liability without a standardized clearance mechanism risked disruption and litigation.[185] When pressed by legislators, Herman Finkelstein acknowledged that ASCAP could agree to a $20 to $30 per jukebox fee per year for the first five years.[186] Although jukebox operators pushed back against such an approach,[187] noting that other collectives would demand further levies, the hearing indicated that a balanced path toward resolution was in sight.[188] The hearings reframed the issue from whether jukebox performances should be compensable to whether the statute should supply an

182. *See Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. 111 (1975) [hereinafter *Hearing on H.R. 2223*] (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.) (characterizing the "jukebox problem" as the Copyright Office's "biggest headache in the early sixties"), *reprinted in* 14–16 OMNIBUS, *supra* note 9.

183. *See Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 25–27 (1966) [hereinafter *Hearings*] (statement of Rep. John V. Lindsay, Member, H. Comm. on the Judiciary) (favoring elimination of the jukebox exemption), *reprinted in* 5 OMNIBUS, *supra* note 9; *id.* at 537–39, 545 (statement of Rep. Byron G. Rogers, Member, H. Comm. on the Judiciary) (contending that elimination of the exemption would "place into the hands of [copyright owners] a club over the head of any operator of a jukebox," referring to the risk of statutory damages and injunctive relief, and create "a great deal of chaos" in efforts to license public performance rights); *id.* at 547–49 (statement of Rep. George P. Miller) (in accord with Rep. Rogers).

184. *See id.* at 551–658 (statements and testimony of Music Operators of Am.).

185. *See id.* at 180–81 (statement of Herman Finkelstein, Am. Soc'y of Composers, Authors & Publishers).

186. *See id.* at 182–83 (colloquy with Rep. Robert Kastenmeier); *id.* at 187–91 (colloquy with Reps. Herbert Tenzer & Richard Poff).

187. *See id.* at 553 (statement of Clinton S. Pierce, President, Music Operators of Am.) (stating that fees to ASCAP "$20 to $30 per machine for the first 5 years and $30 to $60 per year for the next 5 years," along with similar amounts to BMI and SESAC would "drive many of the small businessmen out of the line of operation of automatic phonographs"); *id.* at 570 (statement of William Cannon) (contending that "[t]he $20 to $30 performance fee . . . would be disastrous").

188. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 290 ("Even though the arguments at the hearings were presented dialectically in support of completely opposite conclusions, it was apparent that neither outright repeal nor unqualified retention of the jukebox exemption was the only possible solution to the problem.").

administrable, ex ante compulsory license rather than leave compensation to case-by-case bargaining in the shadow of crushing infringement liability.

The Subcommittee's pressure on the opposing sides produced "strenuous negotiations," resulting in a critical breakthrough.[189] The final version of H.R. 2512 adopted a flat $8 annual royalty per coin-operated machine, payable by the person who owned or exercised primary control over the jukebox.[190] This approach preserved the 1964 Revision Bill's focus on holding the party controlling the device responsible while replacing uncertain, transaction-intensive negotiations with an ex ante, low-transaction-cost rule.[191]

The $8 annual per-machine fee reflected administrative convenience and political pragmatism.[192] Music copyright owners accepted a modest, uniform fee in exchange for certainty, universal coverage, and elimination of the jukebox exemption, while jukebox operators obtained a manageable fee structure with minimal administrative burdens. Congress rejected per-song, per-play, and revenue-based proposals as administratively unworkable, concluding that a flat fee was the only mechanism capable of delivering compensation without imposing uncertain transaction costs, administrative burdens, and bargaining asymmetries.[193]

2. Manufacturing Clause/Importation Prohibition

The 1965 Revision Bill carried over the 1964 Revision Bill's jettisoning of the 1909 Act's manufacturing clause's conditioning of protection on domestic manufacturing in favor of a stand-alone importation prohibition. The Copyright Office expanded the enforcement trigger from "importation" to "importation into or public distribution in the United States,"[194] thereby ensuring that noncomplying copies could not evade the manufacturing requirement once they entered domestic channels. The drafters recognized that a border-only rule invited circumvention once copies were inside the country.

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189. *See id.* at 291.

190. *See* H.R. 2512, 90th Cong. § 116(b) (1967), *as reprinted in* 90th Cong., 1st Sess., H.R. REP. NO. 90-83, COPYRIGHT LAW REVISION, at 185–91 (1967) [hereinafter H.R. REP. NO. 90-83]; *see also Hearing on H.R. 2223*, *supra* note 182, at 111 (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.) (noting the "very difficult compromise").

191. *See* H.R. 2512 § 116(b) (explaining the decision to replace case-by-case bargaining with a flat statutory license), *as reprinted in* H.R. REP. NO. 90-83, *supra* note 190, at 75–84.

192. *See id.* at 82–84 (reviewing various potential benchmarks and jukebox industry data). In 1958, the Senate Judiciary Committee suggested that a $19.70 annual fee would be reasonable. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 291. A 1965 trade article, Aaron Sternfield, *Seeburg Bows Copyright Arsenal: Stockpile Is Ready Vs. ASCAP, BMI*, BILLBOARD, May 15, 1965, at 1, 8, *reprinted in Hearings*, *supra* note 183, at 199–201, referenced annual jukebox music licensing fees of $480 per machine in France and $300 per machine in England and Germany, *id.* at 200.

193. *See* H.R. REP. NO. 90-83, *supra* note 190, at 77–79 (explaining why Congress rejected negotiated and usage-based models in favor of a flat annual fee).

194. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 144–45.

The 1965 hearings revealed that the battle lines had not publicly shifted—a broad range of author and publisher organizations criticized the clause as anachronistic and protectionist[195] while printers, printing trade unions, and typographers opposed repeal[196]—"but beneath the surface a current of compromise was [] flowing."[197] The Copyright Office continued to recommend ultimate repeal but treated the 1965 text as a pragmatic narrowing step toward that end.[198] The House Judiciary Committee concurred that any copyright justification had vanished, but concluded that some "economic justification" arguably remained.[199] This was really about organized labor, protecting domestic industry, and political pragmatism.

3. Fair Use, Educational Uses, and Library Photocopying

By the mid-1960s, photocopying technology had become faster, less expensive, and ubiquitous within universities, research libraries, government agencies, and medical institutions. What had once been occasional, staff-mediated copying for preservation or individual research evolved into routine, systematic reproduction of journal articles and book chapters. Publishers framed this practice as institutional substitution for purchases and subscriptions.[200] A representative of textbook publishers testified that educational exemption from payment should not apply to instructional materials, since "exemption would destroy the only market these materials have."[201] A representative of scientific and technical publishers testified that widespread library copying threatened the economic viability of journals with small circulation bases and undermined incentives to invest in scholarly publishing.[202]

Educators, libraries, and scholars responded with equally detailed and impassioned testimony.[203] Teachers and scholars described actual practices—interlibrary loan, replacement of damaged copies, and copying for researcher requests—as paradigmatic fair uses and emphasized the impracticality of

195. *See* H.R. REP. NO. 90-83, *supra* note 190, at 132.

196. *See id.* at 133.

197. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 362.

198. *See Hearings*, *supra* note 183, at 36–37 (statement of George D. Cary, Deputy Reg. of Copyrights).

199. *See* H.R. REP. NO. 90-83, *supra* note 190, at 134.

200. *See Hearings*, *supra* note 183, at 133 (statement of Howard A. Meyerhoff, Dir. & President, Comm. to Investigate Copyright Probs. Affecting Commc'n in Sci. & Educ.) (describing the "copyright interest groups" surrounding scientific and education publishing and the increasing use of information storage and retrieval as well as reproduction technologies across scientific and educational institutions).

201. *See id.* at 70 (statement of Lee Deighton, Chairman of the Bd., Macmillan Co., on behalf of the Am. Textbook Publishers Inst.).

202. *See id.* at 1510–15 (statement of Lyle Lodwick, Dir. of Mktg., Williams & Wilkins Co.).

203. *See id.* at 323 (statement of Harold E. Wigren, on behalf of the Ad Hoc Comm. of Educ. Insts. & Orgs. on Copyright L. Revision) (emphasizing, "the single most important objection which the ad hoc committee has to [the 1965 Revision Bill] is the fact that no mention is made of . . . statutory limited copying privileges so urgently needed by teachers in the course of their day-to-day teaching").

transaction-by-transaction permissions.[204] Scholars and educators stressed the cumulative and collaborative nature of research and warned that restrictive rules would cripple scientific and academic progress.[205] They advocated retaining the 1909 Act's "not for profit" limitations on copyright protection through educational and research exemptions.[206]

The 1965–1967 hearings are notable for what they did not contain: no stakeholder defended unlimited copying.[207] The inquiry centered on where to draw administrable lines and who should draw them—courts, Congress, or administrative bodies.[208]

The 1967 House Judiciary Committee report noted that the "bare statement" approach to fair use and library photocopying "was supported by a wide range of interests on the ground that the doctrine should remain as flexible as possible, and that any attempt at definition could freeze the concept and open the door to massive, unreasonable abuses."[209] On the other side, "a number of witnesses representing various educational and scholarly organizations criticized the provision as vague and nebulous, and stressed the need of teachers and

204. *Id.* at 459–64 (statement of Charles F. Gosnell, Chairman, Comm. on Copyright Issues, Am. Libr. Ass'n) (defending library copying practices as essential to scholarship and research); *id.* at 464–70 (statement of Robert T. Jordan, Council on Libr. Res.) (lamenting the "failure to provide a specific and simple mechanism or exemption to promote creative and imaginative copying, whether it be by the individual in his home, the educator or student in the school, or the librarian or the library patron in the library" and urging exemption for single photocopies of articles); *id.* at 419–28 (statement of Prof. James I. Miller, Jr., Professor of Eng., Univ. of Chi. & Dr. Robert Shafer, Professor of Eng., Tchrs. Coll., Colum. Univ., on behalf of the Nat'l Council of Tchrs. of Eng.) (emphasizing teachers' need for flexibility in educational use of copyrighted materials); *id.* at 434–37 (statement of James I. Miller, Jr.) (discussing interlibrary loan practices and the chilling effects of vague legal doctrines).

205. *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Pats., Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 1048–49, 1052 (1967) [hereinafter *Hearings on S. 597*] (statement of Harry N. Rosenfield, Esq., representing Ad Hoc Comm. of Educ. Insts. & Orgs. on Copyright L. Revision) (characterizing educational fair use as "not an occasional or only casual right," but "a constant" and "continuing right"; warning that narrowing fair use would prevent creative and effective teaching; and proposing protection for copying undertaken for teaching, coursework, research, and archival purposes), *reprinted in* 9–10 OMNIBUS, *supra* note 9.

206. *See Hearings*, *supra* note 183, at 425–29 (statement of Prof. James I. Miller, Jr., Professor of Eng., Univ. of Chi. & Dr. Robert Shafer, Professor of Eng., Tchrs. Coll., Colum. Univ., on behalf of the Nat'l Council of Tchrs. of Eng.) (suggesting that "the reason there have been so few lawsuits against scholars for doing limited copying of copyrighted material is that the present law gives them two strong defensive positions: 1. The automatic educational exemption ('for profit'); and 2. 'Fair use'").

207. *See, e.g.*, *id.* at 428 (concluding that "[t]he National Council of Teachers of English does not wish to promote the unrestricted, free copying of the works of authors and producers of copyrighted material," but rather to find a middle ground that balances the interests of authors and teachers, consumers, and readers).

208. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 27 (observing that "[n]o issue arising under the general revision bill has been hashed over more thoroughly than the extent to which educators can reproduce and distribute copyrighted works outside of copyright control," not over whether any limits should exist).

209. *See* H.R. REP. NO. 90-83, *supra* note 190, at 30.

scholars to be certain whether what they were doing constituted fair use or infringement."[210]

With momentum building for the passage of a general copyright reform, the House Subcommittee pushed educators, librarians, and book publishers to restore the four-factor formulation of fair use to the bill and better address the needs of education and research in the statute. In her retelling of this inflection point, Barbara Ringer explained:

> In addition to seeking an expanded statement of the doctrine of fair use at the 1965 hearings, the representatives of educators and scholars urged adoption of an entirely new section specifically exempting certain non-profit educational uses from copyright liability. On June 2 and 8, 1966, two "summit meetings" on "fair use and educational and scholarly reproductions" were held in the Library of Congress under the chairmanship of Herbert Fuchs, then as now Counsel of the House Subcommittee. Every aspect of the problem was considered; although, as noted in the 1966 and 1967 reports, no final agreements were reached, there was evident progress toward compromise solutions, including the precise wording of section 107.[211]

At this point, the Copyright Office's inclination to leave educational copying largely to fair use doctrine was untenable.[212] These negotiations produced a critical breakthrough. The final markup of H.R. 2512 restored the four-factor articulation of the fair use doctrine in conjunction with four substantive changes limiting the exposure of educators, archival institutions, and researchers to copyright liability for nonprofit uses of copyrighted materials:[213]

- Section 107's preamble removed "to the extent reasonably necessary or incidental to a legitimate purpose".[214]
- The House Committee Report contained an "Intention of the

210. *Id.* at 30–31 (reporting that "a number of witnesses representing various educational and scholarly organizations" criticized the provision as "vague and nebulous" and sought clearer guidance on permissible uses).

211. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 33.

212. *See* H.R. REP. NO. 89-2237, at 65 (1966) (stating that a workable library copying compromise was "overdue," and urging "all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected").

213. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 34.

214. *See* 17 U.S.C. § 107 ("Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include— (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

committee"[215] setting forth fair use guidelines for educational photocopying to "'provide educators with the basis for establishing workable practices and policies' under the fair use doctrine, but without freezing application of the doctrine in the form of outright educational exemptions."[216]

- A brief new provision (§ 108) immunized nonprofit archival institutions from liability for "reproduc[ing], without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution."[217]
- "[R]ecognizing the need for greater certainty and protection for teachers,"[218] the Committee added a limitation on statutory damages for instructors in nonprofit educational institutions to "insulate a teacher who honestly and reasonably believes what he was doing constituted a fair use from excessive liability for minimum statutory damages."[219]

This was a pragmatic legislative peace treaty forged through legislative mediation and pressure. Libraries warmed to operational limits and recordkeeping obligations in exchange for certainty and protection from infringement liability. Publishers signaled acceptance of statutory authorization for copying that exceeded traditional fair use in exchange for boundaries designed to protect subscription markets. Authors largely acquiesced, recognizing both the benefits of access and the need to preserve viable publishing models.

The classroom guidelines[220] used legislative history to document areas of agreement among publishers, authors, and educators. The choice not to incorporate these guidelines into the statutory text was deliberate. Congress presented the guidelines as evidence of good-faith understanding rather than enforceable rules, signaling both the limits of consensus and the desire to avoid prematurely freezing doctrine. The guidelines thus functioned as political

215. *See* H.R. REP. NO. 90-83, *supra* note 190, at 32–33.

216. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 34–35 (quoting H.R. REP. NO. 90-83, *supra* note 190, at 33).

217. *See* H.R. 2512, 90th Cong. § 108, *as reprinted in* H.R. REP. NO. 90-83, *supra* note 190, at 167; H.R. REP. NO. 90-83, *supra* note 190, at 37–38.

218. *See* H.R. REP. NO. 90-83, *supra* note 190, at 31.

219. *See* H.R. 2512 § 504(c)(2) ("In a case where an instructor in a nonprofit educational institution, who infringed by reproducing a copyrighted work in copies or phonorecords for use in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part."), *as reprinted in* H.R. REP. NO. 90-83, *supra* note 190, at 229.

220. H.R. REP. NO. 94-1476, COPYRIGHT LAW REVISION, at 67–74 (1976) (§§ 107–108; Classroom Guidelines; monitoring requirement) [hereinafter 1976 HOUSE REPORT].

lubricant, reducing litigation risk without unduly constraining courts in the onward and somewhat unpredictable march of technological advance. Section 108 would serve as a starting point and placeholder for further discussion and evolution as the legislative process continued.[221]

4. Community Antenna Television

The mounting clash over CATV became the single greatest obstacle to the general copyright reform effort. CATV operators pressed for complete exemption from copyright liability, characterizing their systems as mere extensions of private reception,[222] while a broad coalition of copyright owners, broadcasters, and professional sports promoters urged full liability, arguing that CATV systems were commercial enterprises that retransmitted and monetized copyrighted programming without authorization.[223]

The problem was soon compounded by developments outside of the copyright arena. In a 1966 order, the Federal Communications Commission (FCC) asserted comprehensive jurisdiction over CATV, requiring CATV operators to obtain formal FCC approval for most new systems and importation of distant broadcast signals.[224] The resulting regulatory uncertainty effectively froze the industry's expansion, transforming CATV from a theoretical copyright problem into a policy morass.[225]

At the same time, copyright owners were actively pursuing infringement litigation against CATV operators,[226] increasing the stakes of congressional

221. *See infra* Sectiona IV.C.1, IV.C.5.

222. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 41–42 (describing CATV proponents' argument that community antenna systems merely "provide its subscribers with a service for improving their television reception"); H.R. REP. NO. 90-83, *supra* note 190, at 48–50 ("The 1965 bill conflicts with national television policy as reflected in the 'compulsory carriage' rules of the Federal Communications Commission and in pending legislation requiring CATV systems to carry the signals of local broadcasters. If that bill were enacted the operator would be forced to choose between violating the copyright law, violating the FCC's rules, paying the copyright owner whatever he asks, or going out of business."); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 118–20 (recounting CATV position that systems act more like viewers than broadcasters and emphasizing the "difficulty . . . of obtaining advance clearances" for retransmitted content).

223. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 41–42 (describing copyright owner and broadcaster position that CATV retransmission "is much more than a 'passive device' or service" and deprives copyright owners of control over their works); *see also* H.R. REP. NO. 90-83, *supra* note 190, at 50; SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 118–21 (describing the "full liability" position of authors, broadcasters, and sports leagues and identifying CATV as "one of the most hotly debated issues" and a principal obstacle to enactment of the revision bill).

224. *See* H.R. REP. NO. 90-83, *supra* note 190, at 51–52 (noting FCC rules compelling carriage of local signals and restricting CATV entry into major markets); *see also* United States v. Sw. Cable Co., 392 U.S. 157, 165–72 (1968) (upholding the FCC's authority to regulate CATV under the Communications Act).

225. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 121.

226. *See* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968); *see* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 122–23 (noting contemporaneous litigation and its interaction with legislative and regulatory developments).

inaction and underscoring the instability of leaving the issue unresolved. What had begun as a doctrinal debate over the scope of the public-performance right thus evolved into a complex interlocking dispute over copyright liability, communications regulation, and market structure.

This convergence of copyright and communications policy drew the House Judiciary Subcommittee into an uncomfortable jurisdictional conflict with the House Commerce Committee,[227] which exercised primary authority over the FCC and communications law. Any statutory solution to the CATV copyright controversy risked encroaching on the Commerce Committee's domain, necessitating inter-committee coordination and ultimately forcing the Judiciary Committee to confront whether the copyright revision bill could proceed at all without resolving—or deferring—the CATV question.[228]

Faced with this convergence of litigation pressure, regulatory uncertainty, and jurisdictional conflict, the House Subcommittee came to view CATV as a threat to the viability of the entire revision bill. Unlike other contested issues, CATV implicated an active regulatory regime administered by a different committee, and any attempt to settle copyright liability risked preempting or undermining developing FCC policy.

The House Judiciary Subcommittee explored a range of intermediate solutions, including variants of compulsory licensing tied to FCC carriage rules. In what became known as the "Kastenmeier proposal," the Subcommittee floated calibrating CATV system liability to impact on the copyright proprietor's market.[229] Section 111 reframed CATV liability in terms of market impact rather than whether "further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission."[230] Systems were divided into three categories: "(1) CATV operations that were wholly exempt; (2) those that were fully liable; and (3) those subject to liability only if given advance notice that a local station had an exclusive license to show the same program in the area."[231]

The proposal unleashed "full-scale verbal war" "between representatives favouring broadcasting and others supporting cable interests"; it also risked

227. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 121–22 (describing jurisdictional tensions between copyright revision and communications regulation, including disputes between Judiciary and Commerce Committees and FCC regulatory actions).

228. *See id.*

229. *See* REG. OF COPYRIGHTS, 70TH ANNUAL REPORT, *supra* note 181, at 1; *see also* Letter from Sen. John L. McClellan, Chairman, to Dean Burch, Chairman, Fed. Commc'ns Comm'n (Jan. 31, 1972) (stating that "the CATV question is the only significant obstacle to final action by the Congress on a copyright bill" and emphasizing the need for coordinated resolution), *in* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 137; *see also* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 122 (noting that FCC action and copyright reform became interdependent).

230. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 121.

231. *See id.* at 122 (describing the "carefully worked out compromise provision" and its tripartite structure); H.R. REP. NO. 90-83, *supra* note 190, at 52.

provoking objections from the House Commerce Committee or reopening broader debates over communications regulation.[232] As a result, leadership concluded that preserving momentum for comprehensive revision required removing the CATV provisions altogether.[233] The House of Representatives therefore struck Section 111 from H.R. 2512 pursuant to an agreement between the chairs of the Judiciary and Commerce Committees,[234] leaving CATV temporarily governed by existing copyright doctrine and FCC regulation.

* * * * *

H.R. 2512 also fine-tuned exemptions for certain performances and displays,[235] ephemeral recordings,[236] and instructional broadcasting,[237] provided clearer articulation of the mechanics of terminations of transfer,[238] and modestly expanded the importation exception.[239]

Although the House of Representatives passed the revised H.R. 2512 by a decisive vote of 379 to 29,[240] the failure to resolve the CATV impasse left the legislation adrift.[241] The House signaled strong support for a sweeping revision of copyright law—modernizing authors' rights, clarifying limitations and exceptions, and resolving numerous long-standing controversies—but in deferring CATV acknowledged that both copyright and communications policy required further development. The House's action thus preserved the core of the general revision while postponing resolution of the single issue most likely to derail the legislation.

IV.
PHASE II: TECHNOLOGICAL DISRUPTIONS AND LINGERING TENSIONS

The consequences of the CATV jurisdictional conflict were immediate. The Senate Judiciary Committee convened hearings focused solely on the CATV

232. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 122.

233. *See id.* at 118, 121–22.

234. *See id.* at 122 (explaining that "in a successful effort to save the rest of the legislation, the CATV section was deleted in its entirety").

235. *See* H.R. REP. NO. 90-83, *supra* note 190, at 40–48 (detailing § 110 exemptions, including revisions clarifying face-to-face teaching, nonprofit performances, and "mere reception" of broadcasts, and explaining their policy rationale).

236. *Id.* at 59–63 (discussing § 112 and recognizing for the first time a transmitting organization's right to make "ephemeral recordings" for its own transmissions under specified conditions and providing special treatment to such recordings made for instructional broadcasting).

237. *See id.* at 42–46 (explaining the compromises behind refinement to the § 110(2) governmental/nonprofit educational performance broadcasting exemption).

238. *See id.* at 90–95 (explaining § 203 and the Committee amendments).

239. *See id.* at 138–39 (explaining § 602(a) and Committee amendments).

240. *See* 113 CONG. REC. 8587 (1967) (recording House passage of H.R. 2512 by a vote of 379 to 29); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 122.

241. *See* REG. OF COPYRIGHTS, 70TH ANNUAL REPORT, *supra* note 181, at 1 (observing that the passage of a general copyright reform bill in the House was "an undeniable achievement, but the satisfaction one could take in a hard-won and not unqualified victory was tempered by the knowledge that some major problems remained unsolved").

issue, which only reinforced the impasse.[242] This "immensely difficult, economically important, and politically explosive question" was further complicated by the pending enforcement litigation against CATV operators and FCC regulatory processes.[243]

As the Senate struggled to gain traction on the CATV impasse, concerns about the use of copyrighted works in information storage and retrieval systems piled on to the logjam. The Copyright Office warned that the so-called "'computer problem' could well turn out to be the most important issue in the history of the copyright law" and that a legislative solution was "not at hand."[244] Meanwhile, advances in phonograph reproduction and home tape recording technology brought concerns about record piracy to the fore. Furthermore, other lingering tensions surrounding omnibus reform continued to fester.

Thus began a decade-long gauntlet addressing a series of technological disruptions and legacy conflicts. Efforts to address CATV, record piracy, educational photocopying, jukeboxes, domestic manufacturing/importation prohibitions, design protection, and computer software did not reopen the foundational premises of the Copyright Office's work, but they jeopardized the overall revision project.

It would take the Copyright Office and legislative committees another decade to bring general copyright reform to fruition. As this Section demonstrates, much of the 1976 Copyright Act tracks H.R. 2512 nearly verbatim. What distinguished this second phase of the legislative process from the first decade, therefore, was not reconsideration of the core reform edifice but rather the addition of adjacent structures and institutional triage. Congress responded through a set of techniques: industry-specific regimes, splinter legislation, monitored compromises, a sunset provision, and finally, deferral of emerging technological challenges to an expert commission. These responses preserved the statute's core design amidst uncertainty, jurisdictional conflict, judicial intervention, and plausible threats of stakeholder veto power.

Hopes of passage ebbed in the late 1960s and early 1970s.[245] Barbara Ringer's appointment as Register of Copyrights in 1973, itself a struggle of a

242. *See Copyright Law Revision—CATV: Hearings on S. 1006 Before the Subcomm. on Pats., Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 89th Cong. (1966), *reprinted in* 8 OMNIBUS, *supra* note 9.

243. REG. OF COPYRIGHTS, 70TH ANNUAL REPORT, *supra* note 181, at 1.

244. *See id.* at 3. The controversy over copyright protection for computer software as such did not ultimately turn out to be "the most important issue in the history of the copyright law." *Id.*; *see* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 68–98 (2003). However, it foreshadowed just such an issue: generative artificial intelligence, *see* MUSTAFA SULEYMAN, THE COMING WAVE: TECHNOLOGY, POWER, AND THE TWENTY-FIRST CENTURY'S GREATEST DILEMMA 6–14 (2023); REG. OF COPYRIGHTS, 70TH ANNUAL REPORT, *supra* note 181, at 3.

245. *See* REG. OF COPYRIGHTS, 72ND ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1969, at 2 (1970) (noting that the general revision program "was stalled throughout fiscal 1969"); REG. OF COPYRIGHTS, 73D ANNUAL REPORT OF THE REGISTER OF

different type,[246] injected unparalleled knowledge of the reform effort and her prodigious work ethic into the revision process. After several years of stasis, the reform effort got onto a fast track following the Supreme Court's 1974 decision in a second CATV copyright case.[247] Over the next three years, Committee Chairs, with ample assistance from the Copyright Office brought the Copyright Act of 1976 to fruition by addressing, and in some cases forestalling, the challenges posed by technological advances. The subsections that follow trace the Phase II evolution across the challenges that unfolded between 1967 and 1976.

A. Community Antenna Television

The resolution of the CATV controversy proceeded amidst sharp industrial division, jurisdictional conflict, unpredictable judicial disruptions, regulatory gyrations, intervention by the White House Office of Telecommunications Policy, strained inter-industry bargaining, and legislative redrafting.[248] In attempting to summarize the evolution in the 1975 SECOND SUPPLEMENTARY REPORT, Register Barbara Ringer observed that "it would take a combination of Homer and Gibbon to make sense of what has happened."[249]

1. The FCC Steps In

Following the FCC's assertion of jurisdiction over CATV, the Supreme Court issued two decisions in June 1968 that further complicated the general copyright reform project. The Court upheld the FCC's authority to regulate CATV systems in *United States v. Southwestern Cable Co.*[250] while ruling a

COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1970, at 1–2 (1971) (reporting that "once again, hope dissolved into disappointment during the second session of the 91st Congress as it became evident that there would be no resolution of the tangled issue of cable television (CATV)").

246. Register Ringer's appointment came about as a result of a historic discrimination lawsuit brought pursuant to Title VII of the Civil Rights Act of 1964. *See* Ringer v. Mumford, 355 F. Supp. 749 (D.D.C. 1973). Barbara Ringer alleged that the decision to appoint Deputy Register George Cary over her was based on sex discrimination—emphasizing her superior qualifications—and racial discrimination—attributable to her outspoken advocacy for racial equality and the rights of African American employees within the Copyright Office. *See id.*

247. *See* REG. OF COPYRIGHTS, 77TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1974, at 3–4 (1975) (observing that "shortly after the Supreme Court's decision in *Teleprompter v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Senate Judiciary Subcommittee resumed active consideration of the bill" and that "it is clear that the program for general revision of the copyright law has regained a substantial amount of legislative momentum and that, unless something new comes along to derail it, the chances for enactment before the end of 1976 are fairly good").

248. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 118.

249. *See id.* Homer, of course, refers to the ancient Greek poet responsible for the ILIAD (appropriately featuring Achilles) and the ODYSSEY, two epic poems about the perils of war and tragic journeys. Gibbon refers to Edward Gibbon, the eighteenth-century British historian best known for the six volumes of THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE published between 1776 and 1789.

250. United States v. Sw. Cable Co., 392 U.S. 157 (1968).

week later—the *Fortnightly* case—that retransmissions of television broadcasts did not "perform" the copyrighted programs and hence that the CATV operator in that case was not liable for copyright infringement under the 1909 Act.[251] The *Fortnightly* majority indicated that the Court was concerned with monopoly control in the broadcasting industry and exorbitant retroactive liability.[252]

Although the Court upheld the FCC's regulatory authority, the agency had been looking to copyright law to regulate the growth of cable systems without undermining local broadcasters.[253] It believed that forcing CATV operators to bargain for importation of distant signals would relieve the FCC of having to rule on questions of importation in individual cases. Following the Supreme Court's CATV decisions, the FCC effectively reimposed the CATV licensing freeze by requiring "retransmission consents" to carry distant signals, which "in the guise of administrative regulation of what it called 'unfair competition,' [had the effect of] . . . impos[ing] copyright liability where the Supreme Court had held it did not exist, and to create de facto copyright protection in a situation where Congress had so far declined to act."[254]

2. Aborted Cross-Industry Agreement

This state of affairs produced a frenzy of activity within the broadcasting and CATV industries, leading to a May 1969 cross-industry agreement calling for "copyright legislation combined with FCC action that would guarantee payment for all CATV transmissions, impose a compulsory licensing system for CATV carriage of local signals and of the nearest available distant signals needed to provide subscribers in a particular market with adequate service (three network stations and three independents), and provide exclusive copyright control in the largest 50 television markets in the United States under certain circumstances."[255] Although the agreement was ultimately scuttled by the broadcasting industry, the aborted effort sparked congressional interest in reviving general copyright revision.[256]

Over the next several years, Senator John L. McClellan's Subcommittee on Patents, Trademarks, and Copyrights considered a general revision bill providing "compulsory license for the nearest available distant signals needed to supply cable subscribers in the top 50 markets with three network, one educational, and three independent stations, and to supply subscribers in all other markets with three network, one educational, and two independent stations. The bill also provided for full exclusive rights, in the top 50 markets, to control or prevent the

251. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 390 (1968).

252. *See id.* at 399–401 (rejecting an interpretation that would expand copyright control over CATV in a manner better left for Congress); *id.* at 401–02 (reflecting hesitation about retroactive liability and judicial overreach, especially given Congress's ongoing consideration of CATV).

253. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 123–24.

254. *Id.* at 126.

255. *Id.* at 127.

256. *See id.* at 128.

carriage of distant signals where a local broadcaster had been granted an exclusive license to transmit a particular copyrighted program within that market and had notified the cable system of the license."[257] Broadcasters and copyright owners objected to the bill as favoring CATV operators.[258] The FCC also criticized the proposal and redoubled its efforts to address the issue, although without success.[259]

3. White House Intervention

In 1971, at the initiative of the White House Office of Telecommunications Policy, the broadcasting and CATV industries unenthusiastically reached a "consensus agreement" supporting both FCC regulatory rules and a copyright compulsory license.[260] This agreement led Senator McClellan to resume consideration of the general copyright revision and the FCC in 1972 to lift its freeze on distant-signal importation, albeit in a mind-boggling 500-page report and order.[261]

4. A New Section 111

Following the Supreme Court's 1974 decision in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[262] extending *Fortnightly* to the importation of distant signals and effectively exempting CATV retransmissions from copyright liability under the 1909 Act, the Senate Judiciary Subcommittee reported the copyright revision bill with a drastically amended version of the Section 111 compulsory license.[263] Under this bill, ordinary cable systems—excluding rooftop antennas and nonprofit "boosters" and "translators"—were subject to liability but were eligible for a compulsory license so long as they were authorized by an FCC license to carry a signal. Section 111 set the royalty fee on a sliding scale running from 0.5% of gross revenue for systems earning up to $40,000 to 2.5% of gross revenue for systems earning over $160,000. The legislation provided a procedure for the Copyright Office to use in distributing the fees. Furthermore, the bill established the Copyright Royalty Tribunal to settle disputes and readjust royalty rates periodically.

The CATV disruption demonstrated that emerging technologies, especially when combined with regulatory jurisdictional conflict, judicial intervention, and concentrated economic interests, could paralyze omnibus reform. Mediation

257. *Id.* at 128–29.
258. *See id.* at 129.
259. *See id.* at 130–31.
260. *See id.* at 131–38.
261. *See id.* at 138–39 (observing that FCC's 1972 Cable Television Report and Order was a "500-page document" whose details are "not easy to grasp, much less summarize").
262. 415 U.S. 394 (1974).
263. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 142–43.

among competing interest groups was essential to enable general revision to proceed.

The final version of Section 111 is the most detailed and lengthy provision of the 1976 Act, weighing in at over 4,000 words.[264] In conjunction with the Copyright Royalty Tribunal provisions (over 2,000 words),[265] these additions account for over 20% of the verbiage of the 1976 Act. This set of provisions divided the profits of cable television among CATV operators, broadcasters, and copyright owners consistent with core principles of the general revision project. Yet the provisions are a self-contained wing of the regime, exerting little effect on the Act's foundational provisions beyond enhancing the flexibility and adaptability of the copyright system. As soon as this impasse cleared, the legislation moved toward near-unanimous passage in Congress, although only after several other technological disruptions and legacy tensions were addressed.

B. Record Piracy

Unlike CATV, the problem of record piracy did not arrive unexpectedly during the general revision process. The unauthorized duplication of sound recordings was identified at the outset of the revision program as a growing concern requiring federal attention. Barbara Ringer's 1957 study, *The Unauthorized Duplication of Sound Recordings*, documented the prevalence of "dubbing," the ease of copying phonorecords, and the inadequacy of state-law remedies.[266] The study noted that competitors could avoid copyright infringement liability by paying the compulsory mechanical royalty on the underlying musical composition.

The REGISTER'S REPORT tentatively recommended that copyright protection extend the full panoply of rights to sound recordings.[267] The Copyright Office backed away from extending the public performance right to sound recordings in the revision bills in reaction to strong broadcaster opposition,[268] explaining that "when it comes to the question of whether a copyrighted sound recording should be given exclusive rights of public

264. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 111, 90 Stat. 2541, 2550–58.

265. *See* §§ 801–809, 90 Stat. at 2594–98; 1976 HOUSE REPORT, *supra* note 220, at 41–44.

266. *See* Barbara A. Ringer, *Study No. 26: The Unauthorized Duplication of Sound Recordings* (Feb. 1957), *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 26–28, at ix (Comm. Print 1961), *reprinted in* 2 OMNIBUS, *supra* note 9.

267. *See* REGISTER'S REPORT, *supra* note 10, at 17–18 (recommending that copyright protection extend to sound recordings, at least against unauthorized duplication, while recognizing unresolved questions concerning the scope of rights).

268. *Preliminary Draft*, *supra* note 103, § 1(a), at 1, §§ 10–11, at 7–13 (including "sound recordings" among copyrightable subject matter, but without a public performance right); SUPPLEMENTARY REPORT, *supra* note 53, at xx, 5, 49–51 (explaining that although sound recordings would be protected against duplication, the bill deliberately excludes a general public performance right in response to competing interests and policy concerns, notably broadcaster opposition).

performance, the issue becomes explosively controversial."[269] That was the state of play when H.R. 2512 passed the House of Representatives.[270]

With the general revision bill stalled by the CATV impasse, concerns over record piracy became urgent by the late 1960s. Advances in tape recording and home taping technology combined with a precipitous rise in record piracy prompted the record industry and recording artists to call upon state and federal authorities to address the problem.[271] The industry and state criminal prosecutors also began bringing state enforcement actions against tape duplicators, raising complex preemption questions.[272]

1. Splinter Legislation

Responding to these calls, in 1971 the Senate and the House intellectual property subcommittees pushed ahead with focused legislation amending the 1909 Act to protect sound recordings against unauthorized duplication. The Sound Recording Amendments Act of 1971 (SRAA) took decisive action against unauthorized duplication of phonorecords while deferring the public performance right issue to the general revision bill.[273]

2. Failed Effort to Provide a Sound Recording Public Performance Right

As the general revision advanced toward passage, the Senate moved to recognize a public performance right in sound recordings in conjunction with a broadcast compulsory license and exemptions for small broadcast stations.[274] Ultimately, Congress dropped the effort to add a public performance right and compulsory license in response to strong opposition from broadcasters and jukebox operators. As Register Ringer observed in the 1975 lead-up to final

269. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 51.

270. The SUPPLEMENTARY REPORT noted that the limitations on exclusive rights in sound recordings are not meant to imply any disparagement of sound recordings as creative works or any doubts as to their copyrightability. "At the same time, we cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry. We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired." *Id.* at 51–52.

271. *See* H.R. REP. NO. 92-487, at 2–4 (1971) (describing "widespread unauthorized reproduction" of sound recordings facilitated by tape technology and emphasizing the urgent need for federal protection to combat record piracy).

272. *See, e.g.*, Capitol Recs., Inc. v. Erickson, 82 Cal. Rptr. 798 (Ct. App. 1969) (affirming the trial court's preliminary injunction restraining Phoenix from reproducing Capitol's recordings). Numerous states had statutes prohibiting unauthorized duplication of sound recordings. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1024 (Supp. 1972); ARK. CODE ANN. § 41-4617 (Supp. 1973); CAL. PENAL CODE § 653h (West 1971); FLA. STAT. § 543.041 (Supp. 1973).

273. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. In *Goldstein v. California*, 412 U.S. 546 (1973), the Supreme Court ruled that California's criminal statute outlawing tape piracy was not preempted by passage of the SRAA.

274. *See* S. REP. NO. 94-92 (1975) (involving Senator McClellan's annual report of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights discussing S. 1361), *discussed in* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 219–21.

consideration of the general revision, "[t]he performance royalty provisions of section 114 were, from all appearances, the most controversial feature of the revision bill during the Senate debates in September 1974; it is unlikely that the bill would have passed the Senate by a margin of 70-1, if at all, had these provisions not been deleted."[275]

Thus, legislators yielded to interest group pressures in dropping the public performance right for sound recordings. In the Copyright Office's view, this omission was a grave injustice to performing artists, yet one that was necessary to achieve the greater good of passing omnibus reform.[276] The struggle to extend a public performance right to sound recordings continues to the present.[277]

C. Educational Uses, Library Photocopying, and Fair Use

As Register Ringer noted in the lead-up to passage of the 1976 Act, "[n]o issue arising under the general revision bill has been hashed over more thoroughly than the extent to which educators can reproduce and distribute copyrighted works outside of copyright control."[278] After the substantial breakthroughs preceding House passage of H.R. 2512, these issues continued to percolate until the end of the legislative process.

1. Expansion of Section 108

In 1968, the American Library Association (ALA) proposed that the copyright revision bill provide that "it would not be an infringement of copyright for an academic institution or library to 'reproduce a work or a portion thereof' provided this was not done for commercial advantage,"[279] which prompted book publishers to threaten to withdraw their support for the reform statute.[280] Although the initial 1969 Senate Bill declined to adopt the ALA's amendment, the Subcommittee reported out a detailed new Section 108 echoing and expanding upon the REGISTER'S REPORT proposal.

> [U]nder certain conditions it is not an infringement of copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work. The reproduction or distribution must not be for

275. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 221.

276. *See id.* at 237 ("[I]f this legislation [establishing a public performance right in sound recordings in conjunction with a compulsory license] were tied to the fate of the bill for general revision of the copyright law there is a danger that it could turn into a 'killer' provision that would again stall or defeat the omnibus legislation. This danger exists, and it would be very real if the potential compulsory licensees, notably the broadcasting and jukebox industries, exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities: the performance royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 copyright law.").

277. *See* American Music Fairness Act of 2025, H.R. 861, 119th Cong. (2025).

278. SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 27.

279. S. REP. NO. 91-519, at 8–9 (1969).

280. *See id.* at 9.

> any commercial advantage and the collections of the library or archives must be available to the public or to other persons doing research in a specialized field. The measure also specifies that the reproduction or distribution of an unpublished work must be for the purpose of preservation and security, or for deposit for research use in another library or archives. The bill further provides that the reproduction of a published work must be for the purposes of replacement of a copy that is damaged, deteriorating, lost, or stolen, and that the library or archives has determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States. The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.[281]

No further action on the legislation occurred during that legislative session as the CATV controversy smoldered.

2. Williams & Wilkins Co. v. United States*: The Trial Court Decision*

As with CATV and sound recordings, judicial intervention influenced the development of Sections 107 and 108. In *Williams & Wilkins Co. v. United States*, [282] the Court of Claims addressed wide-scale photocopying by government libraries supporting biomedical research. In introducing the controversy, Commissioner James Davis explained: "This suit is one of first impression; raises long-troublesome and much-discussed issues of library photocopying of copyrighted materials; and requires for resolution the 'judgment of Solomon' if not also the 'dexterity of Houdini.'"[283]

After laying out the extensive factual record, considering jurisprudence as well as the 1935 "Gentlemen's Agreement," Latman's Study No. 14 (fair use), Varmer's Study No. 15 (library photoduplication), and the legislative history of the general copyright revision project, and weighing the fair use factors, Commissioner Davis concluded that the extensive photocopying by the National Institutes of Health and the National Library of Medicine did not constitute fair use.[284] Commissioner Davis concluded his discussion of the fair use defense by observing that

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281. S. REP. NO. 91-1219, at 5–6 (1970).

282. *See* No. 73-68, 1972 WL 17712 (Ct. Cl. Feb. 16, 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973) (en banc), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam). Pursuant to 28 U.S.C. § 1498(b), copyright suits against the United States must be brought in "the Court of Federal Claims for the recovery of . . . reasonable and entire compensation as damages for such infringement."

283. *Williams & Wilkins Co.*, 1972 WL 17712, at *1 (footnote omitted). The case featured several of the figures involved in the general copyright revision. Alan Latman, author of the Fair Use Study, *see supra* note 64, represented the plaintiff. Irwin Karp, representing the Authors League of America, and Horace S. Manges, representing the Association of American Publishers, submitted amicus curiae briefs.

284. *Williams & Wilkins Co.*, 1972 WL 17712, at *9 ("Whatever may be the bounds of 'fair use' as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for 'fair use.' The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose

> [n]othing in the present statute, its legislative history or the case law suggests that Congress intended to exempt libraries or others from liability for wholesale copying of copyrighted works, whatever be the purpose or motivation for the copying. What defendant really appears to be arguing is that the copyright law should excuse libraries from liability for the kind of photocopying here in suit. That, of course, is a matter for Congress, not the courts, to consider for it involves questions of public policy aptly suited to the legislative process. In an analogous context in *Fortnightly Corp., supra*, Justice Fortas noted at 408:
>
> > The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.[285]

3. 1973 Senate Hearings

Following the *Williams & Wilkins* trial court ruling, the Senate held hearings on the much-expanded version of Section 108 and fair use more generally. Library groups, stunned by Commissioner Davis's ruling, fell into line behind the expanded Section 108.[286] They objected, however, to Section 108(d)'s requirement conditioning library copies upon a prior determination that an unused copy could not be obtained through normal trade sources,[287] a requirement that would interfere with interlibrary loan.[288] Publishers strongly objected to the expanded version of Section 108 as well as the ALA's proposed further expansion of the provision.[289] They further urged Congress to delegate

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as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market.").

285. *Id.* at *14–15.

286. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 37–40 (explaining that Commissioner Davis's ruling "caused considerable consternation and alarm within the educational community" and prompted library and educational organizations to press for clearer and broader statutory protections for photocopying).

287. *See Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Pats., Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 93d Cong. 89–90, 115 (1973) [hereinafter *Hearings on S. 1361*] (statements of Dr. Stephen A. McCarthy, Exec. Dir., Ass'n of Rsch. Librs. & Philip B. Brown, Couns.) (objecting to § 108(d)(1)'s requirement that libraries determine that a copy "cannot be obtained at a normal price from commonly-known trade sources"), *reprinted in* 12 OMNIBUS, *supra* note 9; COPYRIGHT OFF., REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. § 108) 30 (1983) [hereinafter LIBRARY REPRODUCTION OF COPYRIGHTED WORKS].

288. *See* LIBRARY REPRODUCTION OF COPYRIGHTED WORKS, *supra* note 287, at 45–46.

289. *See Hearings on S. 1361*, *supra* note 287, at 115 (statement of Robert W. Cairns, Exec. Dir., Am. Chem. Soc'y) ("[P]hotocopying should not be allowed under any circumstances unless an adequate means of control and payment is simultaneously developed to compensate publishers for their basic editorial and composition costs. Otherwise, 'fair use' or library-photocopying loopholes . . . will ultimately destroy the viability of scientific and technical publications . . . ."); *id.* at 142–47 (statement

analysis of these questions to the National Commission on New Technological Uses of Copyrighted Works (CONTU), which Congress was considering establishing to study a range of related technological issues.[290]

4. Williams & Wilkins Co. v. United States*: Appellate Decision*

While the Senate Judiciary Subcommittee was considering these positions, the full U.S. Court of Claims, in a 4-3 decision, reversed Commissioner Davis's decision.[291] Writing for the majority, Judge Oscar Davis held that the National Library of Medicine's journal copying constituted fair use under the four-factor test, and that the "record . . . fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful."[292] The opinion stressed, however, that its ruling should be read narrowly, and urged Congress to take action as soon as possible.[293] The case was immediately appealed to the Supreme Court, which granted review.[294]

5. Section 108 Refinement

As the *Williams & Wilkins* litigation continued to play out, the Senate Subcommittee reported the bill to the full Judiciary Committee with a modification of the ALA amendment[295] as well as with a further amendment added favoring publishers and authors: "The rights of reproduction and distribution under this section . . . do not extend to cases where the library or archives, or its employee: . . . (2) engages in the *systematic* reproduction or distribution of single or multiple copies or phonorecords of material described in

of W. Bradford Wiley, Chairman of the Copyright Comm., appearing on behalf of Am. Ass'n of Publishers, Inc.) (opposing American Library Association's amendment and offering to establish fair use guides and clearance procedures).

290. *See id.* at 128–31 (statement of Ambassador Kenneth B. Keating, Harcourt Brace Jovanovich, Inc., & Macmillan, Inc.).

291. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1347 (Ct. Cl. 1973) (en banc), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

292. *Id.* at 1352–53, 1362 (holding that the National Library of Medicine's photocopying practices constituted fair use under the circumstances).

293. *See id.* at 1362–63.

294. Williams & Wilkins Co. v. United States, 417 U.S. 907 (1974) (mem.).

295. *See* S. 1361, 93d Cong. (1974) (distinguishing between copies for users of *portions* of works for which no investigation to see if a copy could be obtained from trade sources was required and *entire* works, for which photocopying was permitted only if the work was not available at a fair price, § 108(e)); LIBRARY REPRODUCTION OF COPYRIGHTED WORKS, *supra* note 287, at 46–47 (explaining that the Subcommittee "accepted the essence of the librarians' proposal" while modifying it to distinguish between copying portions of works and entire works).

subsection (d)."[296] Library groups strongly objected to this provision, which they perceived as undermining interlibrary loan flexibility.[297]

The full Senate Judiciary Committee reported the revision in July 1974,[298] and the revision passed in September.[299] In February 1975, the Supreme Court split 4–4 on the *Williams & Wilkins* appeal,[300] thereby affirming the Court of Claims decision but rendering the Supreme Court decision nonprecedential. At the urging of library groups, the House Judiciary Committee added a proviso that "nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."[301]

One of the final additions to Section 108 was subsection (i), which mandated that the Copyright Office produce reports every five years after the effective date of the Act:

> [T]he Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.[302]

6. Section 107 Refinement

After House passage of H.R. 2512 (1967), fair use remained a focal point of negotiation because a bare statutory acknowledgment of the doctrine proved inadequate amid escalating classroom photocopying and the prospect of machine-enabled reproduction. As with CATV, Congress confronted an issue that resisted categorical resolution: author-publisher groups warned that

296. S. REP. NO. 93-983, at 122–23 (1974) (emphasis added) (introducing subsection 108(g)(2)); *see also* LIBRARY REPRODUCTION OF COPYRIGHTED WORKS, *supra* note 287, at 48 (describing the addition of subsection 108(g)(2) and its role in limiting the single-copy privilege).

297. *See* LIBRARY REPRODUCTION OF COPYRIGHTED WORKS, *supra* note 287, at 49–50. The Copyright Office and the National Commission on Libraries and Information Science convened a series of meetings in an effort to find common ground on the meaning of "systematic," but to no avail. *See id.* at 35–36 (describing the 1974 Conference on the Resolution of Copyright Issues and noting that the participants "agreed to disagree" and failed to reach a definition of "systematic" copying).

298. *See* S. REP. NO. 93-983, at 3–5.

299. *See* 120 CONG. REC. D406 (daily ed. June 11, 1974).

300. Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975) (per curiam).

301. 1976 HOUSE REPORT, *supra* note 220, at 78. The House Report noted that the proviso would require guidelines, which CONTU was developing. *See id.*; H.R. REP. NO. 94-1733, at 71–74 (Conf. Rep. 1976) (containing CONTU guidelines), *reprinted in* 17 OMNIBUS, *supra* note 9.

302. 1976 HOUSE REPORT, *supra* note 220, § 108(i), at 7.

enumerating educational purposes could be misconstrued as an across-the-board privilege, while educators and librarians pressed for clearer statutory guidance to reduce uncertainty and clearance costs.[303] The drafting record reflects a familiar oscillation between detailed codification and minimalist recognition before Congress settled on a calibrated middle course.[304]

By 1967, Congress restored a multi-factor formulation while expressly disavowing any intent to freeze the doctrine.[305] Echoing the approach taken elsewhere in the Act, the final House Report stressed that the "endless variety of situations" precluded "exact rules," and that Section 107 was intended to restate—rather than change, narrow, or enlarge—the judicial doctrine, especially "during a period of rapid technological change."[306]

Within that framework, Congress added two targeted textual refinements during Phase II designed to stabilize educational practice without creating categorical exemptions. First, the Section 107 preamble was expanded to clarify that "teaching" includes "multiple copies for classroom use."[307] As the Copyright Office explained, the House added this phrase to acknowledge that, under appropriate circumstances, fair use can encompass classroom multiple-copying—while preserving the requirement that fairness be assessed under the statutory factors rather than by rule. The Conference adopted the House language.[308] This addition functioned as a signal, not a safe harbor. It situated classroom copying within the universe of potentially fair uses—consistent with the Register's earlier illustrative examples—while rejecting the proposition that "teaching" operates as an independent exemption.[309]

Second, Congress refined Section 107(1) to require consideration of "whether such use is of a commercial nature or is for nonprofit educational purposes."[310] The House Committee explained that the amendment was "not intended to be interpreted as any sort of not-for-profit limitation on educational uses," but rather to confirm that commercial or nonprofit character—while not conclusive—"can and should be weighed along with other factors."[311]

Read together, these refinements reflect the same institutional logic evident in the CATV provisions. Congress acknowledged the centrality of education to fair use disputes but resisted categorical solutions. Classroom copying and nonprofit purpose were made relevant but not dispositive, ensuring that amount,

303. *See* H.R. REP. NO. 90-83, *supra* note 190, at 31.

304. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 31–45.

305. *See* H.R. REP. NO. 90-83, *supra* note 190, at 29–35.

306. 1976 HOUSE REPORT, *supra* note 220, at 66.

307. *Id.* at 65–66 (confirming that the classroom-copying language was intended as illustrative and subject to the fair use factors).

308. *See id.*; H.R. REP. NO. 94-1733, at 71–74 (Conf. Rep. 1976) (adopting the House formulation of § 107).

309. *See* 1976 HOUSE REPORT, *supra* note 220, at 66–67 (citing H.R. REP. NO. 90-83, *supra* note 190).

310. *Id.* § 107(1), at 5.

311. *Id.* at 66.

substitutability, and market effect—concerns sharpened by the photocopying controversy—remained integral to the analysis.[312]

These refinements to Section 107 cannot be understood in isolation. They were crafted in the shadow of *Williams & Wilkins* and in tandem with the contemporaneous narrowing and elaboration of Section 108. The Court of Claims' split outcome—and the Supreme Court's affirmance by an equally divided Court—underscored the risks of leaving large-scale educational photocopying to open-ended judicial discretion. Congress responded by pairing a reaffirmed, factor-based fair use standard with a specific library safe harbor, bounded by an express prohibition on "systematic" copying and a savings clause for non-substitutive interlibrary arrangements.[313]

Within that architecture, the Classroom Copying Guidelines appended to the House Report functioned not as law, but as an illustrative détente—a practical gloss intended to guide educational practice during the transition while preserving the primacy of Section 107's factors and Section 108's statutory limits.[314] In this way, Congress stabilized the photocopying conflict without converting either Section 107 or Section 108 into a general educational exemption, and it explicitly reserved the most difficult questions of machine reproduction and systematic copying for further study through CONTU.[315]

* * * * *

The restoration of a more fully codified fair use provision in H.R. 2512 followed by the explication of the Section 108 safe harbor for libraries and other archival institutions more clearly insulated educators, researchers, and libraries from liability while acknowledging that deeper technological questions lay ahead. The decade-long struggle over an unrestricted single-copy library privilege was ultimately resolved by adding a prohibition on systematic copying. The pressure to resolve the photocopying issue was also eased by the formation of CONTU.[316] Part of its charge was to study and make recommendations regarding machine reproduction of copyrighted works. Furthermore, this array of provisions and approaches provided institutional mechanisms and guidance for addressing later controversies over mass digitization.[317]

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312. *Id.* at 66–67.

313. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam); 1976 HOUSE REPORT, *supra* note 220, at 74–79.

314. 1976 HOUSE REPORT, *supra* note 220, at 68–70.

315. Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873; 1976 HOUSE REPORT, *supra* note 220, at 47–48.

316. *See infra* Section IV.H.

317. *See* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97–101 (2d Cir. 2014) (holding that large-scale library digitization for search and accessibility purposes constitutes fair use and emphasizing the role of research-oriented institutional uses); Authors Guild v. Google, Inc., 804 F.3d 202, 207–08, 217–18, 225 (2d Cir. 2015) (upholding mass digitization of books for search and snippet display as a "transformative" fair use and noting that such uses do not substitute for the market for the original works).

D. Jukeboxes

The 1976 Act carried forward the revised H.R. 2512's replacement of the 1909 Act's "jukebox exemption" with an operator-focused compulsory license conditioned on (i) filing/recordation, (ii) certificate issuance and public affixation, and (iii) payment of an $8 annual royalty per machine. The House Judiciary Committee came to view this mediated compromise as the only realistic solution after decades of conflict over the 1909 exemption.[318]

The principal changes between H.R. 2512 and the 1976 Act were not conceptual but administrative and institutional—most notably, aligning Section 116 with the Copyright Office's expanding administrative role and the royalty-rate/distribution machinery contemplated elsewhere in the general revision.[319]

1. Administrative Distribution Model

The 1976 Act replaced H.R. 2512's cumbersome judicial interpleader model—whereby the Register would file an interpleader action in the U.S. District Court for the District of Columbia to distribute deposited fees under court supervision[320]—with a streamlined administrative distribution plan: fees were deposited in the Treasury, invested, and distributed through a process centered on claims, controversies, and (where necessary) adjudication.[321] This change reflects Congress's broader effort to create an administrable system for multiple compulsory licenses (cable retransmission, mechanicals, jukeboxes, and public broadcasting[322]) rather than requiring annual court proceedings.

2. Allocation Framework

The 1976 Act added an access and sampling framework aimed at determining relative contributions of musical works to jukebox earnings—paired with an enforcement mechanism permitting suit in the D.C. district court to cancel a compulsory license where access was denied.[323]

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318. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 294; 1976 HOUSE REPORT, *supra* note 220, at 113 (explaining that the annual $8 per machine compulsory fee was a historical compromise and that the Committee was "impressed by the testimony" regarding the economic pressures on jukebox operators).

319. *Compare* H.R. 2512, 90th Cong. § 116(b)(1) (1967), *with* Copyright Act of 1976, Pub. L. No. 94-553, § 116(b)(1), 90 Stat. 2541, 2563 (reflecting continuity of the $8 annual fee and the general application, certificate, and affixation requirements with administrative refinements).

320. *See* H.R. 2512 § 116(c).

321. *See* § 116(c), 90 Stat. at 2563–64.

322. Section 118 did not establish a classic compulsory license for public broadcasting. Instead, it created a negotiation-first regime for the public performance of nondramatic musical works by noncommercial educational broadcast stations, backed by a rate-setting mechanism administered by the Copyright Royalty Tribunal if voluntary agreements failed. *See infra* Section IV.F.

323. *See* § 116(c)(5), 90 Stat. at 2564.

3. Rate Adjustment

Over the objection of jukebox operators,[324] the 1976 Act authorized the Copyright Royalty Tribunal to adjust the jukebox royalty.[325] Section 804(a) provided for an initial rate-adjustment proceeding commencing in 1980, with subsequent jukebox rate-adjustment petitions permitted in 1990 and at ten-year intervals thereafter..[326]

E. Manufacturing Clause/Importation Prohibition

The 1976 Act carried forward the H.R. 2512 framework with two important refinements that completed the long retreat from the 1909 manufacturing regime. First, Section 601 was expressly framed as a transitional provision with a sunset.[327] The remaining importation prohibition was scheduled to expire on July 1, 1982, subject to the possibility of congressional extension, indicating that Congress no longer viewed manufacturing requirements as a permanent feature of U.S. copyright law.[328] Second, the final Act further narrowed the operative scope of the prohibition by eliminating "public distribution" as an independent trigger,[329] restoring the rule to an importation-only constraint and thereby retreating from the broader domestic-market backstop that had appeared in the 1965 Revision Bill. Together with the already narrow limitation to works consisting preponderantly of nondramatic literary material in the English language,[330] these changes confirmed that Section 601 functioned as a carefully hedged, time-limited restriction on importation.

F. Public Broadcasting

The Copyright Office's shift away from the 1909 Act's "for profit" limitation on public performance[331] narrowed the practical immunity that educational and other nonprofit broadcasters had long enjoyed for performances

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324. *See Hearing on H.R. 2223*, *supra* note 182, at 1888 (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.) (confirming jukebox industry opposition); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 294.

325. *See* § 801(b)(1), 90 Stat. at 2594–95.

326. *See* § 804(a)(2)(C), 90 Stat. at 2597.

327. *See* § 601(a), 90 Stat. at 2588.

328. *See* 1976 HOUSE REPORT, *supra* note 220, at 166 (explaining that the clause was retained only temporarily and would terminate absent further legislative action).

329. *See id.* at 165–66 (describing the narrowed scope of the retained provision). *Compare* SUPPLEMENTARY REPORT, *supra* note 53, at 141–43 (describing broader restrictions, including distribution-based limitations tied to manufacturing requirements), *with* 1976 HOUSE REPORT, *supra* note 220, § 601(a), at 37 (limiting the provision to importation of copies manufactured abroad, without an independent "public distribution" trigger).

330. *See* § 601(a), 90 Stat. at 2588 (limiting the manufacturing clause to copies of works "consisting preponderantly of nondramatic literary material in the English language").

331. *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075–76 (granting to the copyright proprietor of a musical composition the exclusive right "[t]o perform the copyrighted work publicly for profit").

of nondramatic literary and musical works.[332] The 1961 REGISTER'S REPORT identified the "for profit" limitation as a central issue in revising the public performance right and considered the alternative of replacing it with specific statutory exemptions, but ultimately recommended retaining the limitation for nondramatic literary and musical works.[333] The Office expressly shifted away from that position in 1965.[334] The 1965 Revision Bill drew a line between educational broadcasting "as an adjunct to the actual classwork of educational institutions" and broadcasts by educational stations "intended for the enlightenment, edification, or instruction of the public at large."[335] The former category was addressed through a limited instructional-transmission exemption;[336] the latter was left outside any general exemption because educational broadcasting, as a medium of entertainment, recreation, and public information, could be "indistinguishable from a good deal of commercial programming."[337]

The Public Broadcasting Act of 1967[338] gave institutional support to the development of public broadcasting, bringing copyright law's market-based system for promoting creativity into tension with public broadcasting's statutory mission to provide wide access to noncommercial, instructional, educational, and

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332. Under the 1909 Act, such broadcasts were generally understood not to infringe when no "copy" or "record" was made and no commercial element was involved. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 34 ("Under the present [1909 Act] law, as long as no 'copy' or 'record' is made, a performance of a nondramatic literary or musical work in a broadcast to the public by an educational or other nonprofit radio or television station is not an infringement of copyright where, as is usually assumed to be true of such stations, no commercial element is involved in its broadcasts.").

333. *See* REGISTER'S REPORT, *supra* note 10, at 27–28 (observing that "[m]ost foreign laws do not contain an express 'for profit' limitation" but instead specify particular exempt situations, yet concluding that the "for profit" limitation, as applied by the courts, "strike[s] a sound balance between the interests of copyright owners and those of the public" and recommending that, "[f]or nondramatic literary and musical works, the right of public performance should continue to be limited to such performances 'for profit'").

334. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 21 (explaining that the 1965 Bill "departs from [the REGISTER'S REPORT 'for profit' limitation] recommendation and imposes no blanket 'for profit' limitation on the right of public performance" because nonprofit performances, "particularly nonprofit broadcasts reaching huge audiences," had made the present blanket exemption "too broad" and "involve serious dangers to the author's rights").

335. *Id.* at 35; *see also id.* at xviii, 21, 34–35 (explaining that "[i]nstead of the blanket 'for profit' limitation" imposed by present law, the 1965 bill would state public-performance rights broadly and spell out "specific limitations," including "specific exemptions for educational and other nonprofit uses").

336. The 1965 Revision Bill exempted the "performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission," where the transmission was "made primarily for reception in classrooms or similar places normally devoted to instruction" and was "a regular part of the systematic instructional activities of a nonprofit educational institution." *See 1965 Revision Bill*, *supra* note 168, § 109(2), at 196.

337. *See* SUPPLEMENTARY REPORT, *supra* note 53, at 35, 40.

338. Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; *see* BRIAN E. HUMPHREYS, CONG. RSCH. SERV., R48545, PUBLIC BROADCASTING: BACKGROUND INFORMATION AND ISSUES FOR CONGRESS 3–4 (2025) (describing the Act's creation of the Corporation for Public Broadcasting to support public television and radio).

cultural programming.[339] Public broadcasters argued that Congress had shown special concern for the "financial and administrative burdens of noncommercial broadcasting," that public broadcasting was financed by "public support and donations," and that copyright revision would otherwise confront them with "a multitude of administratively cumbersome and very costly rights 'clearance' problems."[340] Copyright owners responded that public broadcasting had "grown and changed significantly," that it now competed with commercial broadcasting as a national medium, and that existing performing-rights arrangements already supplied workable clearance mechanisms for music.[341] Authors and publishers of literary works objected especially that compulsory licensing would deprive authors of control over the integrity and reputation of their works in a major communications medium.[342]

Senator Charles McC. Mathias Jr. became the principal congressional sponsor of a public-broadcasting compulsory license. Toward the end of the 93rd Congress in August 1974, he introduced an amendment to S. 1361 with the understanding that the issue would be studied further in the 94th Congress.[343] In that session, the Senate Subcommittee initially pursued a bargaining strategy rather than immediate compulsion. The Subcommittee Chair asked public broadcasting representatives and copyright proprietors to explore agreements outside the copyright statute that would assure public broadcasting access to copyrighted materials upon payment of reasonable royalties. [344] Because "[c]onsiderable progress was made," the Subcommittee did not initially include a public broadcasting compulsory license in S. 22, and its members issued a joint statement noting "tentative understandings" and urging continued negotiations.[345]

Those negotiations did not fully resolve the problem. When the Senate Judiciary Committee met on October 7, 1975, unresolved issues included royalty levels and arbitration procedures, the absence of central clearance bodies for some categories of works, and the need for antitrust immunity to implement a private agreement.[346] The Committee therefore incorporated a Mathias-style public broadcasting amendment, while still "strongly urg[ing]" continued

339. *See* HUMPHREYS, *supra* note 338, at 3 (framing "public broadcasting as a cultural alternative to the 'vast wasteland' of commercial television, enriching civic discourse, public education, and community life"); *see also* Newton N. Minow, Chairman, Fed. Commc'ns Comm'n, *Television and the Public Interest*, AM. RHETORIC: ONLINE SPEECH BANK (May 9, 1961), https://www.americanrhetoric.com/speeches/newtonminow.htm [https://perma.cc/CY8P-E8MX] (coining the "vast wasteland" characterization of American television broadcasting).

340. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 163–64.

341. *See id.* at 164–66.

342. *See id.* at 166–67.

343. *See* S. REP. NO. 94-473, at 100 (1975), *reprinted in* 13 OMNIBUS, *supra* note 9.

344. *See id.*

345. *See id.*; SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 162–63.

346. *See* S. REP. NO. 94-473, *supra* note 343, at 100.

negotiations and noting that the provision could be modified to reflect private agreements reached before enactment.[347]

The Copyright Office accepted the need to confront public broadcasting but remained wary of compulsory licensing. The SECOND SUPPLEMENTARY REPORT "regretted and deplored" the failure of voluntary negotiations, emphasizing that "[c]ompulsory licensing has been, and should be, regarded as an extreme last resort in copyright law."[348] Nonetheless, the Office viewed music as the strongest case for a statutory mechanism, noting that music clearance was public broadcasting's "foremost problem" and that a compulsory license limited to nondramatic musical compositions might be workable because of the organized structure of the music licensing field.[349] By contrast, it considered the "dangers of an unqualified compulsory license for literary works so great" and the practical need so unproven that it could not support such a provision.[350]

While recognizing Congress's public interest in supporting noncommercial broadcasting and acknowledging that public broadcasting faced special problems, including repeated program use and limited resources,[351] the House "did not feel that the broad compulsory license provided in the Senate bill [was] necessary," and it rejected the Senate's more centralized royalty-deposit and distribution system in favor of direct payments between parties where possible.[352] Accordingly, the House revised Section 118 to encourage voluntary private agreements and confine the administrative fallback to reasonable terms and rates for certain uses of published nondramatic musical works and published pictorial, graphic, and sculptural works.[353] The House noted that voluntary agreements could be negotiated "at any time" and would supersede the statutory terms as between the parties.[354]

The enacted Section 118 thus reflected a pragmatic reconciliation of competing positions: neither categorical nonprofit immunity nor unqualified compulsory access. It adopted a negotiation-first structure, backed by administrative rate-setting only when private ordering failed. The House Report explained that copyright owners were not to be required to subsidize public broadcasting: the rate-setting body was to assure "a fair return to copyright owners without unfairly burdening public broadcasters."[355] The result was a bounded statutory intervention designed to reduce clearance burdens while preserving author control, voluntary licensing, and market development.

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347. *See id.*
348. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 176.
349. *See id.* at 176–77.
350. *See id.* at 177.
351. *See* 1976 HOUSE REPORT, *supra* note 220, at 117.
352. *See id.*
353. *See id.* at 117–18.
354. *See id.* at 118.
355. *See id.*

Alongside Section 118, Congress provided several narrower exemptions and limitations. Section 110(2) created a limited instructional-transmission exemption for performances of nondramatic literary or musical works and displays of works when the transmission satisfied specified instructional conditions.[356] Section 110(8) exempted certain transmissions of nondramatic literary works specifically designed for and primarily directed to blind, deaf, or other handicapped audiences, including transmissions through noncommercial educational broadcast stations.[357] Section 111(a)(2) exempted secondary transmissions made solely for those instructional purposes.[358] Section 112(b) granted special ephemeral-recording privileges to governmental bodies and nonprofit organizations entitled to transmit under Section 110(2) or the sound-recording limitation in Section 114(a), subject to strict limits on copying, use, and retention.[359] Section 114(b) further limited sound-recording rights for recordings included in educational television and radio programs distributed or transmitted by or through public broadcasting entities, provided that copies or phonorecords of those programs were not commercially distributed to the general public.[360]

Thus, through Section 118 and these narrower exemptions, the 1976 Act's handling of public broadcasting fits the broader drafting pattern and architecture for dealing with nonprofit or high transaction cost uses of copyrighted works. Legislators encouraged the broad range of stakeholders to work toward compromise against the backdrop of normative guidelines. Where impasse resulted, Congress responded through carefully delimited exemptions, compulsory licenses, negotiated guidelines, or administrative mechanisms rather than through broad immunity.[361]

G. Design Protection

In a similar vein to the cautionary, step-down approach to containing the public broadcasting issue, the handling of design protection reform shows the use of delay and partial triage in addressing an issue that did not ultimately result in a political impasse. Legislative proposals to reform design protection long predated the launch of the fourth general copyright revision in 1955.[362]

356. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 110(2), 90 Stat. 2541, 2549.

357. *See* § 110(8), 90 Stat. at 2550.

358. *See* § 111(a)(2), 90 Stat. at 2551.

359. *See* § 112(b), 90 Stat. at 2559.

360. *See* § 114(b), 90 Stat. at 2560.

361. *See* §§ 107–108, 90 Stat. at 2546–48 (stating exemptions, guidelines, and judicially administered defenses for research and educational photocopying and other activities); § 110, 90 Stat. at 2549–50 (stating limited exemptions for narrow socially or politically salient uses); § 111, 90 Stat. at 2550–58 (requiring compulsory license for cable retransmission); § 115, 90 Stat. at 2561–62 (requiring compulsory mechanical license for musical compositions); § 116, 90 Stat. at 2562–65 (requiring compulsory license for jukeboxes).

362. *See* Peter S. Menell & Ella Corren, *Design Patent Law's Identity Crisis*, 36 BERKELEY TECH. L.J. 1 (2021) (chronicling the bureaucratic opportunism that led Congress to relabel an English

Following passage of the Patent Act of 1952, the Coordinating Committee of the National Council of Patent Law Associations (NCPLA) planned to develop a copyright-like registration system for design protection.[363] As noted in the stage setting of the general copyright reform at the outset of this Article,[364] the Supreme Court's 1954 *Mazer v. Stein* decision—holding that copyright law extended to expressive elements of utilitarian articles of manufacture—substantially "gave new impetus to the movement among bar and industry groups" to reform protection for ornamental designs of useful articles.[365] At the same time, *Mazer* placed the Copyright Office in a difficult administrative position by opening the door to claims that raised thorny and specialized problems of *de minimis* expression, originality, duplication, and functionality in the registration of useful articles.[366]

Against this backdrop, bar groups organized a Design Coordinating Committee to explore legislative proposals for protecting nonfunctional designs of useful articles, with the Copyright Office and Patent Office participating in the committee's deliberations.[367] Giles Rich—who had played a central role in drafting the 1952 Patent Act[368]—chaired the committee and emerged as the leading patent law voice in these efforts, helping to shape the committee's approach to boundary management between intellectual property regimes.[369] The committee's work reflected an early and durable consensus that industrial design protection raised questions distinct from those implicated by general copyright doctrine.[370] The objective was not to expand copyright reflexively but

design copyright law as a design patent law in 1842 and the incoherence and mischief that it has wrought since that time); David Goldenberg, *The Long and Winding Road: A History of the Fight Over Industrial Design Protection in the United States*, 45 J. COPYRIGHT SOC'Y 21, 61 (1997) (cataloging dozens of failed design protection bills dating back to the beginning of the 20th century and concluding that "[g]iven this long history of failure, it is not difficult to predict the future of design legislation"); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 188 ("Between 1914 and 1957 nearly 50 design protection bills were introduced, and a number of hearings were held. Some of the bills were closer to copyright than patent; some leaned the other way; most of them took the form of special protection based on copyright principles but considerably more limited in scope and duration than traditional copyright. Several of the bills came close to enactment, but none made it all the way through both Houses.").

363. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 189.

364. *See supra* text accompanying notes 47–48.

365. *See* REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 3.

366. *See* REG. OF COPYRIGHTS, 59TH ANNUAL REPORT, *supra* note 41, at 6 (noting that "[r]egistrations for published works of art increased 44 percent over 1955, due largely to an influx of jewelry resulting from the favorable court decisions").

367. *See* REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 3.

368. *See supra* note 48.

369. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 120.

370. *See* REG. OF COPYRIGHTS, 64TH ANNUAL REPORT, *supra* note 52, at 6. Judge Giles Rich supplied the committee's dominant patent-law perspective and consistently argued that industrial design protection posed structural problems ill-suited to resolution within either patent or copyright law. *See Hearings on S. 1884*, *supra* note 48, at 27–36, 83–86 (statement of Hon. Giles S. Rich, Judge, U.S. Ct. of Customs & Pat. Appeals). His views shaped the committee's embrace of a short-term, registration-based *sui generis* regime designed to protect ornamental features of useful articles while preserving doctrinal boundaries between the major intellectual property systems.

to determine whether a bounded *sui generis* regime might better accommodate ornamental industrial design without destabilizing copyright or patent law. Over the ensuing years, design protection bills became a recurring subplot—something of a Groundhog Day—of copyright reform legislation.[371]

Design protection proposals proceeded both independently of, and intermittently alongside, omnibus copyright reform.[372] In 1957, Representative Edwin Willis introduced the first bill drafted by the Coordinating Committee on Designs of the National Council of Patent Law Associations in consultation with the Copyright Office and Patent Office.[373] The bill would have granted designers an initial five-year term of protection for original ornamental designs of useful articles, renewable once for an additional five years, through a registration-based system that expressly excluded functional features.[374] Remedies were narrowly drawn and subject to a short statute of limitations, reflecting an effort to deter deliberate design piracy while preserving competition and avoiding the administrative burdens and extended duration associated with patent and copyright protection.[375]

As Register Ringer summarized in the SECOND SUPPLEMENTARY REPORT,

> the design bill has been pending in one or both Houses ever since its initial introduction in 1957. It has been the subject of hearings three times in the Senate and once in the House. On four occasions it has passed the Senate. On two other occasions it has been reported favorably by the House and Senate Judiciary Subcommittees.[376]

Notwithstanding sustained support for the design protection proposal—Gerald Ford, who would later as President of the United States sign the Copyright Act into law, sponsored six successive design bills bearing his name as a member of the House Subcommittee[377]—and absence of sustained interest group opposition,[378] the *sui generis* design title ultimately dropped out of the omnibus reform bill.

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371. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 189.

372. *See id.* at 120–23.

373. *See* REG. OF COPYRIGHTS, 58TH ANNUAL REPORT, *supra* note 23, at 3 (noting that Barbara A. Ringer, then-Head of the Renewal and Assignment Section of the Examining Division, played a prominent role in connection with the development of the draft design bill).

374. H.R. 8873, 85th Cong. (1957), *reprinted in* 39 J. PAT. OFF. SOC'Y 596 (1957).

375. *See id.*

376. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 196.

377. *See id.*

378. The legislative record reflects no sustained, organized interest-group opposition to the design title. Hearings and written submissions on the design bills from the late 1950s through the 1970s show expressions of support from segments of industry and the intellectual property bar, but little recurring testimony or coordinated lobbying against the proposal by private stakeholders. *See, e.g.*, *Design Protection: Hearing on S. 2075 and S. 2852 Before the Subcomm. on Pats., Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 86th Cong. (1960); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 120–25.

In deleting the design protection title, the House Judiciary Committee explained that the design title "represents a piece of legislation separate from the bill for general [copyright] legislation" and that the new form of protection "could not truly be considered copyright protection."[379] This was not a categorical rejection of design protection on the merits. In fact, the copyright bill continued to permit copyright in separable expressive features of useful articles.[380] The rejection of *sui generis* design protection was a judgment about reducing political risk. By the mid-1970s, the general revision project was already straining under the weight of CATV, sound recordings, educational photocopying, jukeboxes, and the manufacturing clause. Adding a *sui generis* design regime—implicating patent policy, competition, and industrial design markets—risked reopening debates that could delay or possibly derail the overall bill.

H. Photocopying, Information Storage and Retrieval, Computer Software, and Useful Articles

By the mid-1960s, advances in photocopying, electronic storage, and computer technology had begun to converge in ways that unsettled long-standing assumptions about copyright's subject matter and institutional reach.[381] Even as late as 1965, American Library Association representative Charles Gosnell assured Congress that a library "copying system" could never "compete in cost

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The only significant opposition to the design title during the final stages of the general revision process came from the Department of Justice (DOJ), which argued that the proposal would create a hybrid monopoly overlapping with design patent protection and would threaten competition by conferring exclusive rights outside the constraints of patentability. *See* Letter from Michael M. Uhlmann, Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Just., to Hon. Robert W. Kastenmeier, Chairman, Subcomm. on Cts., C.L. & the Admin. of Just., H. Comm. on the Judiciary 4–6 (July 27, 1976) (on file with the Berkeley Technology Law Journal). The DOJ further warned that the proposal would "restrict healthy competition" and that "monopolies on what are basically utilitarian articles should be limited" to inventions meeting patentability requirements. *Id.* at 5, 11–12. In support of the principle that unpatentable product designs remain free for competitive copying (subject to passing-off constraints), the DOJ cited *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

379. *See* 1976 HOUSE REPORT, *supra* note 220, at 49–51; H.R. REP. NO. 94-1733, at 50 (Conf. Rep. 1976) (adopting the House deletion of Title II concerning ornamental designs of useful articles).

Somewhat relatedly, Congress also rejected extending copyright protection to typeface designs. This issue was intertwined with advances in digital technology and efforts to establish an international treaty on protection for typeface designs. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 197–203, 206–08.

380. *See* 1976 HOUSE REPORT, *supra* note 220, at 50–51 (explaining that although the design title was deleted, the bill "continues to permit copyright protection for works of artistic craftsmanship embodied in useful articles, to the extent that their form but not their mechanical or utilitarian aspects are concerned"); 17 U.S.C. § 101 (defining "[p]ictorial, graphic, and sculptural works" to include works incorporated into useful articles, but only "to the extent that[] such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article").

381. *See* 1976 HOUSE REPORT, *supra* note 220, at 65–74.

or in quality with original central publication,"[382] yet other witnesses were already anticipating a different technological trajectory. Frederick Burkhardt of the American Council of Learned Societies warned that

> [m]odern methods of machine reproduction of pages in bound volumes have become so quick, so inexpensive, and so prevalent in use by libraries on behalf of their patrons as to raise copyright questions of a different degree, if not of a different character, from those in which the fair use concept can be of practicable guidance. These questions are admittedly difficult and controversial, but the omission of any attempt to deal with them in the revision bill is a disservice to contemporary scholars, who ought to have available modern tools to facilitate their research work, subject to due regard for the rights of copyright owners.[383]

He further observed that electronic storage and retrieval systems—offering quick, direct access from other locations by electronic means—could substantially reduce sales of periodicals and reference works to individual libraries.[384] This concern underscored that the photocopying debates of the mid-1960s were not merely about paper duplication but also about the prospect of networked access to information and the displacement of traditional distribution models.

What initially appeared as discrete problems—such as library copying for research uses—were increasingly understood as manifestations of a deeper structural challenge: the migration of copyrighted works into systems capable of storing, processing, retrieving, and transmitting information at scale.[385] Although Congress made significant progress in addressing photocopying through the development of the fair use provision and the enactment of Section 108, legislative drafters remained concerned that rapid technological change threatened to outpace doctrinal accommodation.[386]

The legislative response that emerged during Phase II was neither comprehensive nor uniform. Instead, Congress adopted and adapted a range of approaches: (1) codifying clear subject-matter limits to prevent copyright from

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382. *Hearings*, *supra* note 183, at 460 (statement of Charles F. Gosnell, Chairman, Comm. on Copyright Issues, Am. Libr. Ass'n).

383. *Id.* at 1555–56 (statement of Frederick Burkhardt, Am. Council of Learned Soc'ys) (footnote omitted).

384. *Id.* at 1556 n.13.

385. *See id.* at 1435–40 (statement of Bella L. Linden, representing the Am. Textbook Publishers Inst.) (treating photoduplication and computerized information storage and retrieval as interrelated manifestations of a technological revolution and describing the input, storage, retrieval, remote transmission, display, and printout of copyrighted works); *id.* at 1555–56 (statement of Frederick Burkhardt, Am. Council of Learned Soc'ys) (distinguishing conventional library photocopying for research from centralized electronic systems providing rapid remote access to stored works); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 38–40.

386. *See* 1976 HOUSE REPORT, *supra* note 220, at 65–74.

drifting into patent or competition domains; (2) refining existing definitions—most notably with respect to literary works and pictorial, graphic, and sculptural works—to contain, clarify, and codify earlier judicial decisions; and (3) deferring resolution to a technocratic commission where the implications were too uncertain or destabilizing so that unresolved issues would not delay or derail the omnibus revision.

1. Statutory Subject Matter: Section 102(b)

The origins of Section 102(b) lie in growing concern with reliance entirely on judge-made doctrine—principally *Baker v. Selden*[387]—to police the boundary between copyrightable expression and uncopyrightable systems, methods, and processes. As Congress expanded and reorganized copyright's subject matter in successive revision drafts, witnesses and legislators increasingly warned that protection for "literary works" could be leveraged to claim exclusive rights over functional systems embodied in textual form, including accounting schemes, data-processing methods, and computer programs.[388]

These concerns were brought into sharp relief by structural changes in the computer industry triggered by the federal government's antitrust enforcement action against IBM. During the 1960s, IBM's System/360 mainframe came to dominate the computer industry. IBM monetized this dominance through metered hardware usage, while distributing software at no additional charge and encouraging customers to share software to maximize computing time. This model reinforced customer lock-in and severely limited the emergence of

387. 101 U.S. 99, 102–05 (1879) (distinguishing copyright in a book explaining a bookkeeping system from an exclusive right to use the system or the forms necessary to implement it).

388. *See Hearings*, *supra* note 183, at 1144–45 (statement of John F. Banzhaf III, President, Comput. Program Libr.) (reading the bill's broad definitions of copyrightable subject matter, "literary works," and "copies" to encompass computer programs and works embodied in machine-readable data-processing formats); *Hearings on S. 597*, *supra* note 205, at 570–73 (statement of the Interuniversity Commc'ns Council) (warning that the bill's broad subject-matter and exclusive-rights provisions could give the copyright owner control over the process embodied in a program, including a scheme for operating a steel mill or handling payrolls); *id.* at 773–76 (statement of Morton C. Jacobs, Esq.) (arguing that treating computer programs as "literary works" risked extending copyright to machine processes and control mechanisms); *see also* H.R. REP. NO. 89-2237, at 43–44, 44 n.1 (1966) (discussing copyrightability of computer programs while identifying "ideas, plans, methods, systems, [and] mathematical principles" as matters not intended, as such, to fall within the bill); H.R. REP. NO. 90-83, *supra* note 190, at 15 n.1 (same); S. 543, 91st Cong. § 102(b) (1969); S. REP. NO. 94-473, *supra* note 343, at 54–57 (distinguishing copyrightable program expression from the processes and methods embodied in a program); SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 11–13 (reviewing the treatment of computer programs as "literary works" and the exclusion of their underlying ideas, methodologies, and processes).

independent software vendors.[389] Despite the policy salience,[390] the legal status of software as a distinct form of intellectual property remained largely academic.[391]

Following the filing of the federal antitrust enforcement action, IBM immediately unbundled software from its business model. This enabled a competitive software market to emerge that would soon rival the computer hardware industry. These developments forced Congress to confront a new and conceptually difficult question: whether computer software—functional instructions expressed in textual or symbolic form—could or should be protected by copyright law. As software acquired independent economic value, the risk that copyright protection for "literary works" might be asserted to control program structure, logic, and methods of operation became immediate rather than hypothetical.[392]

In 1969, Senate Bill 543 introduced what became Section 102(b), expressly providing that copyright protection "in no case" extends to any idea, procedure, process, system, or method of operation, regardless of the form in which it is described or embodied.[393] Senate reports explained that the provision codified *Baker v. Selden* and ensured that copyright would not become a substitute for patent protection.[394] From this point forward, Section 102(b) functioned as a structural boundary, carried through later drafts and enacted in 1976 without substantive alteration.[395]

2. *Statutory Subject Matter: Limitations on Literary Works and Pictorial, Graphic, and Sculptural Works*

A parallel but distinct boundary-setting effort unfolded with respect to pictorial, graphic, and sculptural works, particularly as applied to useful articles. This line of development did not originate in concerns about software or information-retrieval systems, but in the administrative and doctrinal consequences of *Mazer v. Stein*, which recognized copyright protection for artistic works incorporated into utilitarian articles.[396]

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389. *See* EMERSON W. PUGH, LYLE R. JOHNSON & JOHN H. PALMER, IBM'S 360 AND EARLY 370 SYSTEMS 477–85 (1991); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1340–43 (1987).

390. *See* PRESIDENT'S COMM'N ON THE PAT. SYS., "TO PROMOTE THE PROGRESS OF . . . USEFUL ARTS" IN AN AGE OF EXPLODING TECHNOLOGY, S. DOC. NO. 90-5, at 12–13 (1967) (recommending against patent protection for computer programs).

391. *See* Peter S. Menell, *The Challenges of Reforming Intellectual Property Protection for Computer Software*, 94 COLUM. L. REV. 2644, 2651–52 (1994).

392. *See* S. REP. NO. 94-473, *supra* note 343, at 53–57.

393. *See* S. 543 § 102(b).

394. *See* S. REP. NO. 94-473, at 54–57.

395. 1976 HOUSE REPORT, *supra* note 220, at 54–57.

396. 347 U.S. 201, 211–14, 217–18 (1954) (relying on the Copyright Office's longstanding registration of works of artistic craftsmanship having utilitarian applications and upholding copyright in sculptural statuettes used as lamp bases; explaining that copyright protects an artistic article's form, but

In the decade following *Mazer*, the Copyright Office struggled to distinguish protectable artistic expression from unprotectable industrial design. Early revision drafts, including the Preliminary Draft and the 1965 Revision Bill, acknowledged that works of art could be embodied in useful articles but avoided precise statutory limitations, in part because Congress still anticipated enacting a *sui generis* design protection statute.[397]

By 1967, although the House bill emphasized that copyright should not extend to "the useful article as such," it had not yet articulated the modern separability test.[398] As the design question simmered in the background of the front-line battles over CATV and other more salient political impasses, the House of Representatives and the Senate took different approaches to the design protection question. The final Senate bill contained the design protection title based on the *sui generis* proposals tracing back to the late 1950s,[399] while the final House bill avoided such a regime.[400]

In the final reconciliation, the House and Senate dropped *sui generis* design protection entirely and clarified the definition of pictorial, graphic, and sculptural works to:

> include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[401]

This formulation derived from language in the Copyright Office regulations developed in the wake of *Mazer v. Stein*.[402] The drafters added the following language to the final House Report:

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not its mechanical or utilitarian aspects, and that the article's intended or actual industrial use does not invalidate its registration).

397. *See* SECOND SUPPLEMENTARY REPORT, *supra* note 130, at 118–20.

398. *See* H.R. REP. NO. 90-83, *supra* note 190, at 17, 156, 179 (defining "[p]ictorial, graphic, and sculptural works" simply as including "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models").

399. *See* S. 22, 94th Cong. (1975); S. REP. NO. 94-473, *supra* note 343, at 39–47 (incorporating "The Design Protection Act of 1975" in the omnibus copyright reform bill); *id.* at 161–66 (explaining the purpose and design of the *sui generis* design protection regime).

400. *See* H.R. 2223, 94th Cong. (1975), *reprinted in* 14 OMNIBUS, *supra* note 9.

401. *See* 1976 HOUSE REPORT, *supra* note 220, § 101, at 3 (defining "[p]ictorial, graphic, and sculptural works").

402. *Id.* at 54–55.

> In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design—that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.[403]

Possibly as a sop to design protection advocates, the mention of "physically *or conceptually*" separable arguably expanded protection beyond the *Mazer* standard.[404]

3. The Commission on New Technological Uses of Copyrighted Works (CONTU)

Having drawn firm statutory boundaries—most notably through Section 102(b)—Congress nonetheless recognized that significant questions remained about the treatment of computer software and automated information systems. In particular, while Section 102(b) resolved what copyright could not protect, it left unanswered whether, and to what extent, the expressive elements of

403. *Id.* at 55.

404. *Id.* (emphasis added). Courts have struggled with this question for decades. *See* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484–85 (6th Cir. 2015), *aff'd*, 580 U.S. 405 (2017). The Supreme Court's interpretation of the useful article doctrine—requiring that pictorial, graphic, or sculptural features of a useful article be "capable of existing independently of the utilitarian aspects of the article" has effectively eliminated the conceptual separability inquiry. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. at 414–15. *But cf. id.* at 422 (noting that "[t]he statutory text indicates that separability is a conceptual undertaking. Because separability does not require the underlying useful article to remain, the physical-conceptual distinction is unnecessary").

computer programs and the reproduction of works within automated systems should receive protection.[405]

The legislative record shows that Congress's response was not ad hoc but the culmination of sustained efforts to create an expert commission long before CONTU's eventual enactment. The first serious attempt came in 1967 with Senate Bill 2216, which the Senate passed to establish a commission "in the Library of Congress" to study computers and related new technological uses of copyrighted works.[406] The House, however, took no action.

Two years later, the Senate renewed the effort. Senate Bill 543 incorporated the provisions of S. 2216 as Title II, and Senate reports explained that the commission proposal was carried forward unchanged.[407] Once again, no further action was taken—largely because the CATV controversy continued to dominate the revision agenda.[408] Congress finally enacted CONTU in late 1974 as part of an omnibus "stopgap" statute that also removed the expiration date for the Sound Recording Amendments Act, increased criminal penalties for piracy, extended renewal terms, and addressed other urgent matters.[409]

Rather than resolving software and information-system issues within the general revision, Congress used interim legislation to stabilize the copyright system while comprehensive reform remained delayed.[410] Congress charged CONTU with studying and compiling data concerning:

> (1) the reproduction and use of copyrighted works in automatic systems capable of storing, processing, retrieving, and transferring information, and by various forms of machine reproduction (excluding instructor-driven classroom copying); and
>
> (2) the creation of new works through the application or intervention of such systems.[411]

As a placeholder and in anticipation of CONTU's recommendations, Congress added "§ 117. Limitations on exclusive rights: Computer programs" in the final stage of drafting the 1976 Act.[412] This provision created a narrow, technology-specific limitation on the exclusive rights of copyright owners solely for computer programs, aimed at preventing routine computer use from constituting infringement.

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405. 1976 HOUSE REPORT, *supra* note 220, at 54–57.
406. S. 2216, 90th Cong. (1967); S. REP. NO. 90-640 (1967).
407. S. REP. NO. 94-473, *supra* note 343, at 1–5.
408. 1976 HOUSE REPORT, *supra* note 220, at 47–48.
409. Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873.
410. H.R. REP. NO. 93-1473, at 47–48 (1974).
411. S. REP. NO. 93-983, at 28–30 (1974).
412. H.R. 2223, 94th Cong. (1975); *see* 1976 HOUSE REPORT, *supra* note 220, at 116–17.

Although computer software and cable television systems shared important structural similarities—both involved complex technological systems that did not fit comfortably within existing copyright doctrine—Congress treated them differently during the general revision process. CATV posed an immediate, visible, and politically charged redistribution of revenues from existing copyright owners to new intermediaries, triggering sustained litigation, regulatory interdependence with the FCC, and intense stakeholder conflict that Congress ultimately resolved by legislating an affirmative compulsory-license regime.[413] By contrast, the software marketplace was still inchoate and potentially within the doctrinal grasp of the courts.[414] Accordingly, Congress approached software through boundary-policing (Section 102(b))[415] and deferral to a technocratic process: delegation to an expert commission to gather and analyze data, engage stakeholders, and propose recommendations.[416]

V.
CULMINATION: THE COPYRIGHT ACT OF 1976

After two decades of remarkably diligent, skillful, and persistent effort by the Copyright Office and legislative committees,[417] the House and Senate passed

413. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395–402 (1968) (holding that a CATV system did not "perform" the programs it received and carried under the 1909 Act because it functioned more like a viewer than a broadcaster, and declining to devise a compromise among competing copyright, communications, and antitrust policies because "[t]hat job is for Congress"); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 406–15 (1974) (extending *Fortnightly* to CATV systems importing distant signals, notwithstanding asserted disruption of program-licensing and syndication markets, and concluding that detailed regulation of the resulting commercial relationships and resolution of the field's sensitive problems must be left to Congress); 1976 HOUSE REPORT, *supra* note 220, at 88–90, 93 (noting that cable systems then served approximately 10.8 million homes and earned approximately $770 million in annual subscriber revenues while paying no copyright royalties for retransmitted broadcast signals; recounting the cable-copyright impasse that had stalled general revision; recognizing the interplay between copyright policy and the FCC's intricate cable regulations; finding that distant nonnetwork retransmissions injured copyright owners while enhancing cable systems' ability to attract subscribers and increase revenues; and establishing § 111's compulsory license because transaction-by-transaction licensing would be impractical and unduly burdensome).

414. *See* Baker v. Selden, 101 U.S. 99, 102–05 (1879); S. REP. NO. 94-473, *supra* note 343, at 54; *see also* Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1072–74, 1082–88 (1989) (showing how courts could apply *Baker*, § 102(b), and related limiting doctrines to protect original program expression while filtering out processes, efficient program structures, and elements dictated by function or accepted programming practice, thereby preventing copyright from locking up basic programming techniques); Menell, *supra* note 389, at 1340–43 (explaining that software's systems character, compatibility requirements, and network effects heighten the competitive and innovative costs of overbroad copyright protection); *cf.* Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706–12 (2d Cir. 1992) (adopting a filtration methodology for separating copyrightable program expression from ideas, efficiency-driven elements, external constraints, and public-domain material, mindful of first entrants monopolizing basic programming techniques).

415. 17 U.S.C. § 102(b).

416. *See supra* Section IV.H.3.

417. *See Barbara Ringer, 1973–1980, Acting, 1993–1994*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/registers/ringer/ringer.html [https://perma.cc/YLZ3-LGUB] (noting that in

nearly identical omnibus reform bills and adopted the Conference Report. President Gerald Ford signed the fourth general revision of copyright into law on October 19, 1976.[418] In view of the statute's sweeping substantive and administrative changes, Congress delayed its effective date until January 1, 1978. The Copyright Office immediately shifted into high gear to redesign its regulations, registration practices, and internal procedures to implement the new regime.[419]

As the foregoing has shown, the 1976 Act emerged from two distinct phases of drafting and produced an unusually extensive legislative record. The statute's core architecture—its structure, definitions, exclusive rights, limitations, and ownership framework—was largely settled by the mid-1960s. The 1967 bill expanded duration, softened formalities, and strengthened exclusive rights and remedies while codifying fair use. It emphasized authors' rights through a carefully calibrated termination-of-transfers provision and a constrained definition of works made for hire.

A series of technological advances, beginning with CATV, derailed the bill's momentum. During the next decade, legislators pressed CATV stakeholders to develop a compulsory license. By the time Barbara Ringer became Register of Copyrights in 1973, the task confronting Congress was no longer designing a modern copyright system, but managing technological spillovers and resolving (or deferring) accumulated political conflicts layered atop an already-settled statutory core.

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Part II of this project explores the political economy of this experiment in technocratic legislative drafting. Part III investigates the ramifications of the phased legislative history for interpretation of the 1976 Act and examines the actual practice of interpreting the 1976 Act, revealing an uneven and at times internally inconsistent jurisprudential record.

1977, Ringer received the President's Award for Distinguished Federal Civilian Service, "the highest honor designed for extraordinary achievement in federal service, for her leadership in the revision of the U.S. copyright law that culminated in the 1976 Copyright Act"); JUDITH NIERMAN, ROBERT KASTENMEIER DIES; ACHIEVED SIGNAL INTELLECTUAL PROPERTY LEGISLATION (spec. ed. 2015), https://copyright.gov/about/kastenmeier.pdf [https://web.archive.org/web/20170124212157/https://copyright.gov/about/kastenmeier.pdf] ("[I]f Barbara Ringer was . . . the mother of the 1976 Copyright Act, Kastenmeier was its father." (quoting statement of Marybeth Peters, former Reg. of Copyrights)).

418. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

419. *See* REG. OF COPYRIGHTS, 80TH ANNUAL REPORT, *supra* note 11, at 10; LIBR. OF CONG., ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1978, at 90 (1979) (noting that "Fiscal 1978 was by far the most active regulatory year in the history of the Copyright Office").

APPENDIX A:
COPYRIGHT OFFICE STUDIES

1. Abe A. Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954* (July 1955)
2. William M. Blaisdell, *Size of the Copyright Industries* (May 1959)
3. Staff Members of N.Y.U. Law Review (under the guidance of Prof. Walter J. Derenberg), *The Meaning of "Writings" in the Copyright Clause of the Constitution* (Nov. 1956)
4. William Strauss, *The Moral Right of the Author* (July 1959)
5. Prof. Harry G. Henn, *The Compulsory License Provisions of the U.S. Copyright Law* (July 1956)
6. William M. Blaisdell, *The Economic Aspects of the Compulsory License* (Oct. 1958)
7. Vincent A. Doyle, George D. Cary, Marjorie McCannon & Barbara A. Ringer, *Notice of Copyright* (Nov. 1957)
8. William M. Blaisdell, *Commercial Use of the Copyright Notice* (Feb. 1959)
9. Joseph W. Rogers, *Use of the Copyright Notice by Libraries* (Jan. 1959)
10. Caruthers Berger, *False Use of Copyright Notice* (Mar. 1959)
11. Abraham L. Kaminstein (with supplements by Lorna G. Margolis & Arpad Bogsch), *Divisibility of Copyrights* (June 1957)
12. George D. Cary, *Joint Ownership of Copyrights* (Aug. 1958)
13. Borge Varmer, *Works Made for Hire and on Commission* (Apr. 1958)
14. Alan Latman, *Fair Use of Copyrighted Works* (Mar. 1958)
15. Borge Varmer, *Photoduplication of Copyrighted Material by Libraries* (May 1959)
16. Borge Varmer, *Limitations on Performing Rights* (Oct. 1958)
17. Prof. Benjamin Kaplan, *The Registration of Copyright* (Aug. 1958)
18. Caruthers Berger, *Authority of the Register of Copyrights to Reject Applications for Registration* (Mar. 1959)
19. Alan Latman (assisted by Lorna G. Margolis & Marcia Kaplan), *The Recordation of Copyright Assignments and Licenses* (Sep. 1958)
20. Elizabeth K. Dunne, *Deposit of Copyrighted Works* (Jan. 1960)
21. Elizabeth K. Dunne & Joseph W. Rogers, *The Catalog of Copyright Entries* (Apr. 1960)
22. William S. Strauss, *The Damage Provisions of the Copyright Law* (Oct. 1956)
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24. William S. Strauss, *Remedies Other Than Damages for Copyright Infringement* (Mar. 1959)
25. Alan Latman & William S. Tager, *Liability of Innocent Infringers of Copyright* (Jan. 1958)
26. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings* (Feb. 1957)
27. William S. Strauss, *Copyright in Architectural Works* (Aug. 1959)
28. Borge Varmer, *Copyright in Choreographic Works* (Oct. 1959)
29. William S. Strauss, *Protection of Unpublished Works* (Dec. 1957)
30. James J. Guinan, Jr., *Duration of Copyright* (Jan. 1957)
31. Barbara A. Ringer (with the editorial assistance of Julius A. Culp), *Renewal of Copyright* (June 1960)
32. Árpád Bogsch, *Protection of Works of Foreign Origin* (June 1959)
33. Caruthers Berger, *Copyright in Government Publications* (Oct. 1959)
34. Borge Varmer, *Copyright in Territories and Possessions of the United States* (Mar. 1959)
35. Marjorie McCannon & Benjamin W. Rudd, *The Manufacturing Clause of the U.S. Copyright Law* (Nov. 1963)

Probabilistic "Copies" in Generative AI Models

Mark A. Lemley* & A. Feder Cooper**

ABSTRACT

Recent work shows that it is possible to extract verbatim or near-verbatim text of some copyrighted works from some large language models (LLMs or models). That is evidence that the model weights encode the works in some form—that the model has "memorized" those works from its training data. But LLMs don't store information in the same format as familiar databases. Rather, their weights store statistical relationships that have been learned from the training data, and those relationships inform a generation process that in practice is often probabilistic rather than deterministic. In the case of memorization, those relationships are strong enough that, in many circumstances, the model could generate a copyrighted work from its training data.

Copyright law has not previously had to decide whether storing information that might or might not produce output similar to a copyrighted work is itself a copy of the work. The answer to this question is important, because it may determine the legality of many LLMs. The statute and caselaw are largely unhelpful. We argue that copyright law will likely take a functional approach to the question, finding that LLMs contain a copy of a particular work only if it is straightforward to extract that work in outputs. That result is unsatisfying as a policy matter, and we suggest potential changes to the law, but it is the most likely outcome under current law.

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** Assistant Professor of Computer Science, Yale University. The authors contributed equally to this work. Thanks to Paul Goldstein, James Grimmelmann, Rose Hagan, Jessica Litman, Tyler Ochoa, Tony Reese, Todd Smith, Xiyin Tang, Rebecca Tushnet, participants at the Copyright Act at 50 conference at Stanford Law School, and participants at the 29th Annual BTLJ-BCLT Spring Symposium: Origins, Evolution, and Possible Futures of the 1976 Copyright Act for conversations on this topic and to Austin Taylor for outstanding research assistance. We note that one of us (Lemley) has in the past represented the defendants in some of the cases discussed here, including *Andersen v. Stability AI*, *Kadrey v. Meta*, and *Bartz v. Anthropic*. As of July 2026 he is not working for any clients. Our work is our own and does not reflect the views of any company or any confidential information obtained from any company. © 2026 A. Feder Cooper & Mark A. Lemley.

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I.
INTRODUCTION

More than one hundred pending lawsuits assert that generative AI infringes copyright law.[1] Most of those suits challenge the legality of training AI on copyrighted works.[2] An increasing number allege infringement because the output of AIs is the same as or similar to a copyrighted work,[3] for instance, a near-exact reproduction of specific song lyrics.[4]

1. David Atkinson, *AI Litigation Tracker—AtkinsonAILaw.com*, GOOGLE SHEETS, https://docs.google.com/spreadsheets/d/1BgoFqE0C6148M2evzZU9A-WJN0oys7Pm [https://perma.cc/AWG7-G88F] (last visited Aug. 29, 2026); *see also ChatGPT is Eating the World*, CHAT GPT IS EATING THE WORLD, https://chatgptiseatingtheworld.com/ [https://perma.cc/LDY3-TP7L] (last visited Aug. 29, 2026) (providing live count of total U.S. cases related to AI litigation).

2. *See, e.g.*, Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1034 (N.D. Cal. 2025) (holding that copying of works to train LLMs is fair use); Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026, 1057 (N.D. Cal. 2025) (holding that copying of works to train LLMs is fair use, but emphasizing that insufficient evidence was presented by the plaintiffs on the effect of use upon the potential market for the copyrighted works); Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc., 765 F. Supp. 3d 382, 400–01 (D. Del. 2025) (holding that copying of works to train a legal research platform on Reuters' headnotes was not protected by fair use primarily because Ross was developing a market substitute).

3. *See, e.g.*, N.Y. Times Co. v. Microsoft Co., 777 F. Supp. 3d 283, 328 (S.D.N.Y. 2025) (denying motion to dismiss plaintiffs' claim that defendants' LLMs outputs were substantially similar to plaintiffs' works); *In re* OpenAI, Inc., Copyright Infringement Litig., 800 F. Supp. 3d 602, 612–13 (S.D.N.Y 2025) (declining to dismiss plaintiffs' claims that some model outputs were substantially similar to plaintiffs' works); Tremblay v. OpenAI, Inc., 716 F. Supp. 3d 772, 778, 780 (N.D. Cal. 2024) (dismissing plaintiffs' claim that every output of the model trained on their copyrighted materials is an infringing derivative work).

4. Landgericht München I [LG München I] [Munich Regional Court I], Nov. 11, 2025, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1917 (2025) (Ger.) (holding that reproduction of song lyrics in model outputs was infringing).

Until November 2025, courts and litigants hadn't paid much attention to what happens in between training the model and generating outputs—the copyright status of the model itself. A few early U.S. suits claimed the models were derivative works simply because they were trained on copyrighted works. Courts generally rejected those claims.[5] But two recent decisions—one in Germany and one in the U.K.—have brought the question of whether the model itself incorporates a copy of the works it was trained on to the fore. One decision found that ChatGPT incorporated a copy of copyrighted song lyrics, which appeared in outputs.[6] The other, involving the image-generation model Stable Diffusion, found the opposite.[7] U.S. courts have not yet confronted the issue of whether the model is a copy.[8]

The question is likely to grow in importance and touches on a line of technical research that the scientific literature refers to as "memorization." We address the relevant details of this term in Part I, but the intuition is as follows: during training, specific training data leave a sufficiently strong imprint on the model's weights such that it can be possible to reproduce—i.e., extract—those training data in the model's outputs. In other words, "extraction" is an observable consequence of memorization: if a piece of training data is memorized, it may be possible to extract it from the model.[9]

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5. *See* Andersen v. Stability AI Ltd., 700 F. Supp. 3d 853, 868–69 (N.D. Cal. 2023) (dismissing plaintiffs' claim that the model itself is an infringing derivative work); *Kadrey*, 788 F. Supp. 3d at 1056–57 (dismissing plaintiffs' claim that the model itself is an infringing derivative work).

6. *See* GRUR 1917 (2025) (Ger.); Jörn Poltz & Friederike Heine, *OpenAI Used Song Lyrics in Violation of Copyright Laws, German Court Says*, REUTERS (Nov. 11, 2025), https://www.reuters.com/world/german-court-sides-with-plaintiff-copyright-case-against-openai-2025-11-11 [https://perma.cc/6PQ2-ZM97] (summarizing some of the plaintiff material from *GEMA v. OpenAI*).

7. *See generally* Getty Images (US) Inc v. Stability AI Limited [2025] EWHC (Ch) 2863 (Eng.) (holding that Stability AI's model was not itself an infringing copy of Getty's images).

8. Some courts have rejected claims that the model is by definition a derivative work of anything it is trained on. *See Andersen*, 700 F. Supp. 3d at 861. There is a natural relationship between the training of a model and any content that is memorized in the model. But the training cases do not present the question of whether a copy has been made in the model; rather, they concern the intermediate copy which defendants concede is contained in the training data, and defend as fair use.

9. *See* A. Feder Cooper & James Grimmelmann, *The Files are in the Computer: On Copyright, Memorization, and Generative AI*, 100 CHI.-KENT L. REV. 141, 142 (2025); A. Feder Cooper et al., Report of the 1st Workshop on Generative AI and Law 30 (Dec. 3, 2023) (unpublished manuscript) [hereinafter GenLaw Report], https://arxiv.org/pdf/2311.06477 [https://perma.cc/S3M6-YUF2]. Memorization is a technical term in the scientific literature on machine learning, not one that we have picked to describe the phenomenon in question. In many respects, the choice of terminology is an unfortunate one, as it sounds like a metaphor for how AI models behave—that they "memorize" information in a way like a human might when studying for an exam. But this term is not a metaphor, and it isn't meant to invoke this meaning: it is shorthand for the specific technical phenomenon that we provide an intuition for here, and for which we provide more background details below. *See infra* Section II.B.

Researchers in machine learning have studied both memorization[10] and extraction[11] for years, long before generative AI attracted attention from copyright law. But the training of commercial AI systems on copyrighted works has made memorization a copyright question, not just a machine learning one. Academic research by ourselves and others has shown that it's possible to extract at least some copyrighted works verbatim from AI models.[12] More recent work shows that, even if a copyrighted work can't be extracted verbatim from an AI model, the model can sometimes reproduce near-verbatim copies in its outputs.[13] These copies are sufficiently similar that they would infringe copyright, which does not require identical duplication.[14]

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10. *See, e.g.*, Vitaly Feldman, Does Learning Require Memorization? A Short Tale about a Long Tail (Jan. 10, 2021) (unpublished manuscript), https://arxiv.org/pdf/1906.05271 [https://perma.cc/Q4VH-JSW4]; Reza Shokri, Marco Stronati, Congzheng Song & Vitaly Shmatikov, Membership Inference Attacks against Machine Learning Models (Mar. 31, 2017) (unpublished manuscript), https://arxiv.org/pdf/1610.05820 [https://perma.cc/F5JR-U36D].

11. *See, e.g.*, Nicholas Carlini, Florian Tramèr, Eric Wallace, Matthew Jagielski, Ariel Herbert-Voss, Katherine Lee, Adam Roberts, Tom Brown, Dawn Song, Úlfar Erlingsson, Alina Oprea & Colin Raffel, *Extracting Training Data from Large Language Models* [hereinafter *Extracting Training Data from LLMs*], *in* 30TH USENIX SECURITY SYMPOSIUM 2633, 2633 (USENIX Ass'n 2021); Katherine Lee, Daphne Ippolito, Andrew Nystrom, Chiyuan Zhang, Douglas Eck, Chris Callison-Burch & Nicholas Carlini, *Deduplicating Training Data Makes Language Models Better* [hereinafter *Deduplicating*], *in* 1 PROCEEDINGS OF THE 60TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 3 (Smaranda Muresan, Preslav Nakov & Aline Villavicencio eds., 2022).

12. *See* Milad Nasr, Nicholas Carlini, Jonathan Hayase, Matthew Jagielski, A. Feder Cooper, Daphne Ippolito, Christopher A. Choquette-Choo, Eric Wallace, Florian Tramèr & Katherine Lee, Scalable Extraction of Training Data from (Production) Language Models 9 (Nov. 28, 2023) (unpublished manuscript), https://arxiv.org/pdf/2311.17035 [https://perma.cc/4P6L-VDC8]; A. Feder Cooper, Mark A. Lemley, Allison Casasola, Ahmed Ahmed, Aaron Gokaslan, Amy B. Cyphert, Christopher De Sa, Daniel E. Ho & Percy Liang, *Extracting Memorized Pieces of (Copyrighted) Books from Open-Weight Language Models*, 3 CONF. LANGUAGE MODELING (forthcoming Oct. 2026) (manuscript at 14) (on file with authors) [hereinafter *Extracting Books (Open-Weight)*]; Antonia Karamolegkou, Jiaang Li, Li Zhou & Anders Søgaard, *Copyright Violations and Large Language Models*, *in* PROCEEDINGS OF THE 2023 CONFERENCE ON EMPIRICAL METHODS IN NATURAL LANGUAGE PROCESSING 7403, 7406 (Houda Bouamor, Juan Pino & Kalika Bali eds., 2023).

13. *See* Ahmed Ahmed, A. Feder Cooper, Sanmi Koyejo & Percy Liang, Extracting Books from Production Language Models 4 (Jan. 6, 2026) (unpublished manuscript), https://arxiv.org/pdf/2601.02671 [https://perma.cc/U987-KELD] [hereinafter Extracting Books (Production LLMs)]; Guangwei Zhang, Jianing Zhu, Cheng Qian, Neil Gong, Rada Mihalcea, Zhaozhuo Xu, Jingrui He, Jiaqi Ma, Yun Huang, Chaowei Xiao, Bo Li, Ahmed Abbasi, Dongwon Lee, Heng Ji & Denghui Zhang, Copyright Detective: A Forensic System to Evidence LLMs Flickering Copyright Leakage Risks 7 (Feb. 11, 2026) (unpublished manuscript), https://arxiv.org/pdf/2602.05252 [https://perma.cc/G3QG-YFWW]; A. Feder Cooper, Mark A. Lemley, Christopher De Sa, Lea Duesterwald, Allison Casasola, Jamie Hayes, Katherine Lee, Daniel E. Ho & Percy Liang, *Estimating Near-Verbatim Extraction Risk in Language Models with Decoding-Constrained Beam Search*, 3 CONF. LANGUAGE MODELING (forthcoming 2026) (manuscript at 1) (on file with authors) [hereinafter *Near-Verbatim*].

14. "[A]n infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy." Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947). The test for copyright infringement is substantial similarity, though how that similarity is tested can differ by circuit. The Ninth Circuit, for example, uses a two-part test: an extrinsic test based on objective similarity, and an intrinsic test based on the response

These findings have implications for AI outputs, but also potentially for the models themselves. As is well-established in the AI scientific community, extraction is evidence that the memorized training data is encoded in some form in the model's weights.[15] Writing about this for a legal audience, Cooper and Grimmelmann note that the fact that a model can generate long verbatim snippets of a book (e.g., text from *Harry Potter*) means that at least those portions of the book are encoded in the model itself.[16] And the Copyright Office has declared, without case support, that because model weights are fixed in a tangible medium, anything contained in them is also a fixed copy.[17]

But the *extent* and the *form* in which that encoding happens are likely to matter a great deal under existing copyright law. If an AI model contains a "copy" of a copyrighted work as copyright law defines that term, and it merely replicates that copy in its outputs on request, the creation of the model itself is an act of direct infringement; so is the making of a new copy of that model—for example, downloading the weights of an openly released model, like one from Meta's Llama 3 series, to a corporate server. That is true even if no one ever asks for—and the model never generates—infringing output.[18] By contrast, if the model contains only information that could be used to produce a copy and generates the output only in response to particular prompts—assembling the output on the fly from sources that do not include a legally cognizable copy of

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of a lay observer. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), *overruled on other grounds by*, Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020). The Second Circuit, similarly, asks "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners." Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946); *see* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y 719 (2010) (discussing the various tests).

15. For discussions of extraction as evidence of memorization, see, for example, *Extracting Training Data from LLMs*, *supra* note 11; Nicholas Carlini, Jamie Hayes, Milad Nasr, Matthew Jagielski, Vikash Sehwag, Florian Tramèr, Borja Balle, Daphne Ippolito & Eric Wallace, *Extracting Training Data from Diffusion Models* [hereinafter *Extracting Training Data from Diffusion Models*], *in* 32ND USENIX SECURITY SYMPOSIUM 5253 (USENIX Ass'n 2023); Nicholas Carlini, *What My Privacy Papers (Don't) Have to Say About Copyright and Generative AI* (Mar. 11, 2025) [hereinafter *Carlini Blog*], https://nicholas.carlini.com/writing/2025/privacy-copyright-and-generative-models.html [https://perma.cc/R34S-W8SM]; Avi Schwarzschild, Zhili Feng, Pratyush Maini, Zachary C. Lipton & J. Zico Kolter, Rethinking LLM Memorization Through the Lens of Adversarial Compression (Nov. 11, 2024) (unpublished manuscript), https://arxiv.org/pdf/2404.15146 [https://perma.cc/UBX4-9BFD]; Nasr et al., *supra* note 12; and Giorgio Franceschelli, Claudia Cevenini & Mirco Musolesi, Training Foundation Models as Data Compression: On Information, Model Weights and Copyright Law (Mar. 12, 2025) (unpublished manuscript), https://arxiv.org/pdf/2407.13493 [https://perma.cc/QB4M-HTFV].

16. *See* Cooper & Grimmelmann, *supra* note 9, at 168.

17. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 3: GENERATIVE AI TRAINING 28–29 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf [https://perma.cc/3FZG-33HJ]; *see also* Daniel Gervais, Haralambos Marmanis, Noam Shemtov & Catherine Zaller Rowland, *The Heart of the Matter: Copyright, AI Training, and LLMs*, 71 J. COPYRIGHT SOC'Y 482, 494–98 (2024); Joshua Yuvaraj, *Pseudo-Expressions: An Expanded Conception of the Work in Copyright Law* (Working Paper 2025) (both arguing that model weights can be copies).

18. The copy in the model in this scenario may still qualify as fair use; more on that below.

the work itself—the output may be an infringing copy but the model itself likely wouldn't be.

Determining which of these descriptions fits AI models turns out to be surprisingly complicated. The difficulty lies both in the technical details of how models encode information and generate outputs, and in copyright law's existing treatment of copies and fixation.

The rest of this Article proceeds in two parts. Part I provides a minimal account of how language models encode information, how "memorization" reflects a particular degree of encoding of training data in the model's weights, and why ordinary metaphors like storage, memory, and compression both illuminate and mislead. The point isn't to settle the legal questions by analogy, but to show why the relevant copyright questions can't be resolved at the level of abstraction those analogies invite. Part II then turns to copyright law, examining whether models that can (deterministically or probabilistically) generate copyrighted works from their training data should be treated as fixed copies, and what follows if they are.

II.
THE TECHNICAL COMPLICATIONS OF MEMORIZATION AND EXTRACTION

What is often called "generative AI" refers to a set of technological systems that resist simple description. It's therefore natural to reach for metaphors and analogies—to use the familiar to try to make sense of things that are complex and unfamiliar. This is an especially common pattern in law: "Analogy and metaphor are central to legal rhetoric; they provide a rational framework for thinking through the relevant similarities and differences between cases."[19] But "metaphors . . . can also simplify and distort,"[20] and so legal practitioners (as well as others) "should beware of metaphors that draw on more familiar technologies, which provide inadequate answers to the genuinely hard problems before them."[21]

This warning is critical to keep front of mind when thinking about what the machine learning literature refers to as "memorization," as well as related terms such as "compression" and "training." These terms all invoke familiar, everyday meanings, but in machine learning they also refer to precise technical concepts.[22]

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19. GenLaw Report, *supra* note 9, at 4; *see also* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1397–99 (2001) (arguing that the database problem cannot be adequately understood through the use of the "Big Brother metaphor").

20. GenLaw Report, *supra* note 9, at 4; *see also id*. at Appendix B; Katherine Lee, A. Feder Cooper & James Grimmelmann, *Talkin' 'Bout AI Generation: Copyright and the Generative-AI Supply Chain*, 72 J. COPYRIGHT SOC'Y 251, Part III (2025) [hereinafter *Talkin'*]. For a longer and more recent treatment of related issues, see Michiel A. Smit, *Metaphors We Judge (AI) By: A Rhetorical Analysis of Artificial Copyright Disputes*, 21 J. INTELL. PROP. L. & PRAC. 251 (2026) (Eng.).

21. *See Talkin'*, *supra* note 20, at 255–59.

22. *See* GenLaw Report, *supra* note 9, at 4–5.

A central challenge in work at the intersection of generative AI and law is that the scientific literature is rife with terms that do this metaphorical-technical double duty: shorthand labels that gesture toward, but also obscure, the underlying technical mechanisms they are meant to describe.[23] If one, ironically, leans too literally into the metaphorical side, it can be tempting to reject these terms as "fallacies" or failures of abstraction.[24] But we can't understand the accuracy of the metaphor without the technical substance those terms are actually referring to.

At the risk of making our own imperfect analogy, law faces similar terminological challenges. Many core legal concepts are easily misunderstood by non-experts because they carry ordinary meanings that differ from their technical legal definitions. In copyright, "fair use," "transformative," and even "copy" are three such concepts that invite confusion when invoked on non-technical terms. But the solution in law isn't to throw out these terms—to call them "fallacies" because they are frequently misunderstood by others—but to engage them thoughtfully on their technical merits to make sound, reasoned arguments.

So in that spirit, the remainder of this Section develops a minimal technical account of language models and "memorization"—when the imprint left on the model's weights by a specific work in the training data is sufficient to encode part or all of a copyrighted work in the model itself. We focus on language models because they have been the subject of our own empirical work in machine learning, from which we draw clear examples of memorization.[25] We don't attempt to provide a comprehensive treatment of memorization, and instead defer to others.[26] Rather, we aim to clarify the specific mechanisms necessary to understand the relationship between memorization—which is a property of a trained model itself—and when a model produces copies of its training data as outputs. Further, it's important to remember that memorization is a complex phenomenon, for which the scientific literature continues to evolve. One of the key takeaways from the literature is that it isn't possible to make broad, one-size-fits-all statements about memorization and AI. This is in part why popular metaphorical understandings of memorization fall short, and so we explain why the relevant questions for copyright can't be resolved at the level of abstraction

23. Smit, *supra* note 20, at 251–52.

24. *See infra* Section II.C.

25. While we focus on text and LLMs, memorization also arises in other forms of generative AI, such as images and software code. *See generally Extracting Training Data from Diffusion Models*, *supra* note 15 (extracting images from Stable Diffusion); Aneesh Pappu, Billy Porter, Ilia Shumailov & Jaime Hayes, *Measuring Memorization in RLHF for Code Completion*, THIRTEENTH INT'L CONF. ON LEARNING REPRESENTATIONS, Feb. 25, 2025, art. 4775 (studying memorization in code completion). We particularly focus on *autoregressive* LLMs; while other LLMs, such as diffusion language models (DLMs) are growing in popularity, autoregressive LLMs currently remain the dominant paradigm.

26. *See generally* Cooper & Grimmelmann, *supra* note 9 (defining memorization for a legal audience); *see also* Lee et al., *supra* note 11, at 8 (discussing memorization in detail).

that metaphors and analogies encourage. This provides the foundation for our copyright analysis in Part II.

A. How Language Models Store Information and Generate Outputs

Language models are made up of a large collection of numerical parameters, commonly referred to as weights. These weights are adjusted during training,[27] a process that takes as inputs both a model architecture (how those weights are structured and interact) and a training dataset. The result is a trained model: a fixed set of weights that encode information derived from the training data.[28]

This is how models store information[29] from their training data, and it's important to be clear about what that means. "Store" here does *not* literally mean that the model retains discrete copies of its training data in exactly the same format as a traditional database or lookup table would.[30] The information isn't localized or laid out in that way. But it does mean that certain information about the training data is encoded in the model's weights. That encoded information determines the probability distribution the model assigns to sequences of tokens that represent text. For example, after seeing the phrase "The dog barked at the" the model may assign a higher probability to the next token being "cat" compared to the next token being "chair" or "moon," reflecting what it has learned from the training data about the relationships between words.

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27. The term "training" also performs the same metaphorical-technical double duty we've been talking about. In machine learning, it refers to an optimization process in which a model's weights are adjusted to minimize a loss function over a dataset, rather than to anything like human learning or instruction. Unlike "memorization" or "compression," however, "training" is largely understood in terms of its technical meaning in the legal literature. *See* GenLaw Report, *supra* note 9, at 4–5, 38.

28. *See Talkin'*, *supra* note 20, sections I.A and I.B for a treatment of background information on data and machine learning addressed to a legal audience.

29. Like "memorization" and "compression," the claim that language models "store" information is not merely metaphorical. In a technical sense, a trained model encodes information about its training data in its weights, which parameterize a probability distribution over token sequences. This concept can be formalized using tools from information theory: predictive models induce compression schemes in which better prediction corresponds to more efficient representation of the underlying data in the model's weights. *See generally* Grégoire Delétang, Anian Ruoss, Paul-Ambroise Duquenne, Elliot Catt, Tim Genewein, Christopher Mattern, Jordi Grau-Moya, Li Kevin Wenliang, Matthew Aitchison, Laurent Orseau, Marcus Hutter & Joel Veness, *Language Modeling Is Compression*, TWELFTH INT'L CONF. ON LEARNING REPRESENTATIONS, Mar. 14, 2024, art. 372. Of course, this notion of storage differs fundamentally from discrete, addressable storage in traditional databases or lookup tables, but it's nonetheless a precise and measurable property of the model and so it's correct to refer to this process as "storage." For more on why machine learning models are not at all like traditional databases, see generally A. Feder Cooper et al., *Machine Unlearning Doesn't Do What You Think: Lessons for Generative AI Policy and Research*, THIRTY-NINTH ANN. CONF. ON NEURAL INFO. PROCESSING SYS. POSITION PAPER TRACK, Jan. 16, 2026, art. 474 [hereinafter *Machine Unlearning*]. For a brief treatment of the relationship between compression and memorization, see generally Franceschelli et al., *supra* note 15.

30. The *format* is different from a traditional database or lookup table, but the *behavior* can be rigorously related to a stochastic lookup table. *See Machine Unlearning*, *supra* note 29, at 4–5.

Beyond this high-level description, we in fact know surprisingly little about how AI models actually store specific information. For a text file stored in a computer, one could point to a particular set of 1s and 0s and say "that's the data that corresponds to this particular file." That's generally not true for AI models. To be clear, the problem is *not* that the AI companies know this information and have concealed it from the world. It's that there remain big, open scientific questions on this topic: even the people who build and train models typically don't know precisely what pieces of information models retain or where exactly they store it.[31]

Due to this complexity, it's common to describe this whole process as learning "statistical correlations,"[32] "relationships,"[33] or "patterns"[34] in the training data. That description isn't wrong, but it's also only a very high-level gloss that oversimplifies the information represented by the model. For that matter, the same is true of saying that a model "learns" from its training data. That terminology is useful, but it shouldn't be taken too literally: a language model isn't a human brain, and its internal representation doesn't map exactly onto familiar concepts like human memory or understanding.

This is also the sense in which the term compression is sometimes used in the technical literature. Training a model can be understood as constructing a compact (i.e., compressed) representation of the data that supports accurate prediction.[35] This is almost surely what Emad Mostaque, former CEO of the Stability AI, had in mind when he said the following in 2022 about the Stable Diffusion image generation model:

> It's worth taking a step back and thinking about how crazy insane this is: we took a hundred terabytes of data—a hundred thousand thousand [sic] megabytes of images—2 billion of them—and we squished it down to a 2–4 gigabyte file. And that file can create everything that you've seen. That's insane, right? That's about as compressed as you can get.[36]

Compression is a technically accurate way to describe the results of training to a computer scientist; training a language model is compression in an information theory sense,[37] even though a model is not arranged or otherwise

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31. Developing a better understanding of these phenomena is an active area of ongoing research in machine learning. *See generally Machine Unlearning*, *supra* note 29 and citations therein concerning mechanistic interpretability.

32. *See* Defendant Anthropic PBC's Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, Concord Music Grp., Inc. v. Anthropic PBC, 738 F. Supp. 3d 973 (M.D. Tenn. 2024) (No. 3:23-cv-01092), Dkt. No. 67.

33. *See* Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1017 (N.D. Cal. 2025).

34. *See* Concord Music Grp., Inc. v. Anthropic PBC, 772 F. Supp. 3d 1131, 1134 (N.D. Cal. 2025).

35. *See* Delétang et al., *supra* note 29, at 1–3. More on this below, see *infra* Section II.C.

36. *See* First Amended Complaint at 29, Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956 (N.D. Cal. 2024) (No. 23-cv-00201-WHO), Dkt. No. 129.

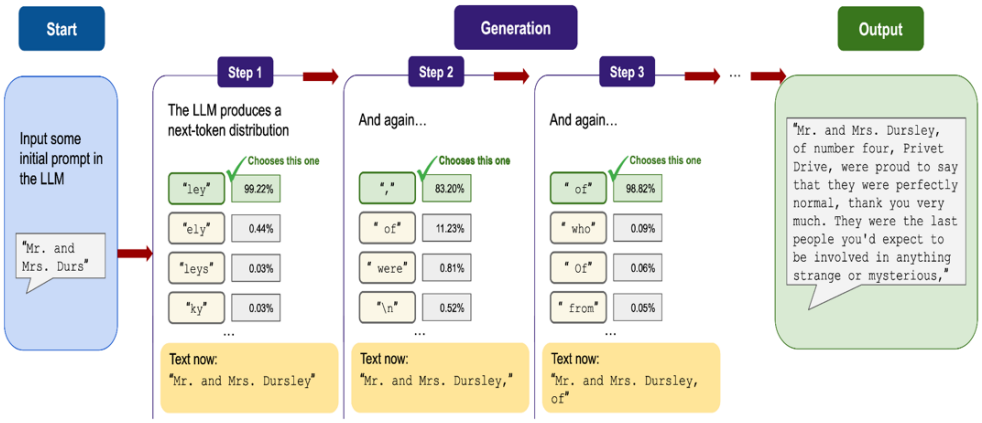
37. *See generally* Delétang et al., *supra* note 29; Franceschelli et al., *supra* note 15.

formatted like more familiar data formats, such as MP3 or PDF files.[38] But what information theory means by compression may not be what lay users have in mind when they hear the term.[39]

Once trained, a language model can be used to generate text. Given an input prompt, an autoregressive LLM predicts the next token in a sequence based on the tokens that precede it, then repeats this process iteratively to produce longer outputs.[40] Each prediction is probabilistic: based on the "patterns" the model has learned during training, it assigns different probabilities to possible next tokens, conditioned on the prior context.[41] We provide a high-level illustration of this process in Figure 1. At each generation step, a token is then selected from this distribution, which determines whether the model continues "Harry" with "Potter," "Truman," or something else.

Figure 1: Illustrating autoregressive generation.

The input prompt is "Mr. and Mrs. Durs," for which the (autoregressive) LLM produces a distribution over the next tokens in its vocabulary (all possible tokens it can generate). At each generation step, the decoding procedure illustrated here selects the highest-probability token as the one to generate. In this example, the top-ranked token has enormous probability at each step. The output after several steps is verbatim text from Harry Potter and the Sorcerer's Stone. Figure produced by the authors, based on results for running this prompt on Llama 3.1 70B with greedy decoding.



38. *See* Cooper & Grimmelmann, *supra* note 9, at 179–80.

39. Matthew Sag, *Copyright's Jagged Frontier*, DUKE L.J. (forthcoming 2026) (manuscript at 36), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6319379 (on file with the Berkeley Technology Law Journal) (noting the difference in how computer scientists use the term).

40. *See* Cooper & Grimmelmann, *supra* note 9, at 189. There are other types of language models, which produce outputs in different ways. Currently, autoregressive language models are the most common paradigm. *See supra* note 25.

41. *See* Cooper & Grimmelmann, *supra* note 9, at 189, 192–93. Hannibal Travis calls LLMs a lexicon of words, grammar, and concepts. *See* Hannibal Travis, *The Universal Lexicon: Generative AI Chatbots and Fair Use of Works in a Training Corpus*, 45 REV. LITIG. 61, 72–73 (2025).

This is where an important distinction arises between the model itself and the procedure used to generate outputs from it. The model defines a probability distribution over sequences. A given model is, in that sense, fixed once training is complete.[42] But generating text from that distribution requires a decoding procedure—a rule for selecting tokens from the model's predicted probabilities. In practice, decoding is often stochastic. Tokens are sampled from the probability distribution represented by the model, which means that the same prompt can yield different outputs on different runs. During generation, sometimes the model might produce "Potter" after "Harry," and sometimes it might produce "Truman"; how often it produces either depends on the learned distribution in the model weights.

But decoding need not be stochastic: there are also deterministic decoding procedures. For instance, greedy decoding always selects the highest-probability token from the next-token distribution at each generation step. Because the learned probability distribution is fixed, at each generation step for a given prompt, that top-ranked token is the same every time. There is no randomness involved in selecting it, and the model produces the same output every time for the given prompt.[43]

This distinction explains both the variability of model outputs and the limits of familiar analogies. Because the model itself defines a fixed probability distribution, the variability in outputs does *not* arise from changes in the model, but from how that distribution is used during decoding. The decoding procedure

42. It is fixed with respect to training being completed at the moment the model is used. But the model could later be updated with additional training (e.g., fine-tuning), which would change its weights. So it's more precise to say that the model is fixed with respect to the moment in which it is used, rather than to take this as a general statement about a model being permanently fixed. *See Talkin'*, *supra* note 20, at 287.

43. *See* Cooper & Grimmelmann, *supra* note 9, at 193–94. This is true in principle, but may vary in practice. For instance, it's true for a given loaded model run with a particular generation configuration on particular hardware. But loading the model weights in a different numerical precision, using generation with or without a KV cache, or other runtime differences may have subtle impacts on the distribution that change which token is ranked at the top. At the system level, there are additional considerations that impact non-determinism of model outputs. For instance, many deployed models are mixtures of experts (MoEs)—there are actually many models, as opposed to a single one. Different prompts get routed to different experts, and the routing decisions may depend on a variety of factors, introducing non-determinism. Nevertheless, for an open-weight model being used with a deterministic decoding algorithm on specific hardware, this is generally true. The results for extracting effectively a verbatim copy of *Harry Potter and the Sorcerer's Stone* using Llama 3.1 70B are deterministic, for the different hardware we ran our code on: with the same prompt, you get the same output. See *infra* Section II.B, discussing *Extracting Books (Open-Weight)*, *supra* note 12. *See generally* A. Feder Cooper, Jonathan Frankle & Christopher De Sa, *Non-Determinism and the Lawlessness of Machine Learning Code* (discussing how hardware and other computational realities impact non-determinism), *in* PROCEEDINGS OF THE 2022 SYMPOSIUM ON COMPUTER SCIENCE AND LAW 1 (Ass'n for Computing Mach. 2022).

determines which of the (typically) many[44] possible continuations represented by the model are realized in any particular output.[45]

Seen in this way, it becomes clear why analogies between models and traditional databases can be misleading. Language models don't store responses in a discrete, localized way and then deterministically return those responses.[46] Instead, they generate outputs from a probability distribution shaped by the training data, with decoding determining which continuation is actually produced in response to any given prompt. These two components—model weights and decoding procedures—together produce content in response to an initial prompt. This distinction is essential for understanding memorization and its relationship to model outputs.[47]

One final clarification is worth noting. The discussion above concerns language models in isolation—that is, the model as defined by its weights and the probability distribution those weights induce over token sequences. This is a useful description for understanding open-weight models, such as Meta's Llama models[48] and Alibaba's Qwen models,[49] which can be downloaded and used directly with a user's chosen decoding procedure.

In practice, however, many end users interact with language models that are embedded within larger proprietary systems: software services deployed as products like Claude or ChatGPT. These systems generally include additional components that constrain or otherwise shape the outputs returned to users such as prompt processing or output filtering. As a result, for these systems, decoding is not the only mechanism that determines outputs; system-level features also play a significant role.[50] Those features may mean that a model actually deployed to the public may not return a particular output to end users even though the model has memorized the content of that output.

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44. Memorization, as we will see soon, is an exception to this: for memorized sequences, there are *not* always "many possible continuations" for reasonable decoding procedures; rather, there may effectively only be *one* or a handful of possible continuation. *See infra* Section II.B.

45. *See* Cooper & Grimmelmann, *supra* note 9, at 151–52, 151 nn. 32–33, 152 nn.35–38.

46. *See id.* at 189–90.

47. *See infra* Section II.B. Memorization is compressed information—it's compressed storage—of specific training data in the model; extraction effectively reads those compressed stored data out of the model as output.

48. *See generally* Aaron Grattafiori et al., The Llama 3 Herd of Models (Nov. 23, 2024) (unpublished manuscript), https://arxiv.org/pdf/2407.21783 [https://perma.cc/3H2V-M3BD].

49. *See generally* An Yang et al., Qwen2.5 Technical Report (Jan. 3, 2025) (unpublished manuscript), https://arxiv.org/pdf/2412.15115 [https://perma.cc/J8EN-HNEP].

50. For a significantly more detailed treatment on this topic, we refer to Cooper & Grimmelmann, *supra* note 9. Here, we try to pare things down to what we consider the absolute minimum information needed to dispel misunderstandings of metaphors about "memorization" and "compression." *See infra* Section II.C.

B. Memorization in the Model, Extraction in Model Outputs

Following from above, we can now explain what the machine learning literature refers to as "memorization."[51] In the discussion that follows, a key takeaway is that, when it comes to memorization, it isn't possible to make broad generalizations about AI, or even generalizations about a specific AI model with respect to all the training data it's been trained on.

As detailed above, a trained language model defines a probability distribution over token sequences, where that distribution is learned from the training data. The technical notion of memorization can be understood as a property of that distribution: loosely speaking, memorization is when, based on its training, the model places unusually high probability on specific sequences from its training data. Thus, those sequences are far more likely to appear in the output than alternatives. This doesn't mean the model ceases to be probabilistic; it still defines a probability distribution and may still give non-zero probability to many possible sequences. But the distribution is so sharply peaked that one sequence dominates.[52]

This is what is meant, in a technical sense, when we and others in the machine learning community say that memorized training data are encoded in the model.[53] In that same technical sense, the point is closely related to compression, which helps make the claim more precise. As noted above, learning involves compression: a high-quality trained model stores a compact internal representation of the data that is sufficient for accurate prediction.[54] That compressed representation may capture broad patterns or abstractions, rather than preserving much that is specific to any particular training sequence. This is the intuition behind Ted Chiang's description of ChatGPT as a "blurry JPEG of

51. To understand "sharply peaked": imagine rolling a weighted die, where there's a 95% chance of rolling 3, and the remaining 5% is shared among 1, 2, 4, 5, and 6. This intuition, while useful, is also a simplification in several respects. Scientific research shows that memorized sequences need not be verbatim copies of training data, but may instead be very close variants (e.g., the memorized sequence replaces a comma with a semi-colon). In fact, many near-exact variants may be memorized simultaneously: a model may concentrate probability on a set of such near-verbatim sequences, for example, sequences that differ only in punctuation or exhibit minor syntactic variation. This is still memorization. More broadly, the scientific understanding of memorization continues to evolve. The account here is intended as a high-level description of the aspects that are relevant for copyright. *See* Daphne Ippolito, Florian Tramèr, Milad Nasr, Chiyuan Zhang, Matthew Jagielski, Katherine Lee, Christopher A. Choquette Choo & Nicholas Carlini, *Preventing Generation of Verbatim Memorization in Language Models Gives a False Sense of Privacy* (arguing that "verbatim memorization definitions are too restrictive and fail to capture more subtle forms of memorization"), *in* PROCEEDINGS OF THE 16TH INTERNATIONAL LANGUAGE GENERATION CONFERENCE 28, 28 (C. Maria Keet, Hung-Yi Lee & Sina Zarrieß eds., 2023). *See generally Near-Verbatim*, *supra* note 13 (developing new search models to understand near-verbatim extraction risk).

52. *See, e.g.*, *Extracting Training Data from LLMs*, *supra* note 11; *Extracting Training Data from Diffusion Models*, *supra* note 15; Nasr et al., *supra* note 12; *Carlini Blog*, *supra* note 15; *Extracting Books (Open-Weight)*, *supra* note 12; *Near-Verbatim*, *supra* note 13; Franceschelli et al., *supra* note 15; Cooper & Grimmelmann, *supra* note 9.

53. *See* Delétang et al., *supra* note 29; First Amended Complaint, *supra* note 36, at 27.

54. *See* Delétang et al., *supra* note 29, at 1–3.

all the text on the Web."[55] But memorization reveals the limits of that analogy: in certain cases, compression preserves particular training data with high fidelity. As Cooper & Grimmelmann write, it is perhaps best to

> . . . refine Chiang's blurry JPEG compression analogy: not all parts of the JPEG are equally or completely blurry. Some training data are compressed more than others, and compression happens in different ways. Some of the compression is lossy: the information is discarded or transformed. But the portions that contain exact memorization are lossless [compression] and the portions that contain near-exact memorization are nearly lossless [compression.][56]

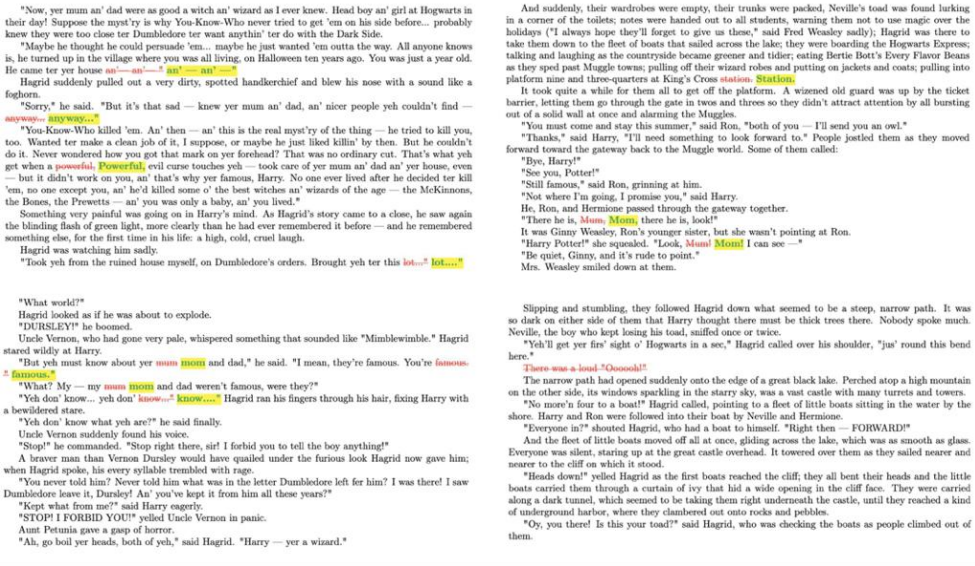
So far, we haven't said much about model outputs; what we've just described—memorization—is a property of the model itself. This property is not directly observable. As discussed in Section II.A, the internal structure of models is difficult to interpret, and so we typically can't identify where or how particular information is stored, including memorized training data. As a result, memorization in generative AI is usually studied through the outputs that a model produces under carefully chosen conditions. This isn't because outputs define memorization, but because they provide a way of observing a property of the model that would otherwise remain hidden.

Figure 2: Four portions of the text of Harry Potter and the Sorcerer's Stone, generated by the authors using Llama 3.1 70B. Highlighting shows differences between the generation and ground-truth text from Books3. Black text is identical across both texts. Text crossed out in red indicates ground-truth text from the book absent in the generation. Text highlighted in yellow is present in the generation, but absent from the ground-truth book. Note that this visual diffing procedure is sensitive to benign formatting differences. These four samples highlight different types of variations we observe between the ground-truth book and the generation. The large majority are formatting differences and British-versus-American English localization changes. (We have the British version available to us from Books3, but Llama 3.1 70B generated the book with American spelling.) Overall, simple quantitative metrics comparing syntactic similarity for the generated text and the ground-truth book yield a 99.2% match. This is why we say that our results produced a near-exact copy of the entire book.

55. Ted Chiang, *ChatGPT is a Blurry JPEG of the Web*, NEW YORKER (Feb. 9, 2023), https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web.

56. *See* Cooper & Grimmelmann, *supra* note 9, at 188–89. We discuss the difference between lossy and lossless compression *infra* notes 101–03 and accompanying text.

Images drawn from Cooper et al. Extracting memorized pieces of (copyrighted) books from open-weight language models; reprinted with permission.



"Now, yer mum an' dad were as good a witch an' wizard as I ever knew. Head boy an' girl at Hogwarts in their day! Suppose the myst'ry is why You-Know-Who never tried to get 'em on his side before... probably knew they were too close ter Dumbledore ter want anythin' ter do with the Dark Side.

"Maybe he thought he could persuade 'em... maybe he just wanted 'em outta the way. All anyone knows is, he turned up in the village where you was all living, on Halloween ten years ago. You was just a year old. He came ter yer house an'—an'—an' an' — an'—"

Hagrid suddenly pulled out a very dirty, spotted handkerchief and blew his nose with a sound like a foghorn.

"Sorry," he said. "But it's that sad — knew yer mum an' dad, an' nicer people yeh couldn't find — anyway... anyway..."

"You-Know-Who killed 'em. An' then — an' this is the real myst'ry of the thing — he tried to kill you, too. Wanted ter make a clean job of it, I suppose, or maybe he just liked killin' by then. But he couldn't do it. Never wondered how you got that mark on yer forehead? That was no ordinary cut. That's what yeh get when a powerful, Powerful, evil curse touches yeh — took care of yer mum an' dad an' yer house, even — but it didn't work on you, an' that's why yer famous, Harry. No one ever lived after he decided ter kill 'em, no one except you, an' he'd killed some o' the best witches an' wizards of the age — the McKinnons, the Bones, the Prewetts — an' you was only a baby, an' you lived."

Something very painful was going on in Harry's mind. As Hagrid's story came to a close, he saw again the blinding flash of green light, more clearly than he had ever remembered it before — and he remembered something else, for the first time in his life: a high, cold, cruel laugh.

Hagrid was watching him sadly.

"Took yeh from the ruined house myself, on Dumbledore's orders. Brought yeh ter this lot..." lot...."

"What world?"

Hagrid looked as if he was about to explode.

"DURSLEY!" he boomed.

Uncle Vernon, who had gone very pale, whispered something that sounded like "Mimblewimble." Hagrid stared wildly at Harry.

"But yeh must know about yer mum mom and dad," he said. "I mean, they're famous. You're famous. " famous."

"What? My — my mum mom and dad weren't famous, were they?"

"Yeh don' know... yeh don' know..." know...." Hagrid ran his fingers through his hair, fixing Harry with a bewildered stare.

"Yeh don' know what yeh are?" he said finally.

Uncle Vernon suddenly found his voice.

"Stop!" he commanded. "Stop right there, sir! I forbid you to tell the boy anything!"

A braver man than Vernon Dursley would have quailed under the furious look Hagrid now gave him; when Hagrid spoke, his every syllable trembled with rage.

"You never told him? Never told him what was in the letter Dumbledore left fer him? I was there! I saw Dumbledore leave it, Dursley! An' you've kept it from him all these years?"

"Kept what from me?" said Harry eagerly.

"STOP! I FORBID YOU!" yelled Uncle Vernon in panic.

Aunt Petunia gave a gasp of horror.

"Ah, go boil yer heads, both of yeh," said Hagrid. "Harry — yer a wizard."

And suddenly, their wardrobes were empty, their trunks were packed, Neville's toad was found lurking in a corner of the toilets; notes were handed out to all students, warning them not to use magic over the holidays ("I always hope they'll forget to give us these," said Fred Weasley sadly); Hagrid was there to take them down to the fleet of boats that sailed across the lake; they were boarding the Hogwarts Express; talking and laughing as the countryside became greener and tidier; eating Bertie Bott's Every Flavor Beans as they sped past Muggle towns; pulling off their wizard robes and putting on jackets and coats; pulling into platform nine and three-quarters at King's Cross station. Station.

It took quite a while for them all to get off the platform. A wizened old guard was up by the ticket barrier, letting them go through the gate in twos and threes so they didn't attract attention by all bursting out of a solid wall at once and alarming the Muggles.

"You must come and stay this summer," said Ron, "both of you — I'll send you an owl."

"Thanks," said Harry, "I'll need something to look forward to." People jostled them as they moved forward toward the gateway back to the Muggle world. Some of them called:

"Bye, Harry!"

"See you, Potter!"

"Still famous," said Ron, grinning at him.

"Not where I'm going, I promise you," said Harry.

He, Ron, and Hermione passed through the gateway together.

"There he is, Mum, Mom, there he is, look!"

It was Ginny Weasley, Ron's younger sister, but she wasn't pointing at Ron.

"Harry Potter!" she squealed. "Look, Mum! Mom! I can see —"

"Be quiet, Ginny, and it's rude to point."

Mrs. Weasley smiled down at them.

Slipping and stumbling, they followed Hagrid down what seemed to be a steep, narrow path. It was so dark on either side of them that Harry thought there must be thick trees there. Nobody spoke much. Neville, the boy who kept losing his toad, sniffed once or twice.

"Yeh'll get yer firs' sight o' Hogwarts in a sec," Hagrid called over his shoulder, "jus' round this bend here."

There was a loud "Oooooh!"

The narrow path had opened suddenly onto the edge of a great black lake. Perched atop a high mountain on the other side, its windows sparkling in the starry sky, was a vast castle with many turrets and towers.

"No more'n four to a boat!" Hagrid called, pointing to a fleet of little boats sitting in the water by the shore. Harry and Ron were followed into their boat by Neville and Hermione.

"Everyone in?" shouted Hagrid, who had a boat to himself. "Right then — FORWARD!"

And the fleet of little boats moved off all at once, gliding across the lake, which was as smooth as glass. Everyone was silent, staring up at the great castle overhead. It towered over them as they sailed nearer and nearer to the cliff on which it stood.

"Heads down!" yelled Hagrid as the first boats reached the cliff; they all bent their heads and the little boats carried them through a curtain of ivy that hid a wide opening in the cliff face. They were carried along a dark tunnel, which seemed to be taking them right underneath the castle, until they reached a kind of underground harbor, where they clambered out onto rocks and pebbles.

"Oy, you there! Is this your toad?" said Hagrid, who was checking the boats as people climbed out of them.

To make this concrete, we turn to a notable example of memorization identified in our own prior work.[57] By studying the outputs of open-weight, non-chatbot[58] models—models that are widely available for download—we found that these models have memorized significantly more text from books in their training data than was previously understood. In an extreme instance, prompting Meta's Llama 3.1 70B model with just a short snippet from the opening of *Harry Potter and the Sorcerer's Stone* was sufficient to generate a near-exact copy of the entire 304-page book. For behavior like this, the only reasonable explanation is memorization of the book from the training data.[59] Figure 2 shows what we mean by near-exact: for four portions of the generated text, it shows the

57. *See Extracting Books (Open-Weight)*, *supra* note 12, at 13–15.

58. These are models that have not been fine-tuned, aligned, or otherwise post-trained to behave like conversational chatbots. See *Talkin'*, *supra* note 20, at 286–88, laying out the generative AI supply chain, including model training, fine tuning, and alignment, and *id.* at 306–307, for a more detailed discussion of model alignment. It's possible that models are aligned or fine-tuned in other ways than to make them chatbot-like. This makes the model different from the original base model from pre-training —it's no longer a base model—even though it isn't a chatbot. This complexity is why we inelegantly refer to the type of model we're talking about as a "non-chatbot model." For more on this regarding open-weight models like Llama 2 70B (which is base model) and Llama 3.1 70B (which is not, because it underwent some post-training, even though it's not a chatbot), see *Extracting Books (Open-Weight)*, *supra* note 12, at 6–8. These models are both different from their "Instruct" variants (e.g., Llama 2 70B Instruct, Llama 3.1 70B Instruct), which are chatbots derived from their respective non-chatbot models. All of these are LLMs, and they're all available for commercial use.

59. For an exhaustive treatment of this, see *Extracting Books (Open-Weight)*, *supra* note 12, at 163–81; *see also Carlini Blog*, *supra* note 15; Cooper & Grimmelmann, *supra* note 9.

differences between the generated text and the reference, ground-truth text we have available from the Books3 corpus.[60] Using the same code with Llama 3.1 70B and a prompt of only the first sentence, we also generated hundreds of pages of George Orwell's *Nineteen Eighty-Four* near-verbatim.

This behavior can be understood in terms of the probability distribution defined by the model. Starting from this very short prompt, the next tokens in the original text have overwhelmingly higher probability than plausible alternatives. Figure 1 provides a simplified illustration for *Harry Potter and the Sorcerer's Stone*, showing the prompt, the model's highest-probability tokens at each step, and the token actually selected during decoding. The ground-truth text from the book consistently has by far the highest probability. The distribution is so sharply peaked that, in practice, the generated output tracks the memorized text. For Llama 3.1 70B, this is true throughout *Harry Potter and the Sorcerer's Stone*,[61] such that it is possible to deterministically reproduce the entire book. This type of behavior—the generation of memorized training data in model outputs—is commonly referred to in the machine learning literature as "extraction."[62]

Figure 3: Running the same long-form extraction procedure on Sandman Slim. The blue text is the prompt we provided, which is the first few sentences of Richard Kadrey's book. The black text is the generation. We tried prompts of various lengths, but produced no generations that were near-verbatim reproductions of text in the ground-truth book. This experiment doesn't show successful extraction of memorized training data. (Interestingly, though, the

60. The Books3 corpus contains approximately 200,000 torrented ebooks, converted to text-format for the purpose of LLM training. Alex Reisner, *Revealed: The Authors Whose Pirated Books are Powering Generative AI*, THE ATLANTIC (Sep. 25, 2023, at 13:40 ET), https://www.theatlantic.com/technology/archive/2023/08/books3-ai-meta-llama-pirated-books/675063/ (on file with the Berkeley Technology Law Journal); *see Talkin'*, *supra* note 20, at 37–39, 113–14. *See generally* Katherine Lee, A. Feder Cooper, James Grimmelmann & Daphne Ippolito, AI and Law: The Next Generation (Oct. 19, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4580739 (on file with the Berkeley Technology Law Journal) (describing pre-training datasets, including Books3).

61. The probabilities are so high that we are able to deterministically decode the whole book using a decoding algorithm called beam search. *See Extracting Books (Open-Weight)*, *supra* note 12, at 1, 183.

62. *See generally* Cooper & Grimmelmann, *supra* note 9 (giving a more precise taxonomy of terms and unpacking some distinctions in the literature). Extraction is intentional prompting to attempt to reproduce training data in outputs. Regurgitation is the unintentional reproduction of training data in outputs. The frequency of regurgitation in language models is poorly understood and not often studied in the literature. There are two exceptions (only sort of) in very limited and controlled research settings. *See generally* Michael Aerni, Javier Rando, Edoardo Debenedetti, Nicholas Carlini, Daphne Ippolito & Florian Tramèr, *Measuring Non-Adversarial Reproduction of Training Data in Large Language Models*, THIRTEENTH INT'L CONF. ON LEARNING REPRESENTATIONS, Feb. 11, 2025, art. 11752; Parjanya Prajakta Prashant, Kaustubh Ponkshe & Babak Salimi, *TokenSwap: A Lightweight Method to Disrupt Memorized Sequences in LLMs*, THIRTY-NINTH ANN. CONF. ON NEURAL INFO. PROCESSING SYS., Sep. 18, 2025, art. 21464. We defer to Cooper & Grimmelmann, *supra* note 9, for more precise treatment, but will call this extraction here.

generation does contain references to characters in the book, which we did not provide in the prompt: James Stark, Sandman Slim, etc.)

I WAKE UP on a pile of smoldering garbage and leaves in the old Hollywood Forever cemetery behind the Paramount Studio lot on Melrose, though these last details don't come to me until later. Right now all I know is that I'm back in the world and I'm on fire. My mind hasn't quite kicked in yet, but my body knows enough to roll off the burning trash and to keep rolling until I can't feel the heat anymore. I come to a stop against a gravestone and lie there for a moment, trying to remember how I got here and who I am. I don't always know right away. It's the amnesia. It's a hell of a way to travel, but it's better than being dead. Slowly, like dirty water dropping out of a rusty pipe, it comes back to me. My name is James Stark. Friends call me Sandman Slim. Call me what you like. I've been called worse. I got this name because all I do is bring nightmares. True, I spend a lot of time in the City of Angels, but it's not like they're putting up a statue to me. Before this, I lived in Hell for eleven years. Even when I tried to stay out of trouble, trouble would come right to my door and make friends. That kind of thing has a way of making a man a little jaded when it comes to trusting his fellow man. Or demons. Even angels. I'm like that. I've got a bad attitude. I drink. I've been kicked out of every twelve-step program I've ever joined. I don't have many friends, so the ones I have mean a lot to me. They mean enough that if someone hurts them, I'll tear the universe down to save them. I'm telling you this so you'll know who I am and what I'm talking about when I say there are things in the dark. Things we don't always see that move among us. Some of these things are good and some aren't and sometimes they do things that make you want to rip open your chest and pull out your heart because you've seen too much and there's no going back. I know about these things because I'm one of them. I'm a monster and I'm a killer. I'm good at it and I never let emotion get in the way. When you live where I live, love can get you killed. And when it doesn't, it's worse because if you don't die, you just wish

Extraction isn't always possible. Models frequently generate text that doesn't reproduce memorized training data. As a counterpoint to the Harry Potter example, consider our attempt to apply a similar procedure for another Kadrey v. Meta book, Richard Kadrey's Sandman Slim, which we illustrate in Figure 3. We know that this book was in Llama's training data,63 so it's at least possible in principle for the model to have memorized text from it, just as it memorized the first Harry Potter book or Nineteen Eighty-Four. But in practice, using the same procedure, the model doesn't reproduce the book. Instead, it produces a range of plausible outputs, reflecting a distribution that isn't concentrated on any single sequence, let alone the ground-truth text from the training data.

These contrasting examples illustrate an important point: memorization isn't a uniform phenomenon that applies equally across a model's training data. Some training data are memorized, while others aren't. Extraction is an imperfect tool for measuring memorization:[64] it can, by definition, only produce sequences that have been memorized,[65] and not all memorized training data are necessarily

63. Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026, 1042 (N.D. Cal. 2025).

64. Specific extraction procedures are selective in additional ways. For instance, a given procedure may test only a certain set of prompts, and miss identifying memorization that other prompts would have revealed. Research using greedy decoding misses large amounts of extraction that ours and others' work has identified using probabilistic extraction, and so on. See *Extracting Books (Open-Weight)*, *supra* note 12, at 186–88; *Near-Verbatim*, *supra* note 13, at 8–10.

65. An important consideration here is that the measurement procedure for extraction has to be *valid*. If it isn't valid, then the "extraction" procedure could produce outputs that are not actually extraction, but chance generation of *non*-training data that would erroneously get interpreted as evidence of memorization. For rigorous scientific work on extraction and memorization, this is not an issue. Nevertheless, not all published work in the technical literature meets this bar. The invalidity of some work that calls itself "extraction" does not cut against the validity of work that rigorously studies extraction. However, it's important to be vigilant about this when assessing extraction claims. This of course isn't unique to extraction; distinguishing between valid and invalid measurement methodologies

extractable.[66] In this second sense, extraction is an imperfect measurement tool: it provides evidence of memorization where it succeeds, but its failure doesn't necessarily imply that memorization hasn't occurred. Memorization isn't a Schrödinger's-cat-like situation: memorized training data do not both exist and not exist depending on whether they're observed. Training data may or may not be encoded in the model; and if they are, they are there regardless of whether they can be extracted and whether we can prove it.[67]

Further, models don't all compress information about their training data in the same way. Sometimes they capture high-level relationships across data points without memorizing specific text sequences, and sometimes they encode specific sequences (i.e., memorize them). Sometimes memorized training data can be extracted deterministically, and sometimes only probabilistically, with varying frequency.[68] These details—the probabilistic elements, how compression works, etc.—are the core of the issue and can't be abstracted away.[69]

But even with this clarifying perspective, much about memorization remains poorly understood. Some factors, such as duplication of sequences in training data, are known to increase the likelihood of memorization.[70] However, in general, there is no single answer to how much memorization occurs, or precisely when and why it arises, in part because our tools for measuring it are imprecise at best. For instance, some prior estimates suggest that somewhere between 0.1% and 10% of training data sequences may be memorized by language models.[71] While these numbers might sound like firm, general, authoritative claims, they are in fact based on very specific experimental

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and resulting claims is a challenge for empirical sciences, more generally. *See generally* A. Feder Cooper, Marika Swanberg, Jamie Hayes, Lea Duesterwald, Christopher De Sa, Daniel E. Ho, Mark A. Lemley & Percy Liang, Extractable Memorization from First Principles (July 14, 2026) (unpublished manuscript) [hereinafter First Principles], https://arxiv.org/pdf/2607.12649 [https://perma.cc/9C7F-KTJR].

66. Cooper & Grimmelmann, *supra* note 9, at 177–78; Nasr et al., *supra* note 12, at 1 (distinguishing discoverable and extractable memorization); *see* First Principles, *supra* note 65, at 4.

67. See *infra* Section II.C for a discussion of how this point is frequently misunderstood: extraction doesn't determine memorization (this flips the relevant direction); memorization is a prerequisite for extraction.

68. *See* Jamie Hayes, Marika Swanberg, Harsh Chaudhari, Itay Yona, Ilia Shumailov, Milad Nasr, Christopher A. Choquette-Choo, Katherine Lee & A. Feder Cooper, *Measuring Memorization in Language Models via Probabilistic Extraction*, *in* 1 PROCEEDINGS OF THE 2025 CONFERENCE OF THE NATIONS OF THE AMERICAS CHAPTER OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: HUMAN LANGUAGE TECHNOLOGIES 9266 (NAACL 2025). *See generally Near-Verbatim*, *supra* note 13.

69. *See* Cooper & Grimmelmann, *supra* note 9, at 197 ("[T]he probabilistic element . . . is inescapable.").

70. *Deduplicating*, *supra* note 11, at 7.

71. *See* Cooper & Grimmelmann, *supra* note 9, at 201–04; Nasr et al., *supra* note 12, at 15 ("[T]his means that approximately 10% of the entire model capacity is 'wasted' on verbatim memorized training data.").

setups.[72] They are average estimates computed using specific extraction procedures on particular models and datasets.

Changing any of these factors—the extraction method, the model, or the training data of interest—can significantly affect the results. Much of the early work relied on greedy decoding to measure extraction, which selects the highest-probability token at each decoding step.[73] More recent approaches allow for more realistic non-deterministic decoding schemes and repeated sampling from the same prompt, which can reveal additional instances of memorization that greedy methods miss.[74] In our own work, we quantify how running the same prompt hundreds or thousands of times can produce verbatim extraction of copyrighted text in some runs,[75] but for many works, a single verbatim extraction of fifty tokens from a work might be accompanied by hundreds of outputs that are not verbatim extractions.[76] And our more recent work shows that even these newer approaches undercount the extent of memorization, because many of the "failures" to extract a sequence in fact generate near-verbatim copies of that sequence.[77]

What we *can* say with some confidence from the empirical extraction literature is that memorization doesn't reduce to a simple story. It's not correct to conclude either that AI models always memorize specific content or that they almost never do. Instead, the extent and specificity of memorization vary

72. For example, Morris et al. make an aggregate claim that models in the GPT family have a 3.6 bits-per-parameter memorization capacity. *See generally* John X. Morris, Chawin Sitawarin, Chuan Guo, Narine Kokhlikyan, G. Edward Suh, Alexander M. Rush, Kamalika Chaudhuri & Saeed Mahloujifar, How Much Do Language Models Memorize? (June 18, 2025) (unpublished manuscript), https://arxiv.org/pdf/2505.24832 [https://perma.cc/3ZGD-8RRQ]. This result is derived with respect to a very specific experimental training conditions for small models—a setup that is significantly different from those used to train production LLMs. *See id.* at 2. So while this work offers a precise scientific claim, in isolation, it is easy to misconstrue the "3.6 bits" number as a general claim about LLMs, as in this news coverage of the scientific paper: Carl Franzen, *How Much Information Do LLMs Really Memorize? Now We Know, Thanks to Meta*, *Google, Nvidia and Cornell*, VENTUREBEAT (June 5, 2025, at 08:35 PT), https://venturebeat.com/technology/how-much-information-do-llms-really-memorize-now-we-know-thanks-to-meta-google-nvidia-and-cornell [https://perma.cc/F8ML-TN9K]. *See generally* First Principles, *supra* note 65 (concerning how the practical setup for extraction experiments influences conclusions about memorization).

73. *See supra* Section II.A (defining greedy decoding); *Deduplicating*, *supra* note 11, at 5–6; Petko Georgiev et al., Gemini 1.5: Unlocking Multimodal Understanding Across Millions of Tokens of Context 1–2 (Dec. 16, 2024) (unpublished manuscript), https://arxiv.org/pdf/2403.05530 [https://perma.cc/WS3W-5AEJ]; Grattafiori et al., *supra* note 48, at 3; Morgane Riviere et al., Gemma 2: Improving Open Language Models at a Practical Size (Oct. 2, 2024) (unpublished manuscript), https://arxiv.org/pdf/2408.00118 [https://perma.cc/8DGG-2BKY].

74. *See generally* Hayes et al., *supra* note 68.

75. This work validates that it's actually capturing extraction, as opposed to chance generation that resembles training data. We defer the details to that work, but emphasize here that generating training data one out of every 1,000 attempts with the same prompt is strong evidence for memorization in the work we conduct. *See Extracting Books (Open-Weight)*, *supra* note 12, at 11; *see also* First Principles, *supra* note 65, at 12–14 (establishing standards for evaluating claims of memorization).

76. *See Near-Verbatim*, *supra* note 13, at 18–19.

77. *Id.*

significantly across models (e.g., Llama versus Qwen), across versions within the same model family (e.g., Llama 2 versus Llama 3), across model sizes (e.g., Llama 2 7B versus Llama 2 70B), and across individual works for a given model.[78] And for models that are part of deployed AI systems, additional system-level factors further affect whether memorized training data are observed in outputs.[79] As recent work shows, it's definitely possible to extract some copyrighted training data, but, depending on the system, this can require different methods altogether.[80] So, in practice, when it comes to memorization it isn't possible to make broad generalizations about AI, or even generalizations about a specific AI model with respect to all the training data it's been trained on.

C. Metaphors, Misunderstandings, and the Problem of Dismissing Technical Precision

Having gone beneath the metaphorical surface of terms like memorization and compression, it should now be clearer why those terms are not exhausted by their lay interpretations.[81] In machine learning, they name technical phenomena. The mistake, then, is not merely to notice that the metaphors are imperfect—they very much are. It is to treat that imperfection as a reason to discount or abstract away the technical particulars.

A model is not literally arranged like a filesystem or a database. But that doesn't really matter,[82] and that also doesn't mean it stores nothing.[83] It stores

78. Nicholas Carlini, Daphne Ippolito, Matthew Jagielski, Katherine Lee, Florian Tramer & Chiyuan Zhang, Quantifying Memorization Across Neural Language Models, ELEVENTH INT'L CONF. ON LEARNING REPRESENTATIONS, Jan. 14, 2026, at 1; Hayes et al., *supra* note 68; *Near-Verbatim*, *supra* note 13 (discussing probabilistic extraction and near-verbatim probabilistic extraction, for the same point). *See generally Extracting Books (Open-Weight)*, *supra* note 12 (providing a books-specific variation in memorization claims, across books, models, model sizes, and versions).

79. *See* Cooper & Grimmelmann, *supra* note 9, at 215–17 (discussing system-level modifications that can prevent memorized training data from being produced to the user even if it is generated by the model); *Machine Unlearning*, *supra* note 29, at 5.

80. *See* Nasr et al., *supra* note 12, at 9 (causing a "divergence" jailbreak by asking the model to repeat the same word forever, e.g., "poem," resulted in some outputs leaking verbatim training data from ChatGPT 3.5). To extract copyrighted books from proprietary models, Ahmed et al. used jailbreaks to elicit memorization from ChatGPT 4.1 and Claude 3.7 Sonnet, but did not need to jailbreak Grok 3 or Gemini 2.5 Pro to elicit enormous amounts of copyrighted material. *See* Extracting Books (Production LLMs), *supra* note 13, at 1. In all cases, they were able to bypass content filters to reproduce copyrighted material in system outputs). *See id*. at 5–7.

81. *See supra* Section II.A.

82. See *infra* Section III.A and *infra* note 97.

83. *See generally* Aline Larroyed, The Fallacy of the File: How the Memorisation Metaphor Misguides Copyright Law and Stifles AI Innovation (Nov. 21, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5782882 (on file with the Berkeley Technology Law Journal) (conflating the technical details of memorization with the metaphorical aspects of the term memorization, taking the metaphor in the title of Cooper & Grimmelmann's *The Files Are in the Computer: On Copyright, Memorization, and Generative AI* too literally, taking the term "memorisation" only on metaphorical rather than technical terms, and then arguing that because memorization is both metaphorical and not exactly like file storage, it's irrelevant to copyright).

information, in bits, in a technically meaningful sense.[84] In the case of memorized training data that can be extracted, information about those data is encoded in the model's weights with enough fidelity to make those data recoverable in outputs. Extraction is important for precisely that reason: it's evidence of training data that are encoded in the model's weights; it "is a symptom of memorization in the model, not its cause."[85] One therefore can't take extraction seriously while setting aside the memorization in the model, because the former is only possible because of the latter.

It's also true that training a model isn't literally like creating a ZIP file or converting a song into MP3 format, and so thinking about learning and compression in those terms can be misleading. But that observation addresses only the everyday analogy and the possible misuse courts or litigants might make of it; it doesn't address the underlying technical claim.[86] In cases of memorization, compression preserves certain specific training data with high fidelity. For that reason, compression helps explain what has been retained in the model and why some memorized training data may later be more readily recoverable than others.[87]

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84. *See generally* Delétang et al., *supra* note 29; Zhiying Jiang, Matthew Yang, Mikhail Tsirlin, Raphael Tang, Yiqin Dai & Jimmy Lin, *"Low Resource" Text Classification: A Parameter-Free Classification Method with Compressors*, *in* FINDINGS OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: ACL 2023, at 6810 (Anna Rogers, Jordan Boyd-Graber & Naoaki Okazaki eds., 2023); THOMAS M. COVER & JOY A. THOMAS, ELEMENTS OF INFORMATION THEORY 103–58 (2d ed. 2006).

85. Cooper & Grimmelmann, *supra* note 9, at 142. See *supra* Section II.B for this point; *see also* Adi Haviv, Niva Elkin-Koren, Uri Hacohen, Roi Livni & Shay Moran, We Should Separate Memorization from Copyright 4–5 (Feb. 9, 2026) (unpublished manuscript), https://arxiv.org/pdf/2602.08632 [https://perma.cc/6LV5-565A]. Haviv et al. emphasize that model weights aren't directly interpretable and that training data aren't stored in a database-like or file-like format. Haviv et al., *supra*, at 5. Then, from that basis, they cast extraction as too mediated by prompts and prior knowledge to be evidence of memorization encoded in the model itself. *Id.* They explain that point by analogy to fMRI reconstructions: brain signals may contain information about an image, but the recognizable image emerges only after a separate reconstruction step infers an image-like output from those signals. *Id.* But that analogy reverses a basic causal point. Prompts and prior knowledge bear on the conditions under which memorized training data becomes observable, not on whether those training data were encoded in the model in the first place. A selective or prompt-dependent extraction result shows only that memorized information isn't uniformly decodable from the model's weights; it doesn't show that the information was supplied by the extraction procedure rather than encoded through training. Indeed, properly validated extraction procedures are designed to rule out the prompt itself as the source of the recovered material. *See Extracting Books (Open-Weight)*, *supra* note 12, at 1–2, 4–5. The fMRI comparison is therefore misleading here. An fMRI scanner produces only an indirect physiological trace, and the recognizable image appears only after a separate system maps that trace back into the image space. By contrast, in extraction, there's no separate reconstruction system generating the recovered content: the model being studied generates the sequence itself.

86. See Sag, *supra* note 39, at 38–39, recognizing that there are instances of memorization—the technical model behavior—that are salient to copyright law; but rejecting the "fallacy of compression" on analogical grounds because "compression" invokes things like MP3 files in ordinary meaning. In doing so, the paper doesn't directly engage the technical aspects of compression and memorization that it simultaneously treats as relevant to copyright. *Id.*

87. *See generally* Hayes et al., *supra* note 68; *Near-Verbatim*, *supra* note 13.

The point, then, is not to discard terms like memorization and compression because their everyday meanings are imperfect guides to how generative AI works. It's to engage them on their technical particulars, as we have done here, because doing so reveals details about what's in the model and what may be recovered in outputs—details that matter for legal analysis. Part II turns to those consequences for copyright.

III. THE LEGAL COMPLICATIONS OF A "COPY"

Part I showed that memorization presents several technical uncertainties. New extraction methods continue to reveal memorized material that earlier methods may not expose, making it difficult to say with confidence that a particular piece of training data definitively hasn't been memorized by a particular model. And where extraction is possible, in some cases it may occur only probabilistically, rather than being deterministically guaranteed. To these technical uncertainties, we now add a discussion of legal uncertainty.

It's unclear how the definition of a "copy" applies to the storage of information that can sometimes be used probabilistically to generate identical or substantially similar outputs in response to a prompt. As discussed below, we can't simply rely on the statutory definition of a copy, in part because it is itself internally self-contradictory. And while courts have applied it to a variety of situations, they haven't confronted one quite like this before. How the courts decide to treat stored model weights that can be used to probabilistically generate different outputs,[88] some but not all of which correspond to prior works, will have significant consequences for the potential liability of AI companies, the viability of open-source business models, the feasibility of efforts to minimize output infringement, and the feasibility of licensing efforts.

A. The Statute Doesn't Tell Us Whether Model Weights Are a Copy

Section 101 of the Copyright Act is normally quite a good guide to the meaning of terms. Unfortunately, that's not true here.

We begin with a significant problem, albeit one tangential to our issue: the definition of copy in the Act is self-contradictory.[89] Read literally, nothing can possibly be an infringing copy. Section 106 says "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1)

88. And, in some cases, deterministically the same output. *See supra* Section II.A (defining greedy decoding); *supra* Figure 1.

89. This hasn't really been discussed in the prior literature. Tony Reese and Tyler Ochoa advert to the confusing language in footnotes. *See* R. Anthony Reese, *Public Display Right*, 2001 U. ILL. L. REV. 83, 127 n.171 (2001); Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is* Galoob *a Mirage, or Does the* Form(gen) *of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 991, 997 n.26 (2004).

to reproduce the copyrighted work in copies."[90] So, not surprisingly, one infringes a copyright by making a copy. Section 101 defines "Copies" as "material objects, other than phonorecords, in which a work is fixed."[91] That means that transitory things like projection of a movie on a screen or data that transits a wire or radio waves in electronic form are not infringing copies. But section 101 also says that "a work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, *by or under the authority of the author*, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[92]

Putting those three together and taking only the literal language seriously, the only potentially infringing "copy" is one that is made "by or under the authority of the author"—and therefore is presumably not infringing.

To be clear, the point here is not that a court is likely to conclude that nothing is copyright infringement. Courts have consistently ignored (or perhaps not discovered) this problem in the statute and proceeded to declare infringing acts copies.[93] Rather, our point is that because the statute is incoherent on its face, we ultimately can't rely on plain meaning in interpreting the statute, and may need to turn to policy, logic, and the purpose of the law to understand it.[94]

At a minimum, though, the statute tells us that to be a copy, the copyrighted work in the model must be fixed in a material object. Computers definitely count as material objects,[95] but there must be actual storage of the copyrighted work in the computer, not just the potential for the computer to generate the work.

That storage need not look like the object in the real world. It's well established that a computer that stores a book or a movie in the form of electrical impulses that translate to 1s and 0s still contains a copy. The definition of a copy addresses this directly; a copy is a material object "in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[96] So it's certainly possible that a work could be

90. 17 U.S.C. § 106.

91. § 101.

92. *Id.* (emphasis added).

93. The problem arises from the perhaps unfortunate choice to define "copy" as central to both copyrightability and infringement without distinguishing the two. For a discussion, see PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.1 (3d ed. 2026-2 Supp. 2026).

94. It also is yet another piece in the mountain of evidence that "plain meaning" is a rather foolish doctrine to adhere to blindly. But that's beyond the scope of the paper.

95. Congress amended the Copyright Act in 1980 to add a definition of computer programs, and the legislative history indicates an intent that a computer program be treated as a literary work, but curiously the amended statute nowhere says as much.

96. 17 U.S.C. § 101.

"fixed" in a series of model weights—*if* it can reliably be perceived or reproduced from those model weights.[97]

B. The Challenge of Non-Deterministic Instantiations

The embodiment of the work must actually exist in the model in some semi-permanent form. The statute says the embodiment in a material object must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated."[98] That turns out to be a key question for a non-deterministic technology like generative AI. In many prior technologies, the embodiment in a computer was encoded, but often deterministic: the same compiled code would create the same result by calling on the same 1s and 0s each time. That deterministic reproduction is what people had in mind when talking about fixation in a computer in the 1976 Copyright Act.[99] If we think the AI is calling on a stored version of the work as a whole, that is clearly satisfied. (The scientific work in machine learning and extraction is consistent with this: there are bits stored in the model that encode memorized works, even if current scientific methods can't localize which model weights reflect that encoding.) If, however, we think the model is generating an output on the fly, it wouldn't be; the user is fixing—and therefore creating—the output by prompting the AI, which creates something new in response to the prompt.[100]

There are some prior technologies that sit somewhere in between those examples. One is "lossy compression." While some computer programs store information with perfect fidelity in a database, often that takes up too much memory. Compression technologies allow a computer to store a smaller subset of information corresponding to, say, a music file or a photograph and then reconstitute the full song or image from the compressed data.[101] Some

97. The definition of a computer program might also seem relevant here. A computer program is "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." *Id.* While that would seem to encompass model weights that generate a copyrighted output, the fact that the definition is nowhere connected to either copyrightability or infringement makes it less useful as a guide. *See generally* Cooper & Grimmelmann, *supra* note 9.

98. § 101.

99. *See* NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS (CONTU), FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 44 (1978) [hereinafter CONTU REPORT] ("In every case, the work produced will result from the contents of the data base, the instructions indirectly provided in the program, and the direct discretionary intervention of a human involved in the process."). CONTU rejected the idea that the computer itself could generate new content as "too speculative to require serious consideration." Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1195 (1986) (citing CONTU REPORT, *supra*, at 44). Samuelson notes that even in the 1980s that was incorrect in some cases: "Although both the programmer and user might contribute to the framework within which the computer makes its selections or arrangements of data, the computer actually makes the selection." *See id.* at 1199, 1201.

100. Samuelson, *supra* note 99, at 1202 ("[T]he user will have been the instrument of fixation for the work, that is, the person who most immediately caused the work to be brought into being.").

101. For a discussion of lossy compression in the AI context, see Cooper & Grimmelmann, *supra* note 9, at 188–89; and *supra* Section II.B.

compression is "lossless": the computer essentially has a shorthand way of storing a reference to all the information in the original file, and it expands that shorthand into the full information set on demand. Other compression is "lossy": we sacrifice some image quality and fidelity in order to store the image in a smaller amount of space. A file saved with lossy compression doesn't correspond exactly to the original work. Nonetheless, we would say a compressed file stored in a computer is a (partial) copy of the original work.[102] But the file, while an imperfect copy, is still deterministic, not probabilistic: the same file will generate the same imperfect copy every time.[103] A given model stored on a computer is also fixed; its weights don't change from one generation to the next. But because those weights encode probabilistic relationships, even where a model has memorized training data, extraction may in some cases occur only probabilistically: the same prompt may sometimes elicit the memorized material and sometimes not.

U.S. copyright law hasn't really had to confront whether copyrighted material that can be elicited from a computer system only probabilistically—appearing in some outputs but not others depending on the probabilities of each successive word appearing—is "fixed" in the sense required to qualify as a copy.[104] A computer program compiled from source code into object code (the

102. Many familiar file formats, like JPEG for images, are lossy. As a matter of information theory, it is an interesting problem how much information must be provided to "contain" a work. But this is out of our present scope. For a discussion, see generally Sarah Scheffler, Eran Tromer & Mayank Varia, *Formalizing Human Ingenuity: A Quantitative Framework for Copyright Law's Substantial Similarity*, *in* CSLAW '22: PROCEEDINGS OF THE 2022 SYMPOSIUM ON COMPUTER SCIENCE AND LAW 37 (Ass'n for Computing Mach. 2022).

103. Language modeling is compression in a precise information-theoretic sense: a probabilistic language model, paired with an appropriate coding scheme, induces a lossless compressor. This does *not* mean the model is a lossless archive of its training data. Rather, the claim is *distributional*: data drawn from the kind of distribution the model captures can be efficiently encoded *on average*. The underlying intuition is simple: predictable material takes less information to describe, and is therefore more compressible. So the better the model is at predicting what comes next, the fewer bits are needed to encode the resulting text, on average. In this sense, an LLM is an effective compressor because of its predictive capabilities. Importantly, this is *not* a claim that every piece of training data is encoded in a lossless or retrievable form, such that it can be reconstituted verbatim or near-verbatim in generation. Rather, verbatim and near-verbatim extraction reflects a specific, high-fidelity form of compression that is a hallmark of memorization, not of language modeling more generally. *See supra* Section II.B; Chiang, *supra* note 54, at 5; Getty Images (US) Inc v. Stability AI Limited [2025] EWHC (Ch) 2863 [555] (Eng.) ("[T]he model weights do not directly store the pixel values associated with billions of training images . . . . A single training image has only a limited impact on how the parameters of the network will be changed." (internal quotation marks omitted)). *See generally* Delétang et al., *supra* note 29.

104. A Munich court decision found that memorization did create a copy under EU copyright law, see Landgericht München I [LG München I] [Munich Regional Court I], Nov. 11, 2025, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1917 (2025) (Ger.), though that decision is currently under appeal. *See, e.g.*, Zbigniew Okoń, *Memoryzacja utworów przez modele AI w świetle unijnego prawa autorskiego* [*Memorization of Copyrighted Works by AI Models Under EU Law*], EUROPEJSKI PRZEGLĄD SĄDOWY [EUROPEAN JUD. REV.], no. 12, 2025, at 19 (Pol.), *translated in* Zbigniew Okoń, Memorization of Copyrighted Works by AI Models Under EU Law (Feb. 10, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6041395 (on file with

1s and 0s that actually operate the program) doesn't look anything like the source code that generated it. But the relationship between the two is designed to be deterministic: the object code is the predictable result of compiling that source code with a particular compiler. That determinacy is what makes the compiled program reliably produce the behavior one would expect from the written source code. Even versions that require more judgment, like language translations, are nonetheless instantiated in a permanent form: once made, the relationship between the original and the translation doesn't vary from one access to the next.

The closest cases to present issues of non-determinism involve gardens and video games. In *Kelley v. Chicago Park District*,[105] the Seventh Circuit held that a garden was not copyrightable because it wasn't fixed, though a blueprint design for a garden could be.[106] The court found that "a garden is simply too changeable to satisfy the primary purpose of fixation; its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement."[107] The court reasoned that because gardens grow and change organically, their evolution is unpredictable.[108]

We think *Kelley* goes too far. While gardens certainly do grow and change in ways that are not fully predictable, both the initial conditions and the way the gardens are curated will significantly affect those changes in a way that seems likely to be mostly if not entirely reproducible. Certainly, the fact that people plan gardens with blueprints suggests that gardens have a design that, if not fully deterministic, is implementable and sufficiently replicable to be usable.

In some prior cases, we see a limited form of non-deterministic behavior in the output of a computer program. In video games, for example, the game code generates images that interact with human behavior to produce gameplay sequences on the screen that are not stored in the computer. My experience of a combat sequence, for example, will differ from yours, because we won't hit the same keys in the same order. Nonetheless, we treat those audiovisual sequences as copies of the underlying work despite the interactivity of the game, which

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the Berkeley Technology Law Journal). *See generally* Matthias Leistner & Lucie Antoine, *TDM and AI Training in the European Union—From 'LAION' to Possible Ways Ahead?*, 74 GRUR INT'L 1027 (2025) (Eng.). By contrast, an English court, evaluating a different model and modality (images) with different evidence presented, has held the opposite. *See Getty Images*, [2025] EWHC (Ch) 2863 [603].

105. 635 F.3d 290, 304 (7th Cir. 2011).

106. *Id.* at 304–05. *Kelley* treats fixation as a matter of copyrightability, not infringement. But since the standards are the same and rely on the same statutory definition, presumably it would apply to the fixation required for infringement, as well.

107. *Id.*

108. *Id.* at 305 ("Although the planting material is tangible and can be perceived for more than a transitory duration, it is not stable or permanent enough to be called 'fixed.' Seeds and plants in a garden are naturally in a state of perpetual change; they germinate, grow, bloom, become dormant, and eventually die. This life cycle moves gradually, over days, weeks, and season to season, but the real barrier to copyright here is not *temporal* but *essential.* The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change.").

means that the precise sequence of images that appear on a screen may not have been generated or even contemplated when the game was written.[109]

In *Micro Star v. Formgen Inc.*, for example, the court held that a user of a video game infringed by profiting from new map files that called on the game assets to generate new levels of the game.[110] The maps were new, so the combination of images the user created didn't exist in the original game. Nonetheless, the court held that the map files infringed because they provided instructions to a computer that created new gameplay using copyrighted images from the original game.[111] That is a form of non-deterministic output that is

109. Although there is player interaction with the machine during the play mode that causes the audiovisual presentation to change in some respects from one game to the next in response to the player's varying participation, there is always a repetitive sequence of a substantial portion of the sights and sounds of the game, and many aspects of the display remain constant from game to game regardless of how the player operates the controls. *See* Stern Elecs., Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982) (finding fixation on the screen display of a computer game because even though the images displayed were not themselves stored anywhere in the computer, "many aspects of the sights and the sequence of their appearance remain constant during each play of the game," and "[t]he repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work"); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982); *accord.* Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1012 (7th Cir. 1982) ("The player of a video game does not have control over the sequence of images that appears on the video game screen . . . . The most he can do is choose one of the limited number of sequences the game allows him to choose.").

110. *See* 154 F.3d 1107, 1114 (9th Cir. 1998).

111. *Id.* at 1112. The court held that the maps were a derivative work of the underlying game. This was a bit unusual, because the maps didn't incorporate any features of the game. But they were encoded to generate gameplay that called on and infringed the copyright in the original game.

A number of copyright plaintiffs in generative AI cases have alleged that even if the model isn't a copy of their works, it is a derivative work. Those arguments have largely been rejected by the courts. *See, e.g.*, Andersen v. Stability AI Ltd., 700 F. Supp. 3d 853, 865–66 (N.D. Cal. 2023) (dismissing plaintiff's claim that the model itself is an infringing derivative work); Kadrey v. Meta Platforms, Inc., No. 23-cv-03417-VC, 2023 WL 8039640, at *1 (N.D. Cal. Nov. 20, 2026) (granting motion to dismiss, describing that "[t]he plaintiffs allege that the LLaMA language models are themselves infringing derivative works because the models cannot function without the expressive information extracted from the plaintiffs' books" and that "[t]his is nonsensical" (internal quotation marks omitted)); *see also* Tremblay v. OpenAI, Inc., 716 F. Supp. 3d 772, 778 (N.D. Cal. 2024) (dismissing the plaintiffs' allegation that "every output of the OpenAI Language Models is an infringing derivative work" (internal quotation marks omitted)); Justice v. Uncharted Labs, Inc., No. 25 Civ. 5026 (AKH), 2026 WL 1430232, at *2 (S.D.N.Y. May 21, 2026) (dismissing plaintiffs' allegations that the outputs of a model were derivative works because the model was originally trained on those works). That's because the law has been interpreted to say that a work is a derivative work only if it is substantially similar in protectable expression to the original work—the same standard for making a copy. *See* Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th. Cir. 1984) (stating that a work is a derivative work only if "it would be considered an infringing work if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work," and "[t]o prove infringement, one must show substantial similarity" to that prior work (emphasis removed) (quoting United States v. Taxe, 540 F.2d 961, 965 n.2 (9th Cir. 1976))). That means plaintiffs can't use the derivative works right as an end-run around the limits of the right to make copies.

Some have called the derivative works right "completely superfluous" as a result. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A][1] (2026). But that's not entirely correct. A derivative work can involve a change to a physical copy of a copyrighted work rather than

somewhat closer to what we see with generative AI. But it is nonetheless different in two important respects.

First, the content produced by playing a video game may not be contained in the same form in the game itself, but the content it will output is generally deterministic. I can make my character look different than others, but I can only do it by combining exact tools and images in the game itself. And I can make that character do many different things in different places in the game, but each of those actions and places are dictated by the parameters of the game. I can't take my character to a place that doesn't exist in the game or have them do something the rules of the game don't permit.

Games like *No Man's Sky* with procedurally generated levels present a harder question for fixation. In procedurally-generated games, the levels are generated anew—involving a degree of randomness—as the player arrives at a new planet. They don't exist until the player arrives, so they aren't stored in the computer, but they're generated using a known algorithm working from a fixed base of content. There isn't litigation on this, but it seems likely a court would say the procedurally generated levels (much less all the possible ones that *might* be generated) didn't preexist in the game; they were created when the user arrived at a new planet and the game engine generated a planet for them. Thus, planets that might at some later point be created in a game aren't fixed in the game itself.

The non-deterministic fixation issue is unlikely to arise in practice in most video game cases because of the second important distinction: the content I generate when I play a video game is the *output* of the interaction between me and the game, displayed or recorded in some medium. It isn't in the game itself. The reason it infringes is that the output, while new and even unpredictable in a sense, copies identifiable elements of the game that *are* present in the computer in a fixed, deterministic form. That was true in *Micro Star*, and it would be true of *No Man's Sky*. We don't need to ask whether the new levels are somehow "in"

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the creation of a new work. *See, e.g.*, 17 U.S.C. § 101; Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1342–43 (9th Cir. 1988).

Another possible difference—one that is relevant for our purposes—is that the statute nowhere says that a derivative work must be fixed, as a copy must. *See* § 101 (defining derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted"). Nonetheless, courts have held that there must be some sort of quasi-fixation to create a derivative work. *Micro Star*, 154 F.3d at 1111 (reaffirming that because "all the Copyright Act's examples of derivative works took some definite, physical form and . . . this was a requirement of the Act"); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992) ("A derivative work must incorporate a protected work in some concrete or permanent 'form'"). Were it otherwise, acts like speaking aloud or reading an email on a computer screen could be viewed as the creation of ephemeral derivative works. *See* Ochoa, *supra* note 89, at 262 (reading the statute to not require fixation "would render illegal merely imagining a modified version of a copyrighted work"); *cf. Talkin'*, *supra* note 20, at 327–28 (noting but not resolving this issue).

the game in fixed form, because it's the act of generating them as output that is the infringing use.

Contrast a video game with a word processing program. Microsoft Word contains all the elements necessary to build any text output, including this Article, all seven *Harry Potter* books, and an infinite number of works that have never been and may never be created. But we wouldn't say that those works are "in" Word merely because they can be assembled from components present in Word. Those individual components (letters, numbers, punctuation, and even higher-order operations like spelling and grammar correction) aren't copyrightable. It's the act of combining them into a creative output that generates a copyrightable work.

But even if that weren't true, it would be nonsensical to say that Word somehow contains all works ever written or that could be written.[112] It may contain the tools for creating those works, but that doesn't mean it has a copy of the works themselves, any more than the digits of pi or any other infinite sequence necessarily contain *Hamlet* (and all other works of authorship now known or later conceived). A key difference here is what information we need as an input in order to retrieve a particular output. In a deterministic file storage system, the address or perhaps the name of the file is enough to retrieve the content of that file. At the other extreme, to say that Microsoft Word or the alphabet encodes *Hamlet* or *Harry Potter* isn't meaningful because they aren't there in any ordered form from which they reasonably can be retrieved. Yes, the works are "in there" in some, very generous, sense, but you would need to actually write the works in order to retrieve them; you'd have to input the information in order to output it.

C. Applying Non-Deterministic Analysis to Generative AI

Generative AI sits in an odd space between these examples. LLMs generate text on the basis of probabilistic word and context relationships that are encoded in their model weights.[113] Those relationships are influenced by the works the models train on. So an LLM encodes certain word relationships as grammatical and others as nonsensical based on its training. But an LLM isn't simply a neutral collector of word relationships. The more heavily particular text strings are

112. *Cf.* Samuelson, *supra* note 99, at 1208 & n.94 ("Granting all rights to the programmer would mean that the programmer would automatically own everything the program was *capable* of generating . . . . Because it is possible to put the entire English language into a computer program that can construct prose, it would theoretically be possible for the programmer to claim rights in all writings that were—or could be—produced by the program. Such a claim may seem ridiculous, and yet it would be a logical result of automatically awarding rights in whatever the program did or could produce." (footnote omitted) (citation omitted)). While Samuelson's focus was on the establishment of rights, fixation is symmetrical, and the same logic applies to the making of fixed infringing copies.

113. Sag, *supra* note 39, at 24 ("The knowledge that resides within an LLM is inherently probabilistic."); *see* Cooper & Grimmelmann, *supra* note 9, at 197 ("[T]he probabilistic element . . . is inescapable.").

represented in training data, the more likely the LLM will be to replicate those word strings verbatim or nearly verbatim.[114] Consider Figure 1: in general, there are many plausible, grammatical English-language continuations of "Mr. and Mrs. Dursley"; after all, these are just two names. The fact that Llama 3.1 70B assigns overwhelmingly high probability to the verbatim continuation from the opening line of *Harry Potter and the Sorcerer's Stone* is not explained by any feature of the English language, but by the model's memorization of that specific passage from its training data.

We have shown that for certain works, like *Harry Potter and the Sorcerer's Stone*, *1984*, and many others, it's straightforward to get some LLMs, notably Meta's Llama 3.1 70B, to deterministically generate all or a substantial part of the work essentially verbatim with minimal prompting.[115] These works are highly memorized by Llama 3.1 70B; the extraction probabilities across each text are over 95% in all locations,[116] which we found makes deterministic extraction straightforward in practice. That suggests that, even if there isn't a copy of those works stored in Llama 3.1 70B in the same sense that we would store a Word document in a computer file, the model has stored a set of instructions from which it's straightforward and deterministic to generate the work as output. And that result is repeatable; running the same queries produces the same basic result. If that isn't exactly like a computer program stored in memory, it's close enough that a court would probably say that there's a copy (or at least near-perfect blueprints for the making of a copy) in the model itself.[117]

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114. *See Deduplicating*, *supra* note 11, at 8430 ("Data duplication has the effect of biasing the trained LM towards particular types of examples. This can contribute to a lower diversity of generations, and increased likelihood that the generated content is copied from the training data.").

115. *See supra* Section II.A (discussing decoding schemes); *supra* Section II.B (discussing greedy vs. deterministic extraction). We used a deterministic decoding algorithm called beam search.

116. *See supra* note 68 and accompanying text. This 95% number applies to contiguous sequences of 50 tokens: there for a given prompt of 50 tokens, there is a 95% probability of outputting the verbatim following 50 tokens. With respect to 50-token inputs and outputs, such high extraction probabilities exist throughout these works. Notably, we did not observe the same amount of memorization of these books even in other Meta models, including Llama 1 65B and Llama 2 70B.

117. There are many other ways to extract training data that fit this general description, but they all ultimately involve some form of prompting. Ahmed et al. extracted large portions of near-verbatim text from production LLMs—models that are aligned and embedded inside systems, that are interacted with through an API. Extracting Books (Production LLMs), *supra* note 13, at 12, 14, 18–19. In some cases, they had to "jailbreak" the models with adversarial prompts to extract training data (e.g., for Claude 3.7 Sonnet and ChatGPT 4.1); in others, no jailbreaking was necessary (Gemini 2.5 Pro and Grok 3). *Id.* at 4. Fine-tuning a model on additional data can also expose memorization of data it was previously trained on, for reasons that aren't particularly well understood. *See generally* Nasr et al., *supra* note 12 (finding that fine-tuning GPT 4 makes it possible to extract additional pre-training data). More recently, others have shown that fine-tuning on books can enable extraction of other copyrighted books the model was previously trained on, demonstrating memorization of those books in the model. *See generally* Xinyue Liu, Niloofar Mireshghallah, Jane C. Ginsburg & Tuhin Chakrabarty, Alignment Whack-a-Mole: Finetuning Activates Verbatim Recall of Copyrighted Books in Large Language Models (Mar. 28, 2026) (unpublished manuscript), https://arxiv.org/pdf/2603.20957 [https://perma.cc/TF75-PHE2]. This type of fine-tuning-based result requires changing the model through additional training, such that the weights are no longer the same as those that are available in systems deployed to

This is also the case for many other works that aren't memorized to quite the same extent—for example, those that take multiple tries to extract or for which we can extract only isolated fragments of the work. In many cases, deterministic decoding methods can extract works near-verbatim where the extraction probability is only 0.1%.[118] The point is, a particular work may be more weakly memorized than another in a model, but it may still be possible to retrieve both works reliably and with just one prompt to the model.[119]

For other works, the opposite seems to be true. Many models won't output all or any significant part of many works on which we know they trained, even if we try thousands or tens of thousands of times, as with our experiments on *Sandman Slim* (Figure 3). It seems clear that there isn't a copy of those works in the model in any meaningful legal sense, at least based on what we can determine using current extraction methods. The model may have been trained on those works, but it apparently didn't retain information about them sufficient to be able to extract them in whole or in part.[120]

There's also a middle class of works for which it may only be possible to extract significant fractions of the work probabilistically, rather than deterministically.[121] We may need to run hundreds or thousands of prompts before the work is extracted.[122] In this case, we would be seeing non-determinism in action. The model would generate tokens based on its encoded probability of those tokens following existing ones, based on what it has learned from training. But it wouldn't generate the same result every time. So the model is like an enormous decision tree, where each token position is a new branching point that can select a different possible token. The model may follow different branches of the tree each time; only the particular branch that happens to

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the general public. Some systems, like ChatGPT, expose fine-tuning APIs that enable such customization.

118. *See generally* First Principles, *supra* note 65.

119. In the distribution the model assigns, 0.1% may be close to the highest probability sequence for a given prompt; deterministic decoding algorithms like beam search, which approximate identifying the highest probability sequence, will therefore often return such sequences. *Near-Verbatim*, *supra* note 13, at 4–5; *see generally* First Principles, *supra* note 65.

120. We say "apparently" because, as we noted above, our methods for extracting text and therefore proving memorization in models are imperfect and in development. That is especially true for closed-source models for which scholars need to use adversarial extraction techniques. *See, e.g.*, Extracting Books (Production LLMs), *supra* note 13, at 4. Indeed, our own prior work has significantly expanded the universe of provable memorization. *See generally Extracting Books (Open-Weight)*, *supra* note 12; *Near-Verbatim*, *supra* note 13. It's possible, and even likely, that methods developed later will be able to extract more training data than we can with today's methods.

121. These would be cases where using a deterministic algorithm like beam search would fail to return the memorized sequence. *See supra* note 115 and accompanying text. In this case, we could use a stochastic decoding algorithm that introduces non-determinism in outputs.

122. These training data are still memorized in a technical sense, but, intuitively, are not memorized as strongly as in the cases where we can extract the work in just a handful of attempts.

correspond to the book will generate text from the book.[123] The other branches may generate content that is substantially similar to the book, or they may generate new and previously unknown content.[124] Many of the outputs generated may not be infringing.[125]

In this particular set of circumstances, it may be hard to say there is a "copy" of the work in the model in the sense the Copyright Act means the term without saying there is a "copy" of every branch of the enormous decision tree, most of which don't actually exist in the outside world. From one perspective, if it takes 1,000 tries at a prompt to generate verbatim output, the 999 tries that are *not* copies aren't somehow pre-stored in the AI model.[126] To say otherwise, we would have to say that a model small enough to run in a single data center (or sometimes on a single computer) somehow stores more unique outputs than there are atoms in the observable universe. That's akin to saying that Microsoft Word stores all the things that could be written with it in a "tree" of potential letters following each other. Yes, it's possible to generate those things from the model, but it doesn't mean they are all sitting in the model already made. They are being generated on the fly. But, if that's true of noninfringing outputs generated by the probability tree, it seems wrong to say the result is any different for the one output that happens to infringe. The output, if and when it's generated, may be a copy, but the untapped potential for generating it isn't a copy.

But that conclusion may depend on the underlying sequence probabilities. One possibility is that the memorized output has an extraction probability of about 1/1,000 (0.1%), and the other 999 non-memorized outputs might have substantially lower generation probabilities (e.g., 1/100,000,000, or 0.000001%). If we took another sample of 1,000 tries, we would perhaps return the memorized sequence again once and 999 very different non-memorized outputs of similarly low probability. There's clearly something meaningfully different between the single probabilistic extraction case and the other outputs the model generates,

123. This picture is also consistent with *supra* Figure 1. It's just that one branch (the memorized one) is so high probability that common decoding algorithms mean it's possible to deterministically generate the text.

124. *See Near-Verbatim*, *supra* note 13, at 9–10.

125. As our work has shown for the verbatim case, this is an open empirical question that depends on the model and work. *Extracting Books (Open-Weight)*, *supra* note 12, at 18. In some cases, most of the outputs may be noninfringing. In others, a branch of (near-)verbatim extraction with 1/1,000 probability may be deterministically decodable, depending on how low the probabilities are of the other branches. (If 1/1,000 is by far the highest probability branch in the tree, common deterministic decoding algorithms, like beam search, will return it every time.) So even the 1/1,000 chance number carries important nuance. See *supra* Section II.A for more on decoding; and Cooper & Grimmelmann, *supra* note 9, at 148–56.

126. This assumes the other tries aren't also similar enough to be infringing; most of the near-verbatim text might be treated the same as the verbatim text for these purposes. So our work showing that there is more near-verbatim memorization than verbatim memorization expands the universe of cases that look more like *Harry Potter*. *See Near-Verbatim*, *supra* note 13, at 1. For additional nuances for this 1/1,000 number, see *supra* note 119; *see also* Cooper & Grimmelmann, *supra* note 9, at 194–97.

even if it takes on average 1,000 tries to extract the memorized training data. From this perspective, like the other, it's also clear that the 999 tries that are *not* copies aren't somehow pre-stored in the AI model; but it's less clear that the one try that yields the memorized work isn't a copy.

If this type of probabilistic case were deemed not a copy, that doesn't mean the model hasn't memorized the work. The model has been trained on a work, has clearly learned things from that work, and it's possible that it will produce that work—much more possible than random chance.[127] From a machine learning perspective, it may make sense to say the work is "memorized."[128] But that doesn't mean the model contains a deterministic copy of that work that is fixed in the model "for a period of more than transitory duration," as the statute requires.[129] The information is there. It's possible with some significant effort to extract it in the order required to replicate a copyrighted work. But if that extraction is just one possibility among thousands, the work is produced at the moment of extraction. The information necessary to create that extraction is present in the system. But, for probabilistic cases where it may take thousands of attempts to realize the memorized training data in outputs, there is likely no copy as the law uses the term.

Generation on the fly in response to prompts likely isn't fixation for a period of more than transitory duration. The legislative history excluded from this concept of fixation embodiments that were "captured momentarily in the 'memory' of a computer."[130] The Ninth Circuit ignored this part of the statute in

127. An old adage holds that if you give enough monkeys enough typewriters, they will eventually produce the works of Shakespeare by chance. So some presume that, similarly, given enough attempts a model might generate by happenstance text identical to a copyrighted work even if it hadn't memorized that work. But LLMs are not like the monkey at the typewriter; the monkey hits keys randomly, but the LLM has learned a probability distribution that isn't completely (uniform) random over text. Further, our work has shown that the kinds of probabilistic copying we discuss are many, many orders of magnitude more likely than could be explained by the model's general ability to produce text. *See Extracting Books (Open-Weight)*, *supra* note 12, at 10–11; First Principles, *supra* note 65, at 1. To do so, we can measure the probability of a model generating *non*-training data (i.e., a case for which memorization is impossible). By doing this for books that are closely matched to known training data (e.g., sequels in the same series that were published after the model was trained), we have found that non-training-data generation probabilities range from 10^{-27} to 10^{-16} (where, as a point of reference, 10^{-3} is 0.1%). As Cooper et al. note: "To give a sense of just how small [the larger of the two numbers (10^{-16})] is, the chance of winning the Powerball lottery jackpot in a single draw is about 1 in 292 million—roughly 34 million times more likely." *Extracting Books (Open-Weight)*, *supra* note 12, at 10.

128. *See* Cooper & Grimmelmann, *supra* note 9, at 177–78; *see also Extracting Books (Open-Weight)*, *supra* note 12, app. E (providing a robust appendix). Cooper and Grimmelmann say that "the probability of generating a near-exact copy of a piece of training data has to be high enough to rule out coincidence." Cooper & Grimmelmann, *supra* note 9, at 198. That is right if the goal is to show memorization. And as they note, a 1/1,000 chance of generating the work in response to a prompt that tries to elicit it is far, far more unlikely than a truly random chance. *Id.* at 198 n.212. But the fact that information latent in the system is sufficient to generate part of all of the work is different than saying that a copy persists in the system.

129. 17 U.S.C. § 101.

130. H.R. REP. NO. 94–1476, at 53 (1976). Similarly, projecting an image on a movie screen for 1/24th of a second is enough for us to perceive it, but clearly doesn't count as fixation. *See id.*

MAI Systems Corp. v. Peak Computer, Inc.,[131] but both the Second and Fourth Circuits have now held that buffering for a few seconds does *not* create a copy that exists for more than a transitory duration, even though it is long enough to be perceived.[132] Permanent storage in computer memory is fixation. And outputting a copy of the work creates a new, fixed copy. But the process of generating results on the fly in the computer doesn't fix a copy in the model itself.

Our ultimate (and tentative) conclusion is thus mixed. We view a sufficient ease of generation as evidence that the work as a whole is in fact latent in the model and not just being generated by chance. The ability to deterministically generate the first *Harry Potter* book using Llama 3.1 70B from a simple seed prompt of ground-truth text from the book suggests that the model has stored instructions that correspond sufficiently to the book, such that it's akin to the storage of a computer program or video game content. But for books that can be extracted only through a high number of efforts producing different outcomes, what is stored is not a copy of the book itself, but a set of ingredients that can produce copyrighted content only when combined in just the right way. A collection of ingredients is not an end product.

That conclusion means that we cannot simply say categorically that models do or do not contain copies of a work in the copyright sense. Some models contain copies of some works under our reading of the statute.[133] No models (so far as we know) contain copies of all the works on which they are trained. This is possible in degenerate cases that don't reflect state-of-the-art training practices;[134] but it's impossible for models like Llama 3.1 70B, which are trained on datasets that are far too large for every piece of training data to be losslessly compressed in a model of that size. Ultimately, the question is an evidentiary one that may differ for each model and for each work in that model's training data.[135] Furthermore, the answer may change, both as new models are developed (ours and others' research suggests, not surprisingly, that larger models memorize

131. *See* 991 F.2d 511, 518 (9th Cir. 1993).

132. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 128–30 (2d Cir. 2008); CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 556 (4th Cir. 2004).

133. Carlini et al. estimated that a 6 billion parameter model memorizes 1% of its dataset. Carlini et al., *supra* note 78, at 1. Other estimates range from 0.1% to 10% depending on the model and the technique used. *See Deduplicating*, *supra* note 11, at 8430; Nasr et al., *supra* note 12, at 15. Larger models may memorize more, and previous tools for identifying memorization may undercount it, so that number is likely to increase.

134. *See* Cooper & Grimmelmann, *supra* note 9, at 199.

135. *Id.* at 190–91; *see also Carlini Blog*, *supra* note 15, at 3 ("[M]odels sometimes emit training data. It doesn't happen every time. Models can produce output that is not just a direct copy of what they were trained on. And it doesn't happen never. But sometimes, models directly output text or images that they were trained on.").

more than smaller ones)[136] and as new ways of assessing the ease of extraction are developed, producing new evidence.

D. The Consequences of Defining a Copy

The consequences of concluding that a model contains a copy of a work as the Copyright Act defines that term are potentially significant.

First, if we conclude the model contains a fixed copy and doesn't just generate one when prompted, that copy is prima facie infringement whether or not it's ever output or used in any way.[137] Whatever copy exists in the model can be "reproduced" even if it's never "perceived" or "communicated."[138] As a policy matter we might not want to include copies that can never be viewed or used as within the scope of copyright,[139] but courts have generally rejected the "communicative function" theory of fixation.[140] So, if we decide that anything that might be memorized is a copy for legal purposes, the model itself is an unlawful copy of each of those works unless protected by a defense or exception.

Further, a copy doesn't have to be of the entire work to infringe. Copying even a small part of the work is sufficient as long as the copy includes a more than de minimis amount of protectable expression.[141] So while our prior work has shown that for many works it's possible to extract only some specific portions, that fact doesn't mean a model wouldn't infringe that work. If we conclude that the possibility of partial extraction makes the model a copy of those parts of the work, the model would still infringe copyright by copying those

136. *See Extracting Books (Open-Weight)*, *supra* note 12, at 41; Carlini et al., *supra* note 78, at 2633; Hayes et al., *supra* note 68, at 9273; *Near-Verbatim*, *supra* note 13, at 82.

137. *See* Walker v. Univ. Books, Inc., 602 F.2d 859, 864 (9th Cir. 1979) ("[T]he fact that an allegedly infringing copy of a protected work may itself be only an inchoate representation of some final product to be marketed commercially does not in itself negate the possibility of infringement."); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1518 (9th Cir. 1992) ("[T]he Copyright Act does not distinguish between unauthorized copies of a copyrighted work on the basis of what stage of the alleged infringer's work the unauthorized copies represent."); MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 518–19 (9th Cir. 1993); Thoroughbred Software Int'l, Inc. v. Dice Corp., 488 F.3d 352, 359–60 (6th Cir. 2007) (calculating damages for unused copies of software).

138. 17 U.S.C. § 101.

139. *See, e.g.*, Jessica Litman, *Fetishizing Copies*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 107 (Ruth L. Okediji ed., 2017); UMG Recordings, Inc. v. Shelter Cap. Partners LLC, 718 F.3d 1006, 1019 (9th Cir. 2013) ("[T]he language of the statute recognizes that one is unlikely to infringe a copyright by merely storing material that no one could access . . . [and suggests] that if the material were still being stored by the service provider, but was inaccessible, it might well not be infringing.").

140. Jay Dratler analogizes the "communicative function" argument to Count Dracula, because it "keeps emerging from the coffin, despite repeated interment." JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW § 5.03[1][b], at 5–63 (1991); *see also* David G. Luettgen, *Functional Usefulness vs. Communicative Usefulness: Thin Copyright Protection for the Nonliteral Elements of Computer Programs*, 4 TEX. INTELL. PROP. L.J. 233, 237–38 (1996).

141. *See infra* Section III.D.

parts.[142] And even portions of works that can't be extracted verbatim can often be extracted with very small changes (i.e., near-verbatim).[143]

If models contain copies of some of the works they were trained on, as the law defines that term, the models themselves *are* infringing copies. That would mean that every new copy of a model also makes a copy of the copyrighted works contained in the model. That has significant consequences for open-weight models. For proprietary systems like those developed by OpenAI and Anthropic, those models exist behind closed doors. There are doubtless numerous copies of the model within the company, and each of those might be infringing, but the company doesn't widely distribute those actual models. By contrast, open-source business models that involve distributing copies of the model weights presumably are making new copies of the works whenever they make a copy of the model. So the potential damages exposure from copyright infringement may be greater for open-source models than for ones embedded in closed systems because of the way the models are used. That doesn't make much sense as a policy matter, since there is no reason to think open-source models are more problematic merely because of the way they are distributed, but it seems to follow from a strict application of the law.

Finally, the remedies for copyright infringement aren't limited to damages. If the model is a copy, it is presumably subject to remedies like injunctive relief and destruction.[144] There are good equitable reasons not to destroy the models, but plaintiffs have asked for it in numerous cases.[145] And while a less drastic remedy might seem to be removing the copyrighted works from the model, there's in fact nothing simple about "unlearning" in generative AI. As we have previously written, it's very difficult, perhaps even impossible, to entirely remove information from an existing copy of a model, and doing so can have unexpected negative consequences for other aspects of the model.[146] Nor is it

142. The exceptions will be cases where the things taken are not themselves copyrightable because they are too small, contain only quotes from other sources or uncopyrightable facts, or are otherwise unprotectable. For example, models that do not otherwise memorize portions of a book often memorize the copyright notice, because it appears repeatedly in standard form across multiple books. But memorizing that basic information would not be copyright infringement.

143. *Near-Verbatim*, *supra* note 13, at 1; Ippolito et al., *supra* note 52, at 29; *Extracting Books (Open-Weight)*, *supra* note 12, at 14–15, 184–85; Extracting Books (Production LLMs), *supra* note 13, at 32–33 (near-verbatim in production LLM outputs).

144. 17 U.S.C. §§ 502–503; *see also* Cooper & Grimelmann, *supra* note 9, at 169 (discussing models-as-copies and destruction).

145. *See, e.g.*, Complaint at 68, N.Y. Times Co. v. Microsoft Co., 777 F. Supp. 3d 283 (S.D.N.Y. 2025) (No. 23-cv-11195 (SHS)), Dkt. No. 1 ("Ordering destruction under 17 U.S.C. § 503(b) of all GPT or other LLM models and training sets that incorporate Times Works . . ."); Landgericht München I [LG München I] [Munich Regional Court I], Nov. 11, 2025, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1917 (2025) (Ger.).

146. *See Machine Unlearning*, *supra* note 29, at 6–7.

evident that we can feasibly identify and come to voluntary licensing deals with those whose works turn out to be memorized in part.[147]

All of this assumes that the *prima facie* infringement that would result from declaring a model to contain a copy of a work leads to a finding of liability. But that conclusion doesn't necessarily follow, for two reasons.

First, it is possible that a copy in the model itself will be treated as *de minimis* and therefore noninfringing. To be infringing, the defendant must copy a more than de minimis amount of the work.[148] De minimis copying is normally thought of as copying a small amount of a work. That might apply in some cases of memorization, for example where a model memorizes only a short passage from a book.

But de minimis has another meaning in the law—not that the copying is of a small amount but that it is "trivial."[149] In deciding whether the copying is trivial, courts consider not just the amount copied but "the observability of the copied work—the length of time the copied work is observable in the allegedly infringing work," and factors such as "focus, lighting, camera angles, and prominence."[150] Indeed, courts have noted that "observability" is fundamental to the analysis.[151] When a work appears momentarily in the background of a film and is not the focus of the scene, for instance, so that the ordinary observer wouldn't notice it, courts may hold it de minimis even though the entire work is depicted.[152]

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147. *See* Pamela Samuelson, Legally Speaking: Does Using In-Copyright Works as Training Data Infringe? 4 (July 15, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5342516 (on file with the Berkeley Technology Law Journal) ("Given the small and uncertain amount each book contributed to the models' value, transaction costs would make licensing infeasible."); Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions* (discussing the various ways copyright markets fail to form or are dysfunctional, including transaction costs, disproportionate market power, regulatory interventions, and holdup problems), *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 139, at 12, 38; *cf.* Xiyin Tang, *The Class Action as Licensing and Reform Device*, 122 COLUM. L. REV. 1627, 1655 (2022) (noting the challenges of finding and licensing AI content).

148. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 138 (2d Cir. 1998) (citing Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997)). *See generally* Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139 (2018) (collecting the law in every circuit).

149. Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998) (quoting *Ringgold*, 126 F.3d at 74); Gordon v. Nextel Commc'ns & Mullen Advert., Inc., 345 F.3d 922, 924 (6th Cir. 2003).

150. *Ringgold*, 126 F.3d at 75 (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2] (1997)); *see also Gordon*, 345 F.3d at 924.

151. *Sandoval*, 147 F.3d at 217; Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 344 (S.D.N.Y. 2020). One of us has shown that proprietary models vary widely in whether and how they build safeguards against extracting copyrighted works. Extracting Books (Production LLMs), *supra* note 13, at 19. For more on the systems vs. models distinction for extracting memorization, see Cooper & Grimmelmann, *supra* note 9, at 207–10.

152. *Ringgold*, 126 F.3d at 77; *cf.* Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943) (asking "whether so much has been taken as would sensibly diminish the value of the original"); Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (depicting a pinball machine in the background of a movie was de minimis).

Memorization in a model, even if it is determined to be a copy, may be de minimis if it's difficult to practically extract that copy from the model. Whether that's true is an empirical question that will differ from case to case. It might be difficult to extract a work as a practical matter because the probability of generating a work from a model is so low. If it takes 1,000 tries to extract a work, users probably won't persist merely to extract content they can already access elsewhere. Further, even if the work is heavily memorized in the model, that doesn't mean it would be easy to extract from a production system like ChatGPT that has some (however limited) guardrails built in to try to prevent surfacing copies in outputs to users. If the model actually deployed to consumers implements sufficient guardrails, it may be very difficult to extract the memorized work. And if you can't practically get the work out of the model, courts might view the inaccessible copy as de minimis. Courts haven't confronted such a case as a de minimis use, so it would be an extension of the doctrine, but it seems a logical one.[153]

Second, it's possible that the models, like the training datasets from which they were built, will be held a fair use of the works they memorize. U.S. courts have so far held that training models is fair use.[154] Even if a model contains a copy of some of the works it has trained on, that copy too might be fair use, especially if it's latent unless and until someone uses it to generate an infringing output. Many of the same arguments that justify fair use of the training data apply to memorization in the model itself.[155] If the work exists in the model but is never output by the model, so its presence there only affects the weights given to language the model uses when creating new and noninfringing works, the use of those copies is likely transformative for the same reasons it is in model training. And the market effects seem similar.[156] One difference is that the model itself is

153. *But cf.* Jessica Silbey & Samantha Zyontz, *De Minimis Copying: An Empirical Study*, 15 J. INTELL. PROP. & ENT. L. 118 (2025) (studying de minimis cases and finding that the argument usually fails).

154. Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026, 1060 (N.D. Cal. 2025), Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1034 (N.D. Cal. 2025). *See generally* Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021); Sag, *supra* note 39. The Copyright Office took a different position, but it did so only by articulating a new theory of market harm that is directly at odds with existing caselaw. *Contrast* U.S. COPYRIGHT OFF., *supra* note 17, at 65–66 (reasoning that market dilution counsels against fair use), *with* Edward Lee, *Copyright Dilution Under Constitutional Scrutiny*, 25 CHI.-KENT J. INTELL. PROP. 1 (2026) [hereinafter Lee, *Copyright Dilution*] (explaining the flaws with the Copyright Office's argument). But only district courts have ruled on the issue, and the result could change. For a comprehensive analysis of training as fair use, see generally Edward Lee, *Fair Use and the Origin of AI Training*, 63 HOU. L. REV. 105 (2025).

155. *See* Tian "Tony" Chen, *Language Models' Verbatim Copying: Copyright Infringement Analysis Through the Lens of* The New York Times Co. v. Microsoft Corp., OpenAI, Inc. et al., 43 CARDOZO ARTS & ENT. L.J. 349, 364–66 (2025) (arguing that memorization in models should be fair use because it is non-expressive and serves the purpose of producing noninfringing outputs).

156. Some copyright owners and their advocates have suggested abandoning the existing legal definition of market effect and creating a theory of "market dilution," under which competing with a copyright owner would weigh the fourth factor against fair use, even if—as is normally the case—the competing work is not infringing. U.S. COPYRIGHT OFF., *supra* note 17, at 64–65; *see* Jacqueline C.

generally a commercial product (or the basis of a commercial service selling the use of the model), while the training dataset is not, and commerciality has taken on greater significance after *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, which revived it as an important consideration, rejecting thirty years of contrary precedent.[157]

Fair use by models has been much discussed elsewhere,[158] and it is not our intention to revisit that debate here. We raise it here only to note that the issue of whether a model contains a copy of a work isn't necessarily determinative. Where a model is deemed a copy, resolution of the fair use question takes on even more importance because of the legal consequences we discuss in this Section.

It's also possible that some (though not all) works that are now memorized might be licensed. But it's not feasible to simply create a license to all training content, for reasons Pam Samuelson has explained.[159] It also doesn't seem possible to eliminate all memorization,[160] and similar to "unlearning," even if it were possible, doing so might have negative unintended consequences for model behavior.[161] And it's not computationally feasible to determine which works each model memorizes in sufficiently relevant part in order to try to narrow down the universe of licenses.[162]

Charlesworth, *Generative AI's Illusory Case for Fair Use*, 26 VAND. J. ENT. & TECH. L. 323 (2025). That is not the law. Indeed, existing cases flatly reject it. *See, e.g.*, Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 607 (9th Cir. 2000) ("[B]ecause the Virtual Game Station is transformative, and does not merely supplant the PlayStation console, the Virtual Game Station is a legitimate competitor in the market . . . . For this reason, some economic loss by Sony as a result of this competition does not compel a finding of no fair use."); Lee, *Copyright Dilution*, *supra* note 154.

157. *Compare* 143 S. Ct. 1258, 1285–86 (2023) (presuming commercial uses were unfair), *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (rejecting the presumption that commercial uses were unfair). As Pam Samuelson notes, even after *Warhol* there are many ways commercial uses can be held fair. Pamela Samuelson, Lecture, *Justifications for Fair Uses*, 2025 WIS. L. REV. 1047, 1049–50 (2025).

158. *See generally* Peter Henderson, Xuechen Li, Dan Jurafsky, Tatsunori Hashimoto, Mark A. Lemley & Percy Liang, *Foundation Models and Fair Use*, 24 J. MACH. LEARNING RSCH., Sep. 23, 2023, art. 400; Cooper & Grimmelmann, *supra* note 9.

159. *See* Samuelson, *supra* note 147.

160. *See, e.g.*, Cooper & Grimmelmann, *supra* note 9, at 204, 204 nn.224–27; Vitaly Feldman, *Does Learning Require Memorization? A Short Tale About a Long Tail*, *in* STOC '20: PROCEEDINGS OF THE 52ND ANNUAL ACM SIGACT SYMPOSIUM ON THEORY OF COMPUTING 954, 958 (Konstantin Makarychev, Yury Makarychev, Madhur Tulsiani, Gautam Kamath & Julia Chuzhoy eds., 2020); *see also* Cooper & Grimmelmann, *supra* note 9, at 204–07; *Talkin'*, *supra* note 20, at 373 n.551; Sag, *supra* note 39, at 8 ("The answer is that avoiding memorization entirely is neither realistic nor desirable because there is no hard-edged distinction between memorization and learning.").

161. *See Machine Unlearning*, *supra* note 29, at 6–7.

162. It is feasible to test a potentially very large set of works, as we have done in some of our work. But training datasets are enormous, and it currently isn't feasible to test every model on every work in its respective training set. For instance, Cooper et al. spent over a year of GPU compute testing approximately 0.1% of the books in the Books3 corpus on Llama models, which are known to have been trained on Books3—and Books3 is only a small fraction of all of Llama's training data. *See generally Extracting Books (Open-Weight)*, *supra* note 12.

E. Policy Implications

The Copyright Act was written in 1976. Its definition of "copy" was intended to encompass technologies that were just emerging at the time, including computers. But Congress didn't have in mind, and didn't address, the sorts of non-deterministic behavior we see with today's generative AI models and systems. In an ideal world, we might rewrite the law to limit copyright to covering copies that actually reach or communicate to people, deleting the word "reproduced" from the "perceived, reproduced, or otherwise communicated" language in the statute. That would exclude the actual models as copies, but would still encompass model output that is substantially similar to a copyrighted work.[163] But we don't live in an ideal world, and given the composition of Congress and the power of industry lobbyists, there are serious risks that revisiting the basic structure of the Copyright Act would end up making things worse, not better.

Given the indeterminacy of the Act's definition of "copy" and "fixed," perhaps courts could read the terms in ways that exclude the actual models as copies but would still encompass model output that's substantially similar to a copyrighted work. The closest analogy is to the cases that have treated temporary buffer copies internet sites make in the course of streaming or preparing to deliver content as not fixed and therefore not copies under the statute.[164] Those cases all involve temporary, intermediate instantiations of a work made in the service of delivery of that work. The instantiations in those cases mostly exist only for a short period of time, unlike the weights in AI models. But the courts seem to be applying the principle that a brief instantiation of a work in the service

163. Haviv et al. suggest that this is already the case, and that the law distinguishes memorization from copyright. Haviv et al., *supra* note 85, at 4–5. We are sympathetic to the policy argument, but skeptical that it reflects existing law, at least in the United States. Oren Bracha makes a similar argument. Oren Bracha, *The Work of Copyright in the Age of Machine Production*, 38 HARV. J.L. & TECH. 171, 179–80 (2024). He couches it as consistent with current law, but again, we are less convinced that is true. Courts have rejected the idea that a work must serve a communicative function to be copyrighted, applying the law to unpublished letters, for instance. *E.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 94 (2d Cir. 1987), *superseded by statute*, Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107); *cf.* Luettgen, *supra* note 140, at 250–52 (arguing for narrower protection for noncommunicative works but not contending that reflects current law). Under the statute the same should also be true of infringing copies, since the definition of the terms is identical for both sections. Nor is it the case, as Haviv et al. suggest, that memorization is generally of "generic, functional, or weakly protected material." Haviv et al., *supra* note 85, at 8. While that is surely sometimes true, we and others have shown numerous instances of verbatim memorization of creative works. See *supra* note 88 for additional discussion.

164. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008); UMG Recordings, Inc. v. Shelter Cap. Partners LLC, 718 F.3d 1006, 1016 (9th Cir. 2013) ("[T]he language of the statute recognizes that one is unlikely to infringe a copyright by merely storing material that no one could access . . . [and suggests] that if the material were still being stored by the service provider, but was inaccessible, it might well not be infringing."); CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 556 (4th Cir. 2004); *cf.* Case C-496/24, Stichting Onderhandelingen Thuiskopievergoeding v. HP Nederland BV, ECLI:EU:C:2026:296 (Apr. 16, 2026) (holding that streaming doesn't create a copy even though it requires temporary instantiations of the files).

of generating an end product that can't itself be perceived or used shouldn't be viewed as a fixed copy, and this seems analogous to generative AI. The parallel argument would be that even if research techniques reveal that a model contains a copy, if that copy is never perceived or communicated to the outside world, the law shouldn't condemn it. Alternatively, courts might treat such unobservable works as de minimis and therefore noninfringing.[165]

But either approach would require an extension of current law, either by statute or by judicial interpretation. As the law stands now, the answer to the question whether a model that memorizes content from a work is itself a copy of that work is: "it depends on the model and the work." That isn't a very satisfying answer, but it's the one the law and the science lead us to.

IV.
CONCLUSION

Memorization of copyrighted works in generative AI models forces copyright law to confront an issue it has so far managed to avoid—what to do about "probabilistic copies" of training works that the model might or might not generate in outputs. We think the most likely answer is a functional one: the model contains a copy of a work if, and only if, the work can be extracted from the model with relatively little effort. That means that whether a model contains a copy of a work will vary depending on the model, the work, and the state of the art of extraction research.[166] We would be better served by a rule that focused not on the metaphysical presence of copies in a model that may never be perceived in the outside world, but on whether the model generates infringing output.

165. It is also possible that a court will hold that the retention of some training data set in the model will not be viewed as a volitional act since no one decided to make that copy. On volition in AI, see Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887, 1901–02 (2019); and Michael P. Goodyear, *Artificial Infringement*, UC L.J. (forthcoming 2026).

166. Indeed, over time, extraction science has developed new techniques that, in the instances in which they've been tested, make extraction easier—expanding our knowledge of how much state-of-the-art models memorize.

The Licensing Architecture of the 1976 Copyright Act at Fifty: A View from the Inside, with Lessons for AI

Daniel J. Gervais*

ABSTRACT

The Copyright Act of 1976 is generally viewed as a statute of rights and limitations. This Article reads it instead as a statute that relied on a licensing system that for the most part it did not itself create. Congress assumed that markets would do most of the work and only reached for compulsory licenses in cases or actual or expected market failures. The rest of the system was put together piece by piece, by legislators, judges, and institutions sometimes improvising under technological pressure, from the antitrust consent decrees that have governed two of the performing rights organizations for decades to the statute-backed systems created in 1995 and 2018 and the voluntary reproduction licensing market that live around the fair use borders established by the courts. The Article by an author who spent the 1990s building collective management organizations at WIPO and then at the Copyright Clearance Center, draws three lessons. First, compulsory licenses have more often been anti-monopoly devices than user subsidies. Second, rate-setting under statutory standards has tended toward below-market outcomes and costly contestation. Third, fair use doctrine and licensing markets are mutually constituting, to the extent that legal exposure creates demand for licensing without creating the institutions able to meet it. The Article applies these lessons to AI training. A compulsory license would likely fail the Berne-TRIPS three-step test where voluntary licensing is possible and might replicate the rate-adequacy issues of compulsory systems. A technology-specific levy, as the Audio Home Recording Act demonstrates, cannot keep up with the uses it is trying to capture due to rapid technological change. Voluntary collective management, possibly combined with extended collective licensing to fill coverage gaps, is a possible way forward.

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I.
INTRODUCTION

In the early-to-mid 1990s, working at the World Intellectual Property Organization (WIPO) as Head of the Copyright Projects Section, I spent a great deal of time in countries that had perfectly serviceable copyright statutes and almost no copyright revenue flowing to creators. The statutes had been drafted, sometimes elegantly, often borrowed from continental European templates. The trouble was that nobody was paying anyone. The rights existed on paper. The exchange did not exist anywhere else. Setting up the institutions that could turn rights into actual money in someone's pocket was the project I had inherited, and it was a project that had remarkably little to do with statutes and almost everything to do with infrastructure.

That experience came back to me as I started thinking about what to say at the Berkeley-Columbia symposium on the fiftieth anniversary of the 1976 Copyright Act. The Act is conventionally read as a statute of rights. The literature, dutifully tracking the statute, dwells on the section 106 exclusive rights.[1] But the Act, like the statutes I worked on in Latin America, Southeast Asia, and a couple of African jurisdictions in those WIPO years, would have done very little for anyone if the licensing system around it had not eventually been built. Some of that system Congress put in place. Most of it came later, often much later, in pieces, through legislation, judicial doctrine, antitrust enforcement, and a great deal of institutional improvisation. This Article is about that licensing system. The question I ask is what fifty years of it can tell us, on the eve of the Act's anniversary, about how to handle the most disruptive licensing problem the system has yet faced: artificial intelligence (AI) training on copyrighted works.

The American licensing landscape is, frankly, a mess. There are statutory compulsory licenses in sections 111 and 115, and a section 116 that began life as a compulsory license but transitioned in 1989, on the eve of American accession to the Berne Convention, to a negotiated regime with arbitral fallback. There are blanket licenses produced by antitrust consent decrees that pre-date the 1976 Act by thirty-five years and have shaped almost everything in music licensing since. There are mandatory designated collectors created by twenty-first-century legislation: the Mechanical Licensing Collective and SoundExchange. There are voluntary Collective Management Organizations (CMOs) operating without any direct statutory mandate, of which the most significant is the Copyright Clearance Center. And there are direct deals struck case by case between major rights holders and major users, currently visible in

1. WILLIAM F. PATRY, PATRY ON COPYRIGHT §§ 1:71–123 (2026); *see also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (discussing the political economy of the 1976 revision).

the contracts AI developers are signing with news organizations and image libraries.

Why this menagerie? Because each piece represents a different congressional or judicial response to a particular kind of market failure. The 1976 Act presupposed that markets would do most of the work. What we now have is an elaborate system for routing around the cases in which they do not. Tracing those routings, and asking what they tell us about the AI training problem now confronting policymakers in Washington, Brussels, and elsewhere, is the project that follows.

The Article proceeds as follows. Part II reconstructs the legislative premise the 1976 Congress actually had in mind. Parts III through V examine three sites where compulsory or quasi-compulsory licensing has done the work the Act did not: section 115; the performing rights organizations, which I argue occupy a structurally distinct position that is neither voluntary nor compulsory in any clean sense; and section 114 with its plumbing in section 112(e). Part VI takes up voluntary reproduction licensing through the *Williams & Wilkins* / CCC / *Texaco* arc, on which I have a perhaps unusual perspective. Part VII inventories what we have at fifty. Parts VIII through XI take up AI training, considering and rejecting two superficially attractive responses (compulsory licensing and the technology-specific levy) before defending voluntary collective management, supplemented where needed by extended collective licensing, as the path forward. Part XII concludes.

II.
MARKETS FIRST, COMPULSION AS EXCEPTION

Congress in 1976 was not neutral on how rights would be exchanged.

The House and Senate Reports are clear that the Act presumed market negotiation as the default mechanism, with statutory rights serving as the leverage that would make negotiation possible.[2] The detailed treatment of subject matter, the codification of the work-for-hire doctrine, the introduction of a statutory termination right: each reflects a legislative design oriented toward private transaction.

Markets, however, sometimes fail. Congress understood this, sometimes explicitly, sometimes only by implication. The legislative history identifies several recurring sources of failure: transaction costs that swamp the value of individual licenses; users too diffuse to identify, let alone monitor; market power asymmetries between concentrated rights holders and dispersed users; and the impossibility of obtaining advance licenses for uses that occur millions of times a day.[3]

2. *See* H.R. REP. NO. 94-1476, at 47–55, 121, 124–28, 139–42 (1976); S. REP. NO. 94-473, at 47–55, 104–05, 108–11, 122–25 (1975).

3. H.R. REP. NO. 94-1476, at 88–101 (cable retransmission); *id.* at 111–15 (jukebox license).

In those cases, Congress reached for the compulsory license. The device was already present in the 1909 Act. It was not, in the American tradition, a concession to users at the expense of rights holders. (This is a point critics of compulsory licensing tend to miss.) It was, more often, a mechanism for ensuring that some kind of market activity occurred where, without regulated access, none would. The cable television license in section 111 and the mechanical license in section 115 each reflect Congress's judgment that without regulation, a particular technology would either be frozen out of the market or operate in legally uncompensated darkness.[4] The cable license in particular was a hard-fought compromise the House Report explained at length.[5] Section 116, the third compulsory license enacted in 1976, had a different trajectory and a shorter half-life. It addressed the public performance of musical works by jukeboxes, and it was converted by the Berne Convention Implementation Act of 1988 into a negotiated license with arbitral fallback, principally because Congress concluded that the original compulsory mechanism could not survive American accession to the Berne Convention.[6] The conversion is itself a small but instructive datum about the treaty constraints I take up in Part IX.

Congress also inherited an existing infrastructure that did not need legislative building. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) were already operating under antitrust consent decrees that had been in place well before the 1976 Act was a glimmer in anyone's eye.[7] SESAC (originally the Society of European Stage Authors and Composers), founded in 1931 and the second-oldest of the American Performing Rights Organizations (PROs), was not subject to a consent decree, but its smaller catalog and more selective membership meant that the regulated PROs effectively defined the licensing landscape into which the 1976 Act dropped.[8] Congress relied on this infrastructure for the public performance

4. *See* 17 U.S.C. § 111 (2024); § 115 (2018). For analysis treating the original 1976 Act compulsory licenses as a connected legislative phenomenon, see ROBERT P. MERGES, CATO INST., NO. 508, COMPULSORY LICENSING VS. THE THREE "GOLDEN OLDIES": PROPERTY RIGHTS, CONTRACTS, AND MARKETS (2004), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa508.pdf [https://perma.cc/5EV2-43KW].

5. *See* H.R. REP. NO. 94-1476, at 88–101. For background on the broader political economy of the cable compromise, see JESSICA LITMAN, DIGITAL COPYRIGHT 35–50 (2006).

6. *See* 17 U.S.C. § 116 (allowing negotiated licenses with arbitral fallback). The jukebox license was originally enacted as a compulsory license by the 1976 Act, converted to a negotiated regime by the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 4(a)(4), 102 Stat. 2853, 2854, and consolidated in § 116 by the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 3, 107 Stat. 2304, 2308. The BCIA was effective March 1989.

7. United States v. ASCAP, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. BMI, 1940–1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941). The decrees have since been amended several times. The most significant amendment to the ASCAP decree (sometimes called "AFJ2") appears at *United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

8. *See About Us*, SESAC, www.sesac.com/about/ [https://perma.cc/BP5L-VW8K] (last visited July 21, 2026).

right in musical works without writing a section-115-style compulsory license for that right. The reliance was quiet, and it shaped much of what followed. Where infrastructure existed and was already constrained by antitrust supervision, Congress did not legislate. Where it did not, Congress eventually legislated, either with a compulsory license or, decades later, a mandatory designated collector. The pattern repeats in every subsequent technological transition I will discuss.

III.
SECTION 115 AND THE LONG SHADOW OF THE PLAYER PIANO

Section 115 is the oldest compulsory license in American copyright law. Its origins matter for the present argument because they reveal something the AI debate has yet to absorb: in the American tradition, compulsory licenses have been at least as often anti-monopoly devices as they have been user subsidies.

The story is by now familiar, but the details are worth retrieving. In 1908, the Supreme Court decided in *White-Smith v. Apollo* that piano rolls were not copies of musical compositions under the pre-1909 statutes on the ground that they were perceptible only to a machine.[9] Composers had no rights over their mechanical reproduction. Congress moved to correct this. By the time the 1909 Act was being drafted, however, the Aeolian Company had quietly secured exclusive licensing arrangements with virtually every significant music publisher, positioning itself to monopolize the market for piano roll reproductions of popular songs.[10] Congress, alarmed, created the compulsory mechanical license not to favor manufacturers over composers but to prevent Aeolian from cornering the market.[11] The two-cent royalty was set by Congress, not by negotiation, and it stayed at two cents for an embarrassingly long time.[12]

This is the lesson worth keeping. The compulsory license, in the American tradition, is often the legislative response to threatened market capture. Where market power threatens to swallow the licensing process, regulated access becomes an alternative to monopolization. The current AI debate, which tends to treat any compulsory license proposal as a creator-friendly intervention against rapacious tech companies, has it half right. The historical pattern is more complicated, and the politics depends entirely on who is doing the cornering.

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9. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908) (holding that piano rolls were not "copies" of musical compositions because they could not be perceived directly by the human eye but only through the operation of a machine).

10. On the Aeolian Company's pre-emptive licensing strategy and the legislative response, *see* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 52–53 (rev. ed. 2003)*; see also* H.R. REP. NO. 60-2222, at 5 (1909) (mentioning the licensing of mechanical reproductions as a way to protect composers' rights "without establishing a great music monopoly").

11. *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075 (repealed 1976). The royalty was fixed at two cents per "part" manufactured.

12. *See* Daniel Abowd, Comment, *Something Old, Something New: Forecasting Willing Buyer/ Willing Seller's Impact on Songwriter Royalties*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 574, 578–82 (2021).

The 1976 Act preserved section 115 with terminology updated to phonorecords.[13] For about three decades, the system worked tolerably. The compulsory mechanism was largely sidestepped in practice through Harry Fox Agency (HFA), which acted as the music publishers' voluntary intermediary and made the statutory procedure unnecessary for routine commercial transactions.[14]

There is a feature of the 1976 architecture worth pausing on, because it shaped four decades of American compulsory rate-setting and was not retired until 2018. The 1976 Act did not just preserve the section 115 compulsory mechanism. It also created a rate-setting institution, the Copyright Royalty Tribunal (CRT), later succeeded by the Copyright Arbitration Royalty Panels (CARP) and then the Copyright Royalty Board (CRB), and a rate-setting standard (the four factors of section 801(b)(1)). The factors directed the rate-setters to balance four objectives, sometimes pulling in different directions: (1) maximizing the availability of creative works to the public; (2) affording the copyright owner a fair return and the copyright user a fair income under existing economic conditions; (3) reflecting the relative roles of owner and user with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets; and (4) minimizing disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

This was openly a policy standard, not a market-mimicking one.[15] The four factors did not ask what the parties would have agreed to in a notional unrestricted negotiation. They asked the rate-setter to balance creator compensation, user equity, technological development, and industry stability, with creator compensation as one factor among four. Defenders of the standard, including, in a careful and well-developed argument, Jacob Victor, have urged that this is the right way to think about compulsory licensing in copyright: not as a backstop for market failure, but as a distinctive policy tool that the market-mimicking analogy obscures rather than illuminates. The position is a serious one, and I do not dismiss it. The empirical record nonetheless tells the other way. Across the four-plus decades section 801(b)(1) governed mechanical rate-setting, administered rates were widely viewed by music publishers and songwriters as systematically below the rates that voluntary negotiation would have produced, and the standard's fourth factor (minimizing industry disruption) was particularly criticized for shifting outcomes toward existing-business-model

13. 17 U.S.C. § 115 (2018). For a comprehensive contemporary account, see Mary LaFrance, *Collective Management of Copyright and Related Rights in the United States*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 343 (Daniel Gervais & João Pedro Quintais eds., 4th ed. 2025).

14. On HFA's historical role and its 2015 acquisition by SESAC, see LaFrance, *supra* note 13, at 346, 357–58.

15. *See* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 922–23 (2020).

preservation at the expense of creator compensation.[16] The two-cent rate that Congress fixed in 1909 stayed at or near two cents until 1978 not by oversight but by the rate-setting mechanics of the time; the 801(b)(1) factors, when the CRT/CARP/CRB applied them, produced a similar pattern of below-market outcomes for the next three decades.[17]

The Music Modernization Act in 2018 abandoned section 801(b)(1) for section 115 rate-setting in favor of the willing buyer / willing seller standard already used for noninteractive digital performance under section 114(f)(2). This was a substantial doctrinal shift, and it has not been fully appreciated outside specialist circles. Congress had concluded, after four decades of evidence, that the policy-balancing approach to compulsory rate-setting was systematically under-compensating the creators the licenses were meant to compensate.[18] The fix was to switch to a market-simulating standard. As I argue in Part IX, the experience of administered rate-setting under both standards is itself an important piece of evidence in evaluating proposals for compulsory licensingThe architecture of administered rate-setting is, in the end, harder than its proponents allow.

That architecture broke with streaming. Interactive services in the mid-2000s, building catalogs at speed and operating under a section 115 procedure designed for physical phonorecords, failed in spectacular fashion to comply with the statute's requirements. They sent bulk notices to the Copyright Office. They invoked the "address unknown" provisions to avoid paying publishers they claimed they could not locate. The litigation that resulted was substantial. *Ferrick v. Spotify* settled, after consolidation, for roughly $43.4 million; Spotify settled separately with the National Music Publishers Association for over $30 million more.[19] The settlements provided evidence of structural breakdown, not just isolated incidents.

16. Abowd, *supra* note 12, at 653–54, 690.

17. *See* U.S. COPYRIGHT OFF.COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 12–13, 26–27, 134–35 (2015) [hereinafter MUSIC MARKETPLACE REPORT], https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (tracing the mechanical license from the two-cent rate of 1909 through the creation of the Copyright Royalty Tribunal, and finding that the section 801(b)(1) policy standard has led to below-market rates); *see also* Jeffrey A. Eisenach, *The Sound Recording Performance Rights at a Crossroads: Will Market Rates Prevail?*, 22 COMMLAW CONSPECTUS 1, 13–14 (2014) (documenting the same pattern under section 801(b)(1) in the sound recording performance context); Abowd, *supra* note 12, at 578–82.

18. *The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/creation.html [https://perma.cc/ZPD8-HW43] (last visited Aug. 5, 2026); *see also* H.R. Rep. No 115-651, at 8, 25 (2018) (explaining that the amendments to section 115(c) change the current rate-setting standard from that currently found at 801(b) to the "willing buyer / willing seller" standard and that the goal is a uniform standard approximating rates negotiated in a free market); MUSIC MARKETPLACE REPORT, *supra* note 17, at 4, 12–13, 134–35 (recommending a uniform market-based rate setting standard for all government rates).

19. *See* Ferrick v. Spotify USA Inc., No. 16-cv-8412 (AJN), 2018 WL 2324076, at *6 (S.D.N.Y. May 22, 2018) (approving class action settlement of approximately $43.4 million). Spotify settled separately with the National Music Publishers Association for over $30 million. *See* LaFrance, *supra* note 13, at 352 n.38.

Congress responded, after roughly a decade of distortion, with the Music Modernization Act of 2018 (MMA).[20] The MMA created the Mechanical Licensing Collective (MLC) as the mandatory administrator of the section 115 blanket license for digital phonorecord deliveries. It eliminated the address-unknown loophole. It established the Musical Works Database to address the matching problem of unidentified rights holders whose royalties had been accumulating in unallocated pools.[21] It replaced the policy-balancing 801(b)(1) standard discussed above with willing buyer / willing seller for section 115 rate-setting.[22] It modified the eligibility requirements for digital services while preserving the underlying first-use limitation: a work must still be authorized for distribution before the blanket license applies.[23] The MLC is the product of demonstrated market failure that the existing mechanism could not address. The pattern matters for the AI question I take up in Part VIII.

IV.
THE PERFORMING RIGHTS ORGANIZATIONS: A VOLUNTARY-COMPULSORY HYBRID

American licensing of music performing rights sits in a structural position the rest of the licensing landscape does not occupy. It is neither a compulsory license nor a purely voluntary CMO arrangement. It is best viewed as a regulated hybrid, shaped by antitrust enforcement rather than by the Copyright Act, and it has structural lessons of its own.

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20. *See* Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018), codified in relevant part at 17 U.S.C. § 115(d). For analysis, see LaFrance, *supra* note 13, at 350–58.

21. 17 U.S.C. § 115(d)(3)(B) (designation of MLC); § 115(d)(3)(E)(i) (Musical Works Database). The MLC began operations on January 1, 2021.

22. 17 U.S.C. § 115(c)(1)(F) (willing buyer/willing seller standard). The MMA's adoption of this standard for section 115 rate-setting replaced the policy-balancing standard previously codified at 17 U.S.C. § 801(b)(1) (2012), which had directed the Copyright Royalty Judges (and their predecessors, the Copyright Royalty Tribunal and the Copyright Arbitration Royalty Panels) to balance four objectives: maximizing the availability of creative works to the public; affording the copyright owner a fair return and the copyright user a fair income under existing economic conditions; reflecting the relative roles of the copyright owner and the copyright user with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets; and minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. For a thoughtful and contrary defense of the policy-balancing approach as a tool of copyright policy distinct from market-mimicking rate-setting, see Victor, *supra* note 15. Victor, defending the policy-balancing approach, acknowledges that "[r]egulators ultimately applied the 801(b) factors to set rates designed to ensure that burgeoning dissemination industries, such as digital radio, could avail themselves of royalty rates that would allow them to thrive, even if those rates were lower than those suggested by free market proxies." *Id.* at 922. For a comparative analysis of the two standards in CRB practice, see Abowd, *supra* note 12.

23. 17 U.S.C. § 115(a)(1)(A)(i)–(ii). The first-use limitation, modified but not eliminated by the MMA, requires that the musical work have been previously distributed to the public on phonorecords or fixed in a sound recording with the consent of the copyright owner and authorized for digital distribution.

There are now five performing rights organizations operating in the United States. ASCAP, founded in 1914 and historically the largest; BMI, founded in 1939 by the National Association of Broadcasters in response to ASCAP licensing disputes; SESAC, founded in 1930; Global Music Rights, founded in 2013; and AllTrack, founded in 2019.[24] The asymmetry that matters is that ASCAP and BMI operate under antitrust consent decrees first imposed in 1941, while the other three do not.

The 1941 decrees imposed obligations that have shaped American collective licensing of music ever since.[25] ASCAP and BMI must accept any qualifying songwriter or publisher who applies for membership. They must offer licenses to any applicant on reasonable terms. They cannot charge discriminatory rates. They must offer alternatives to blanket licenses, including per-program licenses. They cannot acquire exclusive performance rights from members, who therefore retain the right to grant direct licenses. They must provide "through-to-the-viewer" licenses for broadcast networks.[26] And, perhaps most importantly, disputes over fees go to the United States District Court for the Southern District of New York, sitting as a rate court.[27]

The rate court is, in effect, the regulator of musical performance licensing in the United States. ASCAP and BMI bear the burden of proving the reasonableness of their proposed fees. If they do not, the court sets a fee.[28]

The Supreme Court's 1979 decision in *Broadcast Music, Inc. v. CBS, Inc.* upheld blanket licensing against a per se antitrust challenge, finding that the consent decree safeguards preserved enough competition to satisfy the rule of reason.[29] The decision is foundational not only as a holding but as a framework: the lawfulness of collective licensing depends on the regulatory constraints that surround it, not on the formal voluntariness of the arrangement. Without the consent decrees, the same blanket licensing arrangements would face renewed antitrust scrutiny tomorrow.

Two episodes from the past decade are worth lingering on. In 2016, the Department of Justice, in what struck many of us at the time as an institutional

24. *See* LaFrance, *supra* note 13, at 343–50 (introducing the five-PRO landscape and recounting the founding histories of ASCAP (1914), BMI (1939), SESAC (1930), Global Music Rights (2013), and AllTrack (2019)).

25. *See* United States v. ASCAP, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. BMI, 1940–1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

26. *ASCAP*, 1940–1943 Trade Cas. (CCH) at 403–05; *BMI*, 1940–1943 Trade Cas. (CCH) at 382–84.

27. *See ASCAP*, 1940–1943 Trade Cas. (CCH) at 406; *BMI*, 1940–1943 Trade Cas. (CCH) at 384.

28. ASCAP rate court proceedings are heard by the United States District Court for the Southern District of New York pursuant to AFJ2. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 323 (S.D.N.Y. 2014), *aff'd sub nom.*, Pandora Media, Inc. v. ASCAP, 785 F.3d 73 (2d Cir. 2015); *see also* BMI v. DMX Inc., 683 F.3d 32, 44–45 (2d Cir. 2012) (addressing the BMI rate court mechanism).

29. 441 U.S. 1, 24 (1979) (holding that ASCAP's and BMI's blanket licenses were not per se illegal under the Sherman Act and were instead to be evaluated under the rule of reason given the safeguards in the consent decrees).

misreading of the consent decrees, attempted to require each PRO to license 100 percent of any musical work even when ownership was split among members of different PROs. Judge Stanton rejected the DOJ's reading; the Second Circuit affirmed.[30] Fractional licensing continues. Around the same time, several ASCAP-affiliated publishers, dissatisfied with what digital music services were paying, attempted to withdraw their digital performance rights, but only those rights, to negotiate higher royalties directly. The federal courts held the partial withdrawal ineffective, because the consent decree forbids ASCAP from refusing to license any subset of potential licensees.[31] The publishers had to choose: all or nothing.

The PRO model is, in important practical respects, not entirely voluntary, at least as far as ASCAP and BMI are concerned. From a music user's perspective, the practical choice is between obtaining a blanket license and facing infringement suits across a vast and diffuse repertoire that cannot be cleared at any reasonable cost through individual negotiation. The system is voluntary in the sense that rights holders affiliate by choice and users apply for licenses by choice. It is effectively mandatory in the sense that neither side has a real alternative for the bulk of the music market. The 1941 decrees were designed to regulate this condition, not eliminate it.

The smaller PROs (SESAC, Global Music Rights, AllTrack) have never been subject to antitrust consent decrees. They have not, however, escaped the gravitational pull of the regulated model. Both SESAC and Global Music Rights have faced private antitrust litigation from radio and television broadcasters. SESAC settled by agreeing to submit royalty disputes to binding arbitration; GMR settled in 2022 on confidential terms through long-term licenses with the stations.[32] The threat of antitrust scrutiny, in other words, exerts effective discipline on participants who are not formally bound by the 1941 decrees. The licensing landscape, despite the formal asymmetries, is more uniform in its operation than it appears at first glance.

30. United States v. BMI, 207 F. Supp. 3d 374, 376–77 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017).

31. *In re* Pandora Media, Inc., No. 12 Civ. 8035(DLC), 2013 WL 5211927 at *1 (S.D.N.Y. Sep. 17, 2013), *aff'd sub nom.*, Pandora Media, Inc. v. ASCAP, 785 F.3d 73 (2d Cir. 2015).

32. *See* Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 657–58 (S.D.N.Y. 2015) (involving a settlement requiring SESAC to submit royalty disputes to binding arbitration); Radio Music License Comm., Inc. v. SESAC, Inc., No. 2:12-cv-05807 (E.D. Pa. dismissed July 28, 2015). The terms of the GMR settlement were not fully disclosed, see David Oxenford, *GMR and RMLC Announce that Radio Royalty Settlement is Effective – Gives Commercial Radio Stations One Last Chance to Join Licensing Agreement by March 31*, BROAD. L. BLOG (Feb. 7, 2022). https://www.broadcastlawblog.com/2022/02/articles/gmr-and-rmlc-announce-that-radio-royalty-settlement-is-effective-gives-commercial-radio-stations-one-last-chance-to-join-licensing-agreement-by-march-31/ [https://perma.cc/6MWQ-WP4B].

V.
SECTIONS 114 AND 112: A RIGHT BORN WITH ITS OWN LICENSE

The Digital Performance Right in Sound Recordings Act of 1995 is the most architecturally self-conscious piece of legislation in American copyright history.[33] Congress simultaneously created a new exclusive right (the digital public performance right in sound recordings) and pre-constrained it with a statutory license. Section 114 came into the world already equipped with a regulatory safety valve. This was not an accident.

The legislative history reveals a three-way balancing among the recording industry, broadcasters who insisted on continuing exemptions for over-the-air radio (a question that remains a live one), and the nascent digital music industry, which needed legal certainty to build any business at all.[34] The compromise was the interactive / noninteractive distinction. Interactive services, meaning those giving users control over what plays when, must negotiate voluntary licenses. Noninteractive services, meaning those providing a radio-style experience without user control, receive a statutory license at rates set by the Copyright Royalty Judges.

The boundary between the two has produced persistent litigation, predictably. In *Arista Records v. Launch Media*, the Second Circuit held that a service using listener preferences to influence but not entirely control playlist composition was noninteractive, on the ground that users could not select specific recordings or predict with certainty what would play.[35] The interactive / noninteractive line is, in effect, the boundary between the regulated and negotiated markets. Every dollar of difference between the statutory rate and a negotiated rate gives the parties strong incentives to fight over which side of the line they are on.

The Digital Millennium Copyright Act (DMCA) in 1998 added section 112(e), the ephemeral recordings license.[36] Most observers at the time, myself included, treated it as an obscure infrastructure provision. We were wrong about that. Digital streaming requires server copies. Without section 112(e), every server copy of a sound recording would constitute a separate act of reproduction requiring its own license.

SoundExchange, the government-designated collector for the section 114 royalty, represents a hybrid distinct from anything that came before.[37] It is not a voluntary membership organization, like the PROs. It is not a purely private

33. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

34. S. REP. NO. 104-128, at 13–16 (1995).

35. Arista Recs., LLC v. Launch Media, Inc., 578 F.3d 148, 162–64 (2d Cir. 2009).

36. Digital Millennium Copyright Act § 405, 17 U.S.C. § 112(e). The ephemeral recording license is tied to a corresponding section 114 statutory license.

37. 37 C.F.R. § 380.4 (2025) (designating SoundExchange as the collective for the section 114 statutory royalty); *see also* LaFrance, *supra* note 13, at 358–63 (explaining public performance licensing for sound recordings).

intermediary, like Harry Fox. It is a government-designated body with mandatory authority over all eligible rights holders, regardless of whether they want it. The royalty split is set by statute: 50 percent to rights owners, 45 percent to featured recording artists, and the remaining 5 percent divided equally between non-featured musicians (administered through the American Federation of Musicians (AFM)) and non-featured vocalists (administered through the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)).[38] The willing buyer / willing seller rate-setting standard reflects a particular legislative judgment about what compensation level the statute means to ensure, and contestation over that judgment continues at every CRB cycle.[39]

What SoundExchange illustrates, and the MLC repeats with the MMA two decades later, is a third model of collective administration sitting alongside the consent-decree-regulated PROs and the section 115 voluntary intermediary system: the government-designated mandatory collector. Both came into being because Congress eventually concluded that voluntary intermediation could not deliver complete coverage in the relevant market. The pattern, again, will be relevant when I get to AI.

VI.
WILLIAMS & WILKINS, CCC, AND THE *TEXACO* MECHANISM

Compulsory and what one might call regulated licensing addresses one half of the picture. The other half is voluntary licensing, particularly for reproduction rights in text, and its development illustrates a doctrinal mechanism that I think is underappreciated: judicial calibration of fair use can constitute, rather than merely describe, a licensing market.

Photocopying existed in legal limbo before the 1976 Act took effect. In *Williams & Wilkins*, the Court of Claims held in 1973 that systematic photocopying of journal articles by the National Institutes of Health and the National Library of Medicine was fair use, principally because the publishers could not show concrete economic harm.[40] The Supreme Court split four-four. Publishers and users were left in an unsettled position that benefited neither side. Copyright Clearance Center, Inc. (CCC) was incorporated in 1978, by joint agreement of the Authors League of America and the Association of American Publishers, in part as a response to the practical mess *Williams & Wilkins* had

38. 17 U.S.C. § 114(g)(2). The rights owner receives 50%; the featured recording artist receives 45%; the remaining 5% is divided equally between non-featured musicians (administered through the American Federation of Musicians) and non-featured vocalists (administered through SAG-AFTRA).

39. *See* § 114(f)(1)(B); Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), 86 Fed. Reg. 59452 (Oct. 27, 2021) (to be codified at 37 C.F.R. pt. 380).

40. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1359, 1362–63 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

created.[41] The Final Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU Final Report), also issued in 1978, recommended against statutory exemption for photocopying, on the bet that licensing markets would develop organically.

For its first decade and a half, CCC's commercial fortunes were modest. I joined CCC as Vice President in the 1990s, with responsibilities that included international relations and the development of new licensing programs. I had spent the years before that at WIPO, where, as I noted in the Introduction, one of my responsibilities had been to set up CMOs from the ground up in jurisdictions that had statutes but no functioning licensing. I came to CCC expecting that the institutional challenges in the United States would be different from those I had been helping countries solve. They were different in scale and resources. The underlying problem was the same. Rights on paper do not turn into payments to creators without an institutional intermediary that knows how to negotiate, monitor, and distribute, and without an external incentive that makes paying preferable to not paying.

What may have turned CCC's situation around, more than any management decision we made, was a Second Circuit ruling. *American Geophysical Union v. Texaco*, decided in 1994, held that Texaco researchers' systematic copying of journal articles for personal archival files was not fair use.[42] The court's analysis turned, decisively, on the fourth factor of section 107: the effect of the use on the potential market for or value of the copyrighted work.[43] The court found that CCC licensing was readily available, that publishers had reasonably expected to receive revenue from corporate institutional copying, and that Texaco's copying therefore caused cognizable harm.[44]

The doctrinal point deserves explicit articulation. The existence of a functioning licensing market made it possible for the court to find harm. Fair use was narrowed because licensing existed. Licensing, in turn, was incentivized because fair use was narrowed. The apparent circularity is not a flaw. It is the mechanism by which the statute, working through the courts, constitutes voluntary markets. Where licensing markets do not yet exist, fair use tends to be more permissive. Where they emerge, fair use tends to narrow. Doctrine and market are mutually constituting.

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41. On the founding of CCC, see COPYRIGHT CLEARANCE CTR., CREATING SOLUTIONS TOGETHER: LESSONS TO INFORM THE FUTURE OF COLLECTIVE LICENSING 24–32 (2020), https://www.copyright.com/wp-content/uploads/2021/01/CCC_CreatingSolutionsTogether_Ebook_2020.pdf [https://perma.cc/D9B4-PDUS]. CCC was incorporated in 1978 through the joint efforts of the Authors League of America and the Association of American Publishers, with the NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 48–49 (1978) [hereinafter CONTU REPORT], anticipating that licensing markets would develop organically rather than through statutory exemption.

42. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931–32 (2d Cir. 1994).

43. 17 U.S.C. § 107; *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

44. *Texaco*, 60 F.3d at 929–31.

By the time I arrived at CCC, the change in the wind was still palpable. Corporate counsel who had been politely dismissive of CCC license offers in 1993 wanted meetings in 1995. The institutional dynamic shifted overnight, or close to it. What *Texaco* did not change was the underlying institutional capacity needed to make the licensing system work; that capacity, painstakingly built over the previous fifteen years, was what made it possible to absorb the new demand. (A point worth keeping in mind for AI: legal exposure creates demand for licensing, but it does not, by itself, create the licensing organizations that can meet the demand.)

The post-*Texaco* developments confirmed the pattern. The Sixth Circuit, sitting en banc, rejected a course packet publisher's fair use defense for unauthorized commercial reproduction of textbook excerpts. The Eleventh Circuit applied the same fourth-factor logic in the Georgia State digital course reserves litigation, finding that where CCC licenses were available and reasonably priced, unauthorized educational copying weighed against fair use.[45] Each judicial decision reinforced the market that made the next decision easier to reach. CCC's evolution since the 1990s, from photocopying to digital licensing and now to AI training, has followed the same logic.[46]

This dynamic is essential to understanding what voluntary licensing for AI training can plausibly become. I return to the point in Part XI.

VII.
THE SYSTEM AT FIFTY

What has fifty years actually produced? Honest assessment runs in both directions.

On the achievement side, the record is real. The PRO system has distributed performing rights royalties at scale and with reasonable efficiency for over a century, enabling transactions that individual negotiation could not have managed. SoundExchange has collected and distributed billions of dollars in digital performance royalties that, without a mandatory designated collector, would likely have remained unallocated or consumed by administrative costs. CCC has built a functioning text reproduction licensing market that did not exist in 1978. The MLC, in its first years of operation, has made meaningful progress on the matching problem that had left hundreds of millions of dollars in mechanical royalties unassigned. The Copyright Royalty Board, for all its

45. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996) (en banc); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1283–84 (11th Cir. 2014) (involving the Georgia State digital reserves and applying the fourth factor with reference to CCC license availability).

46. On CCC's evolution into AI training licensing, *see AI Systems Training License*, COPYRIGHT CLEARANCE CTR., https://www.copyright.com/solutions-ai-systems-training-license/ [https://perma.cc/8W6D-NWVZ] (last visited July 21, 2026).

procedural difficulties, has at least kept rates from drifting completely free of an economic anchor.[47]

On the structural-tension side, things are murkier. The CRB rate-setting process is expensive, slow, and adversarial to a degree that imposes serious costs on every party. Major participants spend millions of dollars in =proceedings that take place every five years.[48] The standard the CRB applies has itself shifted, as I discussed in Part III, from the policy-balancing four-factor test of section 801(b)(1) to the willing buyer / willing seller standard introduced for section 114 in the 1990s and extended to section 115 by the MMA. The shift was, in substance, an institutional concession that four decades of policy-balancing rate-setting had under-compensated creators. The willing buyer / willing seller standard has not, however, fully resolved the rate-adequacy problem. The interactive / noninteractive distinction has generated persistent boundary litigation. The proliferation of licensing entities (five PROs, the MLC, SoundExchange, HFA, CCC, Artists Rights Society (ARS), and a long tail of voluntary CMOs in other sectors) imposes coordination costs on every user trying to assemble comprehensive clearance.[49] A single performance can generate multiple separate licensing obligations, payable to multiple separate organizations, under multiple separate rate regimes.

The deepest tension, though, is one I have been hinting at throughout. Legislative updating runs on a political timescale. Technology runs on a faster one. The 1976 Act established the Copyright Royalty Tribunal as a mechanism for ongoing rate adjustment; it took twenty-five years and two subsequent statutes to make that mechanism work tolerably. The MMA addressed section 115 failures that had been visible since the mid-2000s; by the time it passed in 2018, a decade of market distortion had already happened.[50] The gap between the speed of technology and the speed of law is the system's most fundamental problem. It is also the problem the AI moment now presents in its sharpest form.

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47. On the institutional achievements of the licensing system, see LaFrance, *supra* note 13; *see also* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age* (explaining how licensing enables the copyright system to work), *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 13, at 3, 4–5.

48. *See* Responses of David J. Del Beccaro, President & CEO, Music Choice, to Questions for the Record from Sen. Charles E. Grassley, *Protecting and Promoting Music Creation for the 21st Century*, response to question 3, U.S. Senate Judiciary Committee (stating that Music Choice has participated in several Copyright Royalty Board proceedings and that the associated legal fees "run in the millions of dollars"); 17 U.S.C. § 114(f)(1)(A) (requiring the Copyright Royalty Judges to commence proceedings "every fifth year" to set rates and terms for the specified sound-recording licenses).

49. On the proliferation of licensing entities since 1978, see LaFrance, *supra* note 13, at 343, observing the "dramatic increase in both the number and variety of other collecting societies."

50. The MMA was enacted approximately a decade after the systemic compliance failures associated with the rise of streaming services first became visible. *See* Ferrick v. Spotify USA, Inc., No. 16-cv-8412 (AJN), 2018 WL 2324076, at *1 (S.D.N.Y. May 22, 2018).

VIII.
THE AI STRESS TEST

AI training is, structurally, the most severe stress test the system has yet faced.

The scale of reproduction involved exceeds anything the existing compulsory license framework was designed to accommodate. The works span every category of protected material at once: text, images, sound recordings, audiovisual works, and software. The dozen suits pending at the time of writing, are generating legal uncertainty at a speed no market participant can absorb.[51]

The U.S. Copyright Office, in the third part of its report on Copyright and Artificial Intelligence released in May 2025, took a position close to the one I argue for here.[52] The Office rejected compulsory licensing as premature. It noted that compulsory schemes "set practices in stone" and risk chilling flexible market-based solutions. It recommended allowing voluntary licensing markets to continue developing without statutory intervention, while endorsing extended collective licensing (ECL) as a targeted, less intrusive option for sectors where voluntary licensing proves unworkable. It also acknowledged candidly that the licensing markets for AI training are nascent and that their viability at full scale has not yet been demonstrated.[53]

The European context is differently shaped. Article 4 of the Directive on Copyright in the Digital Single Market (CDSM Directive) permits text and data mining (TDM) for any purpose, including AI training, subject to a rights-holder opt-out.[54] The EU AI Act layers training-data transparency obligations on top.[55] Two recent decisions illustrate how unsettled the doctrinal landscape remains. In *Kneschke v. LAION*, the Hamburg Regional Court ruled in September 2024 that AI training fell within the TDM exception, with particular focus on the scientific research carve-out under Article 3.[56] Fourteen months later, in *GEMA v. OpenAI*,

51. Among the principal pending cases at the time of writing are: *Authors Guild v. OpenAI, Inc.*, No. 1:23-cv-08292 (S.D.N.Y. argued Sep. 5, 2026); *New York Times Co. v. Microsoft Corp.*, No. 23-cv-11195 (S.D.N.Y. Apr. 4, 2025); *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. filed Oct. 30, 2023); *Getty Images (US), Inc. v. Stability AI, Ltd.*, No. 3:25-cv-06891 (N.D. Cal. filed Aug. 14, 2025); and *Concord Music Group, Inc. v. Anthropic PBC*, 5:24-cv-03811 (N.D. Cal. filed Oct. 18, 2023). In *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025), Judge Martínez-Olguín approved the $1.5 billion class settlement on July 20, 2026.

52. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 3: GENERATIVE AI TRAINING (2025) [hereinafter PART 3 REPORT].

53. *Id.* at 70, 74, 103–05.

54. Council Directive 2019/790, art. 4, 2019 O.J. (L 130) 92, 113–14 [hereinafter CDSM Directive].

55. Parliament and Council Regulation 2024/1689, art. 53(1), 2024 O.J (L).

56. Landgericht Hamburg [LG Hamburg] [Hamburg Regional Court], Sep. 27, 2024, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1710 (2024) (Ger.). The Hanseatic Higher Regional Court dismissed Kneschke's appeal on December 10, 2025, confirming the first-instance ruling and holding, going beyond the Regional Court, that the reproduction was covered by the commercial TDM exception (§ 44b UrhG/Art. 4 DSM) as well as the research exception. Hanseatisches

the Munich Regional Court ruled the other way, finding that the incorporation of song lyrics into training datasets and their reproduction in ChatGPT outputs constituted infringement.[57] The Munich ruling is under appeal as of this writing. The European Court of Justice will, sooner or later, need to resolve the underlying questions.

The voluntary licensing market is responding. OpenAI has signed agreements with the Associated Press, the Financial Times, Axel Springer, and News Corp. CCC has extended its Annual Copyright License to AI training uses (a development I watched with particular interest, having helped design the license's predecessor in the 1990s). CMOs in the UK, Australia, and Canada have launched or announced AI-specific frameworks.[58] These developments are not trivial. They demonstrate that voluntary markets can begin to fill a regulatory space even before doctrinal uncertainty is resolved. The *Texaco* dynamic discussed in Part VI explains much of this development.

There is also a global dimension that the domestic system cannot address on its own. Copyright law is territorial. AI training and deployment are not.[59] The fiftieth anniversary of the 1976 Act is an appropriate moment to ask how a territorially organized system can govern an inherently borderless technology. The answer, as I will argue in Part XI, lies in the capacity of voluntary collective licensing to cross borders that statutory law cannot.

IX.
WHY THE COMPULSORY LICENSE TEMPTATION SHOULD BE RESISTED

The historical pattern this Article has traced—the failure of voluntary intermediaries for cable retransmission, for mechanical reproduction in the streaming era, and for digital performance—gives the compulsory license proposal a certain superficial appeal. Why not skip the decade of distortion and do it now for AI training?

I think the answer is that this would be the wrong move on two distinct grounds. First, it would not survive scrutiny under the Berne-TRIPS three-step

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Oberlandesgericht [OLG Hamburg] [Hanseatic Higher Regional Court], Dec. 10, 2025, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 398 (2026) (Ger.).

57. Landgericht München I [LG München I] [Munich Regional Court I], Nov. 11, 2025, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1917 (2025) (Ger.). The appeal is currently pending.

58. On the OpenAI partnerships with the Associated Press, the Financial Times, Axel Springer, and News Corp, see *Partnering with Axios Expands OpenAI's Work with the News Industry*, OPENAI (Jan. 15, 2025) https://openai.com/index/partnering-with-axios-expands-openai-work-with-the-news-industry/ [https://perma.cc/NP9N-AM3T]. On CCC's AI training license, see *AI Systems Training License*, *supra* note 46. On UK, Australian, and Canadian CMO initiatives, see, for example, *Generative AI and Copyright*, CLA, https://cla.co.uk/ai-and-copyright/ [https://perma.cc/3YE8-KJXE] (last visited July 22, 2026).

59. On the territoriality problem in copyright, see generally DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 11–12, 30–58 (2019).

test in any market where voluntary licensing remains feasible. Second, the empirical record of compulsory licensing in adjacent industries gives us little reason to expect that an AI compulsory license would deliver fair value to creators. The argument is set out at greater length in a companion report; what follows is summary.[60]

Let us begin with the international framework. The Berne Convention is structured around the author's exclusive right, not a right to remuneration. Article 9(1) provides that authors "shall have the exclusive right of authorizing the reproduction of these works, in any manner or form," and analogous formulations apply to public performance and broadcasting.[61] Limitations on these exclusive rights are permitted only within the constraints of the three-step test, originally codified at Article 9(2) of Berne for reproduction and generalized to all exclusive rights through Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Article 10 of the WIPO Copyright Treaty.[62] I had a hand in some of the negotiations that led to TRIPS during my time working on the General Agreement on Tariffs and Trade (GATT) in the early 1990s, and I have written elsewhere on the negotiating history of Article 13 in some detail. The test that emerged is cumulative: first, a limitation must be confined to certain special cases; second, it must not conflict with normal exploitation of the work; third, it must not unreasonably prejudice the legitimate interests of the author.[63]

Mandatory collective management of an exclusive right operates as a limitation on that right. It is not a mere modality of exercise. It replaces the author's power to authorize or prohibit at a market-negotiated price with a non-negotiable tariff administered by an organization the author did not select. It must therefore satisfy the three-step test, and a mandatory regime applicable to AI training of all literary, musical, and visual works would, in my view, fail at every step. It would not be confined to a "certain special case" given its breadth.[64] More damningly, it would conflict with normal exploitation in any market where voluntary or direct licensing is feasible, because the existence of a viable

60. *See* DANIEL J. GERVAIS, LICENSING, MANDATORY COLLECTIVE MANAGEMENT, AND AI MACHINE LEARNING (2026), https://collectivemanagement.net/Gervais_report_on_Compulsory_CM_12%20June%20P.pdf [https://perma.cc/J9S4-X6TL].

61. Berne Convention for the Protection of Literary and Artistic Works arts. 9(1), 11(1), 11*bis*(1), July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

62. *Id.* art. 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS]; WIPO Copyright Treaty art. 10, Dec. 20, 1996, T.I.A.S. No. 02-306.1, 2186 U.N.T.S. 121. The drafting history is reconstructed at length in DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS §§ 3.188–3.206 (5th ed. 2021).

63. *See* GERVAIS, *supra* note 62, § 3.198.

64. *See* Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶¶ 6.108–6.112, WTO Doc. WT/DS160/R (adopted July 27, 2000) (interpreting the "certain special cases" requirement).

voluntary licensing market is itself part of the work's normal exploitation.[65] As Mihály Ficsor has put the point, "[s]ince mandatory collective management is a limitation of the exclusive rights, it may be applied as such only (but it may be) if the cumulative conditions of the three-step test . . . are fulfilled."[66]

There is a contrary view. Silke von Lewinski has argued for a more flexible reading of the three-step test, on which a carefully scoped mandatory mechanism, preserving meaningful remuneration, could be Berne-compatible if the essential core of the exclusive right is preserved.[67] I have a great deal of respect for von Lewinski's scholarship on international copyright, and her position has obvious appeal as a matter of policy flexibility. I do not, however, think it survives serious engagement with how voluntary AI licensing is developing on the ground. If voluntary licensing is functioning in significant market segments, and it is, then the existence of that voluntary market is itself the normal exploitation that any mandatory mechanism would conflict with. The Step 2 question is not whether the legislative scheme is well-designed. It is whether the legislative scheme replaces a functioning market for an exclusive right with a non-negotiable tariff. The answer for AI training, in any segment where voluntary licensing is currently happening, is yes.

The standard counterargument invokes the Berne Convention's own enumerated exceptions. Article 11*bis*(2) permits compulsory licensing for cable retransmission.[68] Article 13(1) permits compulsory licensing for the mechanical reproduction of musical works.[69] If compulsory licensing is sometimes permissible, why not for AI training? The answer lies in how those provisions are structured. They are specific, narrowly bounded, and historically contingent. They were included to address particular markets in which the drafters believed (in 1948 and 1908, respectively) that voluntary licensing was practically impossible. Their existence as enumerated, narrowly bounded exceptions is itself an argument that no general power to extend compulsory licensing to other rights exists. The drafters knew how to authorize state-mandated licensing when they wanted to. The fact that Article 9 contains no analogous authorization for digital reproduction or text and data mining is a structural choice, not an accident.[70]

The American experience with section 116 is a small but concrete piece of evidence on the same point. The 1976 Act enacted a compulsory license for the

65. *See id.* ¶¶ 6.165–6.186 (interpreting "normal exploitation" to extend to markets that are likely to acquire economic importance, not only existing markets); GERVAIS, *supra* note 62, §§ 3.198–3.201.

66. MIHÁLY FICSOR, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 87 (3d ed. 2022).

67. SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY ¶¶ 5.174–5.188 (2008).

68. Berne Convention, *supra* note 61, art. 11*bis*(2).

69. *Id.* art. 13(1).

70. On the limited and historically contingent character of these exceptions, see GERVAIS, *supra* note 62, §§ 3.203–3.206; and SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND §§ 13.36, 13.120 (3d ed. 2022).

public performance of musical works by jukeboxes. When the United States moved toward Berne accession in the late 1980s, Congress concluded that the compulsory mechanism could not be reconciled with Article 11(1) and converted section 116 into a negotiated license with arbitral fallback. The decision reflected an institutional judgment, by a Congress engaging seriously with the Berne framework on a specific compulsory licensing question, that voluntary or negotiated mechanisms were the answer where Berne-protected exclusive rights were at stake. The same institutional logic applies, with greater force, to AI training, which involves a far broader set of exclusive rights than the public performance of musical works in coin-operated machines.

The empirical record then reinforces the treaty-law concerns. As already noted, the two-cent statutory mechanical royalty enacted in 1909 stayed at two cents for over six decades.[71] The pattern continued in modified form after 1976. Rate-setting under section 801(b)(1) generated administered rates that music publishers and songwriters argued, with some empirical support, were systematically below voluntary-market levels for over four decades. When Congress finally addressed the problem in the MMA, the fix was to abandon the policy-balancing standard for a market-mimicking one. Even that more modest correction has not been a clean success: the parties before the CRB continue to disagree, sometimes bitterly, about whether the resulting rates approximate market value, and the comparator-based methodology that willing buyer / willing seller produces has its own well-documented difficulties. The European experience with mandatory collective licensing for cable retransmission has produced administrative complexity, persistent rate disputes, and uneven distribution to individual creators. None of this is decisive against compulsory licensing in genuinely narrow cases. But it should make us very cautious about extending the model to a vastly larger and more heterogeneous use.

Let us be explicit about what this evidence does and does not show. It does not show that compulsory rate-setting is impossible. The institution exists, and it produces rates. What it shows is that compulsory rate-setting tends, even with the better of the two American standards, toward systematic deviation from what voluntary markets would produce, and toward administrative cost, contestation, and delay that imposes its own friction on the industries the licenses are meant to serve. Proponents of AI compulsory licensing must explain why those characteristics, well-documented over fifty years of American experience in a much narrower context, would not also characterize an AI compulsory regime, especially one that would have to span every category of protected work and handle the rate-setting problem at a scale at least an order of magnitude larger than anything the CRB has yet faced.

71. On the consistent below-market character of statutory mechanical royalties prior to the MMA, see 2 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.04[H][1] (2026). The two-cent rate established in the 1909 Act remained unchanged until the 1976 Act.

The argument here is not that compulsory licensing is never appropriate. In narrow cases, where voluntary licensing is structurally impossible and the use is socially essential, it can be. The argument is that AI training does not satisfy that test. The voluntary market is developing. The use is commercial. The technology is amenable to institutional solutions. None of the conditions that justified Article 13(1) in 1908 are reproduced in the AI context.

X.
THE LEVY LESSON AND THE OUTPUT-SIDE PROPOSALS

If the compulsory license is the wrong response, the technology-specific levy is even worse. The American experience with the Audio Home Recording Act of 1992 stands as a cautionary exhibit.[72] Congress imposed a statutory royalty on the manufacturers and importers of digital audio recording devices and blank media, distributing the proceeds among rights holders and performers through a statutory formula.[73] The scheme was coherent on paper. It was built for a technology that passed through the market like a comet. Digital audio tape recording had a brief moment in the early 1990s and was effectively displaced by computer-based copying before the levy generated any meaningful revenue stream. The statute's express exclusion of computer equipment and storage media meant that the total collected over more than two decades came to roughly $45 million across all categories, which is closer to a rounding error than a compensation system.[74] The lesson is not that levies are categorically unworkable. (My WIPO experience suggests otherwise: private copying levies, well-designed, can perform real functions in specific markets.) The lesson is that a levy tied to a specific technology rather than to a use is acutely vulnerable to the pace of technological change. A system designed to compensate creators for AI training would have to be defined around the use, not the device or medium.

Several proposals from German practice and academic commentary attempt precisely this kind of use-based design. They are sometimes described, with some imprecision, as levies. They are better understood as output-side remuneration mechanisms, which is a structurally different thing. VG Wort has proposed a model in which the input side remains opt-in for rights holders, while the output side, where AI-generated content does not sufficiently reproduce an

72. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–1010.

73. 17 U.S.C. § 1004 (imposing royalty rates of 2% of transfer price for digital audio recording devices, capped at $8 per unit and 3% for media). The express exclusion of computer equipment is at § 1001(3)–(4).

74. Total DART royalties collected between 1992 and 2017 amounted to approximately $45 million across all categories. *See* U.S. COPYRIGHT OFF., YEAR-OVER-YEAR GROWTH IN THE COPYRIGHT ROYALTY FUNDS AS OF SEPTEMBER 30, 2025, https://www.copyright.gov/licensing/copyright-royalty-funds.pdf [https://perma.cc/TKW3-WDCZ] (last visited Sep. 6, 2026); *see also* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999) (holding that personal computers were not "digital audio recording devices" within the meaning of AHRA).

identifiable work to fall within existing copyright doctrine, is subject to a new remuneration claim analogous to the private copying levy. GEMA has proposed a two-part model that licenses AI training through a percentage royalty on provider net income and licenses the downstream monetization of AI-generated music separately.[75] In the academic literature, Martin Senftleben has articulated a structurally similar approach: rather than encumbering the AI training process with opt-out obligations and clearance requirements, remuneration would be triggered at commercialization, when a fully trained AI system is brought to market.[76] Katharina de la Durantaye has proposed a revenue-based levy on AI providers, the proceeds of which would flow to rights holders through collecting societies.[77]

These proposals share a common move: shifting the remuneration trigger from the training stage to the output or commercialization stage. The structural advantage is real. Output-side schemes avoid most of the rights-identification problems that plague input-side licensing, and they may avoid the principal Step 2 objection to input-side mandatory collective management.[78] Whether they succeed in avoiding it depends on how they are designed. The line between a sui generis remuneration claim and a limitation on an exclusive right subject to the three-step test is, in my reading, harder to draw than some of the proposals assume.

I am not, in any case, persuaded that the levy logic, even at the output stage, is the right answer for AI. My principal worry is more practical than doctrinal. The history of CMO administration of levy revenues, in private copying and reprographic reproduction across multiple jurisdictions, is uneven at best when it comes to getting money to individual creators rather than to institutional rights holders. The "black box" problems familiar from American mechanical licensing have analogues in many of the European levy systems I worked on at WIPO. None of this is fatal to output-side schemes; transparent governance, auditable distribution, and meaningful creator representation on CMO boards can address

75. On VG Wort's position, see ROBERT STAATS, GESETZLICHE REGELUNGSANS . . . TZE BEI KI-NUTZUNGEN URHEBERRECHTLICH GESCHÜTZTER WERKE [APPROACHES TO STATUTORY REGULATION REGARDING THE USE OF COPYRIGHT-PROTECTED WORKS IN AI] (2025) (Ger.), https://vgwort.de/media/pages/service/aktuelles/vortrag/b6a6829972-1769612914/gesetzliche-regelungsansaetze-bei-ki-nutzungen-urheberrechtlich-geschuetzter-werke.pdf [https://perma.cc/T76D-D99L]. On GEMA's proposal, see *Zwei S . . . ulen ein Ziel: Effektive KI-Lizenzierung für eine faire Beteiligung der Musikschaffenden* [*Two Pillars, One Goal: Effective AI Licensing for Fair Participation of Music Creators*], GEMA (Oct. 17, 2024) (Ger.), https://www.gema.de/de/w/generative-ki-lizenzmodell-zwei-saeulen [https://perma.cc/DUV7-8K7].

76. Martin Senftleben, *Generative AI and Author Remuneration*, 54 INT'L REV. INTELL. PROP. & COMPETITION L. 1535 (2023) (Ger.).

77. KATHARINA DE LA DURANTAYE, STELLUNGNAHME PROF. DR. KATHARINA DE LA DURANTAYE [STATEMENT BY PROF. DR. KATHARINA DE LA DURANTAYE] (2026) (Ger.), https://www.bundestag.de/resource/blob/1149944/Stellungnahme-Prof-Dr-Katharina-de-la-Durantaye.pdf [https://perma.cc/4ERB-9YV8].

78. On the structural advantages and disadvantages of output-side approaches in greater depth, see GERVAIS, *supra* note 60, §§ 4–5.

it. But these are real problems that deserve real engagement, not the kind of design-confidence some of the current proposals exhibit.

XI.
VOLUNTARY COLLECTIVE LICENSING AS THE PATH FORWARD

What I have been arguing toward, with some detours, is that voluntary collective management, supplemented where needed by extended collective licensing, is the right response to the AI training problem. Let me say what I think that means in practice, and why my time at WIPO in the early 1990s has shaped how I think about it.

My WIPO portfolio in those years included setting up CMOs in jurisdictions that had statutes but no functioning collective administration. The pattern was always similar. The statute existed. Sometimes it had been on the books for decades. No money was flowing. The reasons varied (sometimes rights holders were too dispersed to coordinate, sometimes the user community was too informal to license, sometimes the political will to support enforcement was lacking), but the underlying problem was the same: rights without institutions are paper. The work was building the institutions. It involved persuading rights holders to deposit catalogs in good faith. It involved persuading users that paying was preferable to litigating. It involved staffing, training, technology, governance, and a great deal of hand-holding through the first two or three years of operation, when nothing yet looked viable.

That experience taught me something I think is relevant here. Voluntary CMOs are buildable. They have been built in jurisdictions far more institutionally challenging than the United States, the EU, or the UK. What it takes is a combination of ingredients that is not mysterious: legal exposure that makes paying preferable to not paying (which is what the AI litigation is currently providing[79]); a critical mass of rights holders willing to register works and accept collective administration; a credible institutional intermediary that can negotiate, monitor, distribute, and account; and an external policy environment that supports rather than undermines voluntary licensing. None of these is impossible. None is even particularly difficult, in jurisdictions that already have functioning collective management for other purposes.[80]

The voluntary licensing market for AI training is, I think, more capacious than its critics often allow. The challenge is that the market must be built to reach beyond the major rights holders who have the leverage to negotiate directly. That reach is achievable. An author who retains her rights does not have to negotiate individually with every AI developer. She can register her works with CCC, or with a sectoral CMO, and authorize collective licensing, receiving royalties for

79. *See* cases cited *supra* note 51.

80. On the operational requirements for an effective voluntary CMO framework for AI licensing, including rights-metadata infrastructure, claims validation, cross-border coordination, and the role of ECL, *see* GERVAIS, *supra* note 60, §§ 3, 10; and Gervais, *supra* note 47, at 19–28.

uses she could neither have tracked nor enforced on her own. CCC's evolution from corporate photocopying to digital licensing to AI training has followed exactly this logic. The individual novelist whose work appeared in a training dataset is outside the voluntary licensing system only if she has not enrolled, or if the organizations available to represent her have not yet built the AI-specific infrastructure. Both are correctable, in the medium term.

The litigation, meanwhile, is doing what *Texaco* did a generation ago.[81] By making the cost of non-compliance concrete, it is incentivizing the development of the licensing infrastructure that can serve as the legal alternative. I have already argued that doctrine and market are mutually constituting. The current AI cases are constituting an AI licensing market in real time, whether or not their authors intend that result.[82]

There is, however, a real infrastructure deficit that any honest case for voluntary licensing must acknowledge. Voluntary licensing at scale requires investment in rights-metadata registries, claims validation processes, and cross-border coordination mechanisms.[83] These do not currently exist at the scale AI training requires. The EU AI Act's training-data transparency obligations could provide part of the informational foundation, especially if combined with complementary obligations or incentives to register ownership metadata. Existing CMOs with more advanced data capacities could host such registries in their respective sectors. The American system, with its existing PROs, MLC, SoundExchange, CCC, ARS, and other voluntary collective licensing organizations, has a head start in this respect that some other jurisdictions do not.

Extended collective licensing offers a targeted solution where pure voluntary licensing leaves coverage gaps. Under ECL, a CMO that is sufficiently representative of a class of rights holders is statutorily authorized to license on behalf of the entire class, including non-members, with an opt-out preserved for individual rights holders who prefer to manage their rights directly. ECL preserves the property-rule character of exclusive rights while solving the long-tail coverage problem. It has been used in the Nordic countries for decades. The current EU framework contemplates it as a permissible mechanism for out-of-commerce works and other defined contexts.[84] The U.S. Copyright Office has identified it as a possible targeted intermediate option for AI training, distinct

81. For a glimpse at the panoply of pending cases, see *ChatGPT is Eating the World*, CHAT GPT IS EATING THE WORLD, http://www.chatgptiseatingtheworld.com [https://perma.cc/YG49-G4F2] (last visited July 22, 2026).

82. On the constituting function of litigation in voluntary licensing market formation, see *supra* Part VI.

83. On the metadata problem and its implications for licensing at scale, see GERVAIS, *supra* note 60, §§ 7, 10.

84. On extended collective licensing in the Nordic context, *see* Mari Wallgren, *Collective Management in the Nordic Countries*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 13, at 289. On the EU framework for ECL, *see* CDSM Directive, *supra* note 54, ¶¶ 23, 33, 44; and Stef van Gompel, *Collective Management in the European Union*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 13, at 137.

from compulsory licensing.[85] ECL is a supplement, not a substitute. It works where pure voluntarism leaves gaps; it does not displace voluntary licensing where the market can function on its own.

The international dimension favors voluntary collective management as well. Voluntary licensing tends naturally toward cross-border consistency through private ordering and CMO reciprocity agreements, without requiring formal regulatory coordination among states.[86] Mandatory systems, by contrast, are inherently national in design and enforcement, and they tend to compound the territorial fragmentation they are meant to solve. The cross-border collective licensing infrastructure developed by music CMOs over the past century is imperfect, sometimes embarrassingly so, but it provides the relevant precedent for what an AI licensing system could look like at the international level.

In summation, voluntary collective management for AI training is feasible. It requires investment in metadata infrastructure, transparent governance, and cross-border coordination. It will be supplemented in some sectors by ECL. It will be reinforced by litigation that makes non-compliance costly. None of this requires departing from the international copyright framework, and none of it repeats the rate-adequacy failures of the compulsory license tradition. This is, in my submission, the path forward.

XII.
CONCLUSION

At fifty, the 1976 Copyright Act is neither the triumph its admirers describe nor the failure its critics insist on. It is a workable instrument that has lasted because the institutions around it did much of the work the statute could not do for itself. Section 106 is a list of entitlements. The licensing system around it is what makes those entitlements economically real. Some of that system Congress put in place. Most of it was built afterward, sometimes decades afterward, by people and institutions improvising in response to technological pressures the 1976 drafters could not have anticipated.

Two observations bring the analysis to a close. The first is historical. The American licensing system has shown itself to be more adaptive than its critics feared and less adequate than its designers hoped. It has managed successive disruptions, from photocopying through cable retransmission through digital downloads through streaming, with a combination of legislative intervention, judicial doctrine, and market development that has, on the whole, kept the system functional. Each adaptation has been slower and costlier than it should have been. None has been perfect. The system has held.

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85. *See* PART 3 REPORT, *supra* note 52.

86. On reciprocal agreements among CMOs, *see* Gervais, *supra* note 47, at 9–20; and Christian Handke & Richard Watt, *Essential Economics of Collective Copyright Management in the Twenty-First Century*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 13, at 97.

The second is prospective. The AI moment combines scale, speed, and territoriality in ways no previous disruption did. Meeting it will require domestic legislative response, of course. It will also require international coordination, which is the part of the puzzle the existing framework is least good at. The most promising path is voluntary collective management built with cross-border architecture, supplemented where necessary by ECL. The piece I am least confident about is whether the existing CMOs, including the one I worked at, can build the metadata and governance infrastructure that the AI moment requires fast enough. Some of them will, I think. Some will not. The ones that do will look very different in ten years from how they look today.

Fifty years is a long time for a statute to remain operative in a field this technologically dynamic. That the 1976 Act has survived, and in important respects thrived, reflects the institutional ingenuity of the people, public and private, who have done the actual work of exchange in the spaces the statute left for them.[87] Whether that ingenuity is sufficient for the next fifty years is the question this anniversary asks us to take seriously. I would not bet against the system. I would not bet entirely on it either. The fiftieth anniversary is, if nothing else, a good occasion to ask what we want it to look like at seventy-five.[88]

87. *See* U.S. CONST. art. I, § 8, cl. 8; Eldred v. Ashcroft, 537 U.S. 186, 212 (2003).

88. Resources on the comparative dimensions of collective management referenced throughout the Article are collected at *Collective Management of* Copyright, COLLECTIVEMANAGEMENT.NET, https://collectivemanagement.net/ [https://perma.cc/P3EH-J8XX] (last visited July 22, 2026), which is the companion site to COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 13.

Author Empowerment in the Copyright Act of 1976: Work Made for Hire and Termination of Transfers

Peter S. Menell* & David Nimmer**

ABSTRACT

From its genesis in the wake of the printing press, copyright law has mediated the division of power and compensation between publishers (and later, other intermediaries) and authors. For much of copyright's history, publishers held tremendous sway due to organizational strength and the high cost of mechanically reproducing and distributing books.

The Copyright Office drafters of what would become the Copyright Act of 1976 sought to shift the balance toward greater author control and remuneration. They targeted overturning the Supreme Court's 1943 decision validating advance assignment of copyright renewal terms, which largely negated authors' renewal claim. In doing so, the drafters had to confront the dual challenge of establishing a right to reclaim copyright consistent with aligning U.S. copyright law with the international unitary duration norm and without undermining exploitation of multi-author works.

Part II traces the development of an inalienable termination of transfer right in conjunction with the work made for hire definition of the 1976 Act. Part III examines how courts have interpreted—and at times destabilized—that integrated ownership architecture.

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I.
INTRODUCTION

The passage of the Copyright Act of 1976—the fourth general revision of U.S. copyright law—required Congress and the Copyright Office to resolve numerous complex industrial and technologically dynamic divides.[1] Among the most important and complex was the question of author empowerment.

For much of American copyright history, publishers and other intermediaries exercised substantial leverage in shaping both doctrine and practice. They were organized, capitalized, and institutionally entrenched. Authors, by contrast, often negotiated individually from positions of relative weakness. By the mid-twentieth century, however, authors had begun to organize more effectively through guilds and professional associations. At the same time, copyright policymakers—particularly within the Copyright Office—grew increasingly attentive to structural imbalances affecting authors' long-term participation in the economic value of their works.[2]

This Article examines two interrelated pillars of the 1976 Act's effort to recalibrate that balance: the termination of transfers provision and the modern definition of works made for hire (WMFH). Part II traces the co-evolution of these doctrines during the omnibus revision process, demonstrating how the drafters crafted an innovative ownership architecture that enabled authors to reclaim transferred copyrights while preserving the stability of composite and collaborative works. Part III explores how courts have interpreted—and sometimes destabilized—that architecture in subsequent decades, focusing on the employment prong, the independent contractor prong (particularly as applied to sound recordings), and the inalienability of termination rights.

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1. *See* Peter S. Menell, *The Making of the Copyright Act of 1976: Part I—Technocracy and Compromise*, 41 BERKELEY TECH. L.J. 753 (2026) (tracing the drafting of the Copyright Act of 1976).

2. *See Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. 94 (1975) (statement of Abraham L. Kaminstein, Former Reg. of Copyrights, Libr. of Cong.) ("For my part, I make no bones about favoring authors, composers, and artists."), *reprinted in* 14 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001) [hereinafter OMNIBUS]; *id.* at 106 (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.) ("My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole and only beneficiary of the copyright law of the United States under the Constitution, the authors of the so-called writings. In other words, the creators of copyrighted works as we now know them. I am profoundly of the belief that authors in this country have been treated shabbily and stingily from the very beginning of our copyright system. And, whatever I say will be with the thought that the situation of authors, not only as the creators of works of economic value, but as something that is infinitely precious to our country, needs to be promoted."); Barbara A. Ringer, *Viewpoint of the Copyright Office on General Revision of the Copyright Law*, 11 BULL. COPYRIGHT SOC'Y 37, 39 (1963) ("To me it is a compliment to be called 'pro-author'; in fact, I cannot see how we could justify taking the lead in drafting a new copyright law unless this were true."); COPYRIGHT OFF., LIBR. OF CONG., SIXTY-SEVENTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1964, at 2 (1965) ("Miss Ringer and Mr. Goldman were the principal drafters of the revision bill.").

II.
THE MAKING OF THE TERMINATION OF TRANSFERS AND WORK MADE FOR HIRE PROVISIONS OF THE 1976 COPYRIGHT ACT

This Part traces how the Copyright Office moved from the flawed renewal framework of the 1909 Act to a new ownership architecture built around an inalienable termination of transfers and a carefully delimited WMFH doctrine.

A. The 1909 Act and Judicial Interpretation

The ownership provisions of the 1976 Act ultimately turned on two structural features of the 1909 Act regime: the lack of a definition of "work made for hire" and concerns regarding unremunerative transfers amplified by the Supreme Court's 1943 decision authorizing advance assignment of renewal interests. The 1976 Act's WMFH provision and definition would ultimately be shaped by the duration and termination of transfer provisions.

1. The 1909 Act Work Made for Hire Provision

The 1909 Act provided that "the word 'author' shall include an employer in the case of works made for hire."[3] The Act did not, however, define "works made for hire," leaving this term to judicial interpretation. By the mid-1960s, courts had developed a two-pronged test distinguishing between employees and independent contractors.

Under the employee prong, courts presumed that the employer owned the copyright of works prepared by employees who created original works of authorship within the scope of their employment.[4] Under the independent contractor prong, courts presumed that works prepared by independent contractors at the "instance and expense" of the commissioning party were owned by that person or entity.[5] Nearly all circuits adopted this test.[6] This presumption was rebuttable by express agreements to the contrary as well as

3. Copyright Act of 1909, Pub. L. No. 60–349, § 62, 35 Stat. 1075, 1088.

4. *See* Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 567 (2d Cir. 1966).

5. *See id.*; Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965) ("[W]hen one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature . . . in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done."). Courts interpret "instance" to mean that the hiring party was the motivating factor behind the work and had at least the right to direct, supervise, accept, reject, or request revisions, even if it did not exercise day-to-day control. "Expense" generally means that the hiring party paid for the work or bore the financial risk; fixed-fee payment typically satisfied this element, while royalty-only arrangements could cut the other way. *See, e.g.*, Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1216–17 (2d Cir. 1972); Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 554–56 (2d Cir. 1995); Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc., 380 F.3d 624, 634–35 (2d Cir. 2004).

6. *See* Meredith Annan House, Note, Marvel v. Kirby*: A Clash of Comic Book Titans in the Work Made for Hire Arena*, 30 BERKELEY TECH. L.J. 933, 944 (2015).

evidence establishing contrary intent of the parties, such as the lack of the hiring party's right to direct and supervise the manner in which the work was created, industry custom, and course of dealing.[7]

Importantly, the 1909 Act's WMFH rule operated against the backdrop of a dual-term copyright structure.[8] Ownership and duration were intertwined in ways that would later become central to reform.

2. Unremunerative Transfers: The Problem of Advance Assignments of the Renewal Term

In theory, the dual-term structure of the pre-1976 Act copyright regime afforded authors who assigned their copyrights to distributor intermediaries (publishers, film producers, etc.) an opportunity to reclaim those rights when the time came for renewal of their copyright. The drafters of the 1909 Act enhanced the value of renewal by doubling its duration from 14 years to 28 years.

In practice, however, publishers, record companies, and film producers nullified that theoretical ability by routinely requiring authors to assign not only the initial term but also the renewal term through advance assignments of the renewal expectancy. So long as the author survived until the renewal window, the assignee could renew in its own name. On the other hand, if the author died before renewal vesting, then the renewal inured to the author's spouse and children.[9] Cognizant of that risk, intermediaries often also secured assignments from spouses and children of their own contingent renewal interests. Thus armed, the copyright belonged seamlessly to the intermediary through both its initial and renewal terms.

Such assignments from the spouse and children, in advance of its even becoming legally operative, could be viewed as deficient. Nonetheless, the Supreme Court validated this practice. *Fred Fisher Music Co. v. M. Witmark & Sons*[10] held those advance assignments of renewal interests to be enforceable. The decision effectively abolished renewal as a structural safeguard. What had served as a statutory protection against bargaining power imbalance and undervaluation instead devolved into a routinely circumvented formality.

By the mid-twentieth century, the renewal system's failure to secure meaningful author recapture had become widely recognized within copyright circles.[11] This problem—frequently described during the revision process as

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7. *See* Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909, 914 (2d Cir. 1974); Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 139–41 (2d Cir. 2013).

8. *See* Copyright Act of 1909 § 23 ("[T]he proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years . . . .").

9. *See id.*

10. 318 U.S. 643 (1943).

11. *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961) [hereinafter REGISTER'S REPORT] ("In practice, this reversionary feature of the

"unremunerative transfers"—would become one of the most explosive and difficult issues in the omnibus reform effort.[12]

B. The Lead-up to Omnibus Revision

Efforts to reform the 1909 Act began within a decade of its passage and intensified after World War I.[13] Yet comprehensive revision stalled for decades.[14] Meanwhile, the communications environment transformed dramatically: broadcasting expanded, phonographs proliferated, and mass reproduction technologies reshaped markets for creative works.

By the mid-1950s, Congress concluded that piecemeal amendments were inadequate.[15] In 1955, it appropriated funds for the Copyright Office to undertake a comprehensive revision study and to draft an overhaul of the 1909 Act.[16] The Office commissioned thirty-five studies examining doctrinal, industrial, and comparative law issues.[17] Most were prepared by Copyright Office personnel; the remainder were authored by leading scholars and practitioners.[18] The Office circulated drafts for comment and solicited extensive feedback.

These studies framed many of the structural questions that would define the revision process. Among the most important studies were Borge Varmer's study, *Works Made for Hire and on Commission*,[19] and Barbara Ringer's study, *Renewal of Copyright*.[20]

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present renewal system has largely failed to accomplish its primary purpose."), *reprinted in* 3 OMNIBUS, *supra* note 2.

12. *See* H.R. REP. NO. 94–1476, at 124 (1976) (discussing safeguards against unremunerative transfers).

13. *See* Abe A. Goldman, *Study No. 1: The History of U.S.A. Copyright Law Revision from 1901 to 1954*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST SESSION, STUDIES 1–4, at ix, 4–14 (Comm. Print 1960), *reprinted in* 1 OMNIBUS, *supra* note 2.

14. Congress enacted a focused bill in 1912 according copyright protection to motion pictures. *See* Act of Aug. 24, 1912, Pub. L. No. 62–303, 37 Stat. 488 (1912).

15. *See* Menell, *supra* note 1, at 759–60.

16. *See* COPYRIGHT OFF., LIBR. OF CONG., ANNUAL REPORT OF THE REGISTER OF COPYRIGHT FOR THE FISCAL YEAR ENDING JUNE 30, 1955, at 5 (1955) (noting that Congress "approved a sum of $20,000 to enable the Copyright Office to initiate studies as a part of a 3-year program for the general revision of the copyright law").

17. *See* 1–2 OMNIBUS, *supra* note 2.

18. *See* Peter S. Menell, *The Making of the Copyright Act of 1976: Part II—Political Economy*, COLUM. J.L. & ARTS (forthcoming 2026).

19. Borge Varmer, *Study No. 13: Works Made for Hire and on Commission*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 11–13, at 123 (Comm. Print 1960), *reprinted in* 1 OMNIBUS, *supra* note 2.

20. Barbara A. Ringer, *Study No. 31: Renewal of Copyright*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE

1. Works Made for Hire

Varmer's study traced the legislative history of Section 26 of the 1909 Act (enacted as Section 62 and renumbered in the 1947 codification of Title 17), surveyed judicial interpretations, examined reform proposals, and considered comparative approaches. It also explored alternative ownership models and their implications.

i. Employee Works

With respect to works created by employees within the scope of employment, Varmer observed that the 1909 Act default of employer ownership had "worked satisfactorily" in many contexts.[21] At the same time, he acknowledged the conceptual criticism that designating an employer as the "author" of another's intellectual creation was artificial and potentially inconsistent with the premise that creators are the primary beneficiary of copyright.[22]

Varmer identified a practical tension. On the one hand, employees might reasonably claim participation in uses beyond the employer's immediate business. On the other hand, the statutory default placed the burden of contracting on employees—typically the weaker bargaining party. In industries where employers routinely insisted on ownership, shifting the default to employees might produce little real change while increasing transaction costs.

Varmer also explored an alternative drawn from patent law: the "shop right" doctrine.[23] Under the shop right model, an employee-inventor retains patent ownership, but the employer receives a nonexclusive implied license where the invention arises from employment or use of employer resources. Where an employee is specifically hired to invent, the employer may compel assignment.

Varmer recognized both the conceptual appeal and the administrative difficulty of such a model.[24] Transposing this approach to copyright would have required distinguishing between general employment and specific creative assignments. He also emphasized the special case of collective and team productions.[25] In motion pictures, newspapers, encyclopedias, and similar works, dividing ownership among numerous contributors would complicate

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ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 29–31, at 105 (Comm. Print 1961), *reprinted in* 2 OMNIBUS, *supra* note 2.

21. Varmer, *supra* note 19, at 139.
22. *Id.*
23. *See id.* at 140.
24. *See id.* at 140–41.
25. *See id.* at 141.

licensing and exploitation. In such contexts, the case for centralized ownership was particularly strong.

The study also contemplated "split copyright" arrangements—akin to certain British reforms—under which an employer would hold rights necessary for exploitation in its primary medium while employees retained rights in other media.[26] But Varmer cautioned that such schemes would require precise statutory drafting to avoid confusion.

ii. Commissioned Works

Commissioned works presented a distinct challenge. The 1909 Act did not expressly address them, yet courts would later develop the previously mentioned "instance and expense" presumption to define the boundaries of commissioning parties.[27]

Varmer noted the doctrinal distinction between employees and independent contractors.[28] Agency principles justified imputing employees' acts to employers but did not automatically justify attributing independent contractors' creations to commissioning parties. Underlying the distinction was the premise that employers typically exercised greater control over employees than commissioners did over freelancers.

Varmer observed that, except in limited contexts such as photographs, commissions were generally governed by contract.[29] Unlike employer-employee relationships, commissioned works were usually subject to negotiated agreements specifying ownership rights.

This analysis highlighted an unresolved tension in 1909 Act doctrine: judicial presumptions often favored commissioning parties, but the statute itself offered no clear guidance. Any reform would need to clarify whether commissioned works should be assimilated to employment or treated differently.

2. Renewal of Copyright and Limitations on Assignments

The renewal study began by tracing the legislative history.[30] Renewal, originating in the Statute of Anne and carried through the 1790 and 1909 Acts, was designed to divide copyright duration into two estates and return ownership to the living author at the end of the first term.[31] As Barbara Ringer explained, the renewal device was intended to function as a reversionary safeguard—a second opportunity for authors and their families to participate in the long-term

26. *See id.* (quoting H.R. 8177, 68th Cong. § 45(b) (1924)).
27. *See* Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965).
28. *See* Varmer, *supra* note 19, at 142.
29. *See id.*
30. *See* Ringer, *supra* note 20, at 109–22.
31. As noted above, the renewal interest of authors who were deceased at vesting devolved to their surviving spouse and children.

value of the authors' works.[32] Yet, by the mid-twentieth century, that mechanism had been substantially undermined by *Fred Fisher Music Co. v. M. Witmark & Sons*,[33] the Supreme Court's 1943 decision upholding advance assignments of renewal interests.

The renewal study treated this development as a structural failure and canvassed broader alternatives in light of the emerging debate over a unitary term.[34] In that connection, the study explored several reform options: (1) limiting copyright assignments to a fixed number of years with automatic reversion; (2) authorizing termination of assignments deemed unfair; and (3) granting termination rights to authors who had transferred rights for lump-sum consideration.[35] The study reframed the debate from whether renewal should survive to how Congress could override *Fisher* and restore a meaningful right of recapture within a modernized duration framework. In so doing, the renewal study laid the conceptual groundwork for the termination-of-transfers provision that would ultimately emerge.

C. The 1961 Register's Report

In 1961, Register of Copyrights Abraham Kaminstein issued the *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* ("Register's Report"),[36] synthesizing the thirty-five preparatory studies and charting a path forward for omnibus reform. The Register's Report addressed the structural problems of renewal within a unitary term framework.

1. From Renewal to Limitations on Transfers

The Report candidly acknowledged that the renewal system had fallen well short of its intended protective function. The reversionary feature of renewal had "largely failed to accomplish the purpose of protecting authors and their heirs against improvident transfers" and had become "the source of much confusion and litigation."[37]

The Report called for "some other provision" that would permit authors to renegotiate transfers that failed to yield a reasonable share of economic returns.[38] To achieve this objective, the Report proposed a novel mechanism: any

32. *See* Ringer, *supra* note 20, at 188 (observing that "[p]robably the main purpose of the present renewal provision was to protect the author against disadvantageous bargains—to give him a second chance to realize financial benefits from his creation").

33. 318 U.S. 643, 647, 657 (1943); Ringer, *supra* note 20, at 162–63.

34. *See* Ringer, *supra* note 20, at 187–90.

35. *See id.* at 192–93, 199, 212.

36. *See* REGISTER'S REPORT, *supra* note 11.

37. *Id.* at 92.

38. *Id.*

assignment by an author would be ineffective beyond twenty years unless it provided for continuing royalty payments.[39]

The twenty-year limitation targeted what the Report viewed as the most problematic transactions: outright sales of copyright for a fixed sum at a time when the work's future value was uncertain.[40] Where the author received ongoing participation in exploitation revenues, the Report presumed that the bargaining problem was mitigated and therefore did not impose a temporal restriction.

This proposal was conceptually separate from the WMFH doctrine. Works made for hire—defined as works created by employees within the scope of employment[41]—were exempt from the twenty-year limitation. The Report recommended retaining the basic rule that works created by employees within the scope of employment vested initially in the employer.[42] At the same time, it rejected designating the employer as "author" in conceptual terms, preferring instead to state that the employer would have the right to secure copyright.[43] More significantly, the Report declined to treat commissioned works as works made for hire. The courts, it noted, had "not generally regarded commissioned works as 'made for hire.'"[44]

2. Strong Reactions

The twenty-year limitation proposal became one of the most controversial elements of the Report.[45] Authors' organizations strongly supported the reversionary principle, but many objected to the exemption for royalty-based agreements. In their view, publishers could easily structure transfers as nominal "royalty" contracts while drafting accounting terms that left authors with little meaningful participation.[46] Several commentators therefore urged a broader, non-waivable reversion right untethered to the lump sum/royalty distinction.[47]

Publishers and motion picture producers, by contrast, vehemently objected to the twenty-year limitation itself. They disputed the premise that authors were systematically disadvantaged in modern markets and emphasized the financial

39. *See id.* at 93–94.
40. *See id.* at 93.
41. *Id.* at 87.
42. *Id.*
43. *Id.*
44. *Id.* at 86.
45. *See, e.g.*, COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Feb. 1963), at 104 (statement of Thomas J. Robinson, Copyright Comm., Motion Picture Ass'n of Am.) ("[W]e are absolutely and violently opposed to [the 20-year lump-sum limitation]."), *reprinted in* 3 OMNIBUS, *supra* note 2.
46. *See id.* at 259 (statement of the Authors League of Am., Inc.).
47. *See, e.g.*, *id.* ("No exception should be made for royalty assignments.").

risk borne by intermediaries.[48] More fundamentally, they warned that a fixed temporal cap—even limited to lump sum transfers—would inject instability into works with long commercial lives.[49] Reversion would require renegotiation with authors or their heirs decades later, potentially fragmenting rights in motion pictures, textbooks, and other composite works.

The ensuing discussions thus exposed two weaknesses in the 1961 model. First, the royalty exemption appeared unstable: too porous for authors and too restrictive for industry. Second, and more consequentially, the practical effect of any reversion mechanism depended on how "work made for hire" was defined. A strong reversion right combined with a narrow WMFH doctrine could destabilize integrated productions. A broad WMFH doctrine could swallow reversion altogether.

D. The Preliminary Draft and the Reframing of Reversion

The controversy surrounding the twenty-year limitation forced the Copyright Office to reconsider not merely the details of the proposal but its structural foundation. When the Office circulated the Preliminary Draft, it retained the commitment to eliminating renewal and to providing authors with a mechanism for recapture. But the form of that mechanism began to shift.

The Preliminary Draft introduced alternative formulations for "[l]imitations on [t]ransfers," including a fixed-term (twenty-five-year) reversion model[50] and a more discretionary standard based on disproportionality of returns.[51] At the same time, the Preliminary Draft refined the definition of work made for hire, defining it as a work prepared by an employee within the scope of employment and explicitly excluding works made on special order or commission.[52]

This configuration intensified the structural tension identified during the earlier discussions. If commissioned works were categorically excluded from

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48. *See, e.g.*, *id.* at 280 (statement of Joseph A. Dubin, Universal Pictures Co., Inc.) ("No one forces an author to sell or license his work and no one stands over him with a club.").

49. *See, e.g.*, *id.* at 230 (joint statement of Am. Book Publishers Council, Inc. & Am. Textbook Publishers Inst.) ("[T]o require a publisher who has made a lump-sum payment to make a new deal at the end of 20 years would involve considerable practical difficulty.").

50. COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (1964), at 15–16 ("In the case of any work other than a work made for hire, a transfer by the author after the effective date of this act, otherwise than by will, of copyright or of any exclusive right under a copyright shall be effective for no more than twenty-five years from the date of its execution."), *reprinted in* 3 OMNIBUS, *supra* note 2.

51. *Id.* at 16 ("If, at the end of twenty years following the execution by the author, after the effective date of this act, of a transfer of copyright or of any exclusive right under a copyright, the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors, action may be brought in any court mentioned in section 1338 of Title 28 to reform or terminate said transfer.").

52. *Id.* at 15 n.11.

WMFH status and if transfers were subject to reversion after a defined period, then contributors to composite works—screenwriters, translators, textbook authors, illustrators—would retain authorship status and eventually reclaim their rights. As a consequence, the long-term exploitation of motion pictures, encyclopedias, and similar works could be rendered impossible absent successful renegotiation with multiple creators or their heirs.

Publisher representatives focused sharply on this interaction during the Preliminary Draft discussions. Their objections were no longer directed solely at the fairness of a twenty-five-year cap but at the systemic consequences of combining reversion with a narrow WMFH doctrine.[53]

Author representative Irwin Karp recognized that the central issue was not abstract authorship, but the relationship between reversion and composite production.[54] The debate shifted from whether authors should have a second chance to how that second chance could coexist with the economic realities of collaborative works.

For the Copyright Office, this was the pivotal moment. The problem was no longer simply how to police unfair transfers. It was how to design an ownership architecture that preserved meaningful author recapture without destabilizing integrated productions. The next revision would supply that vital element.

E. The 1964 Revision Bill: An Integrated Ownership Architecture

The 1964 Revision Bill marked the decisive shift from a conditional limitation on assignments to a structurally integrated reversion system. The Bill introduced what would become the modern termination right: an inalienable (albeit optional) right to terminate a transfer thirty-five years after execution, coupled with an expanded WMFH definition.[55] The provision included notice of termination, statutory succession of the termination right, and allowance for continued exploitation of derivative works made during the assignment period.[56]

By expanding termination, the Copyright Office increased the need for stability in composite productions. By expanding WMFH to encompass

53. *See* COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW (1964), at 250, *reprinted in* 3 OMNIBUS, *supra* note 2.

54. *See id.* at 314.

55. *See* H.R. 11947, 88th Cong. §§ 16, 54 (1964), *reprinted in* COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 10–11, 31 (Comm. Print 1965), *reprinted in* 4 OMNIBUS, *supra* note 2; *cf.* 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.") (enacted formulation).

56. *See* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 9–11 (Comm. Print 1965), *reprinted in* 4 OMNIBUS, *supra* note 2.

commissioned works, the Office sought to prevent fragmentation of composite productions—a central concern of publishers and motion picture producers. Such a broad commissioned work prong, however, threatened to swallow the termination right. Author representatives strongly objected.[57]

F. The 1965 Revision Bill Through the 1976 Act: Structural Containment Through WMFH Enumeration

The Copyright Office responded by narrowing the independent contractor prong of the WMFH definition to specified categories: contributions to collective works, parts of motion pictures, translations, and supplementary works.[58] The accompanying Supplementary Report characterized the resulting definition as a "carefully worked out compromise aimed at balancing legitimate interests on both sides."[59]

This enumerated approach proved durable. Although the general revision bill would undergo another decade of legislative evolution before enactment—largely over issues such as cable television[60]—the core termination/WMFH architecture remained intact. The drafters added compilations, instructional texts, tests, answer material for tests, and atlases, along with "other audiovisual work[s]" in addition to motion pictures, to the list of works eligible for WMFH treatment under the independent contractor prong.[61]

The final 1976 formulation thus preserved the structural logic forged between 1961 and 1965. First, termination applied broadly to author-executed grants (with a parallel termination right under Section 304(c) for pre-1978 grants of interests in the extended renewal term). Second, works prepared by employees within the scope of employment remained works made for hire. Third, and finally, commissioned works qualified for that status only if they fell within the statute's enumerated categories and the parties expressly so agreed in a signed writing.

III.
AUTHOR EMPOWERMENT IN THE COURTS

As Part II demonstrates, the termination of transfers and WMFH provisions were crafted as components of a single ownership architecture designed to balance author recapture with enterprise stability. The drafters crafted

57. *See, e.g.*, *id.* at 146–48.

58. *See* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 67 (Comm. Print 1965), *reprinted in* 4 OMNIBUS, *supra* note 2.

59. *Id.* at 66.

60. *See* Menell, *supra* note 1, at 804–32.

61. 17 U.S.C. § 101 (definition of "work made for hire," para. 2).

termination rights specifically to restore to authors and their families a meaningful opportunity to recapture copyrights decades after their initial transfer. The carefully delimited definition of "work made for hire" ensured that this recapture mechanism would not destabilize integrated productions such as motion pictures, collective works, and other collaborative enterprises. The provisions were interdependent: broaden the definition of work made for hire too far, and termination rights would be swallowed; constrict it too narrowly, and composite works would fragment.

In the half-century since enactment, courts have alternately reinforced and destabilized that structural equilibrium. In some domains, judicial interpretation has preserved the compromise forged between 1961 and 1965. In others, courts have effectively reverted to pre-1976 formalism that risks re-creating the very pathologies Congress sought to eliminate. The principal fault lines concern (A) the employment prong of the WMFH doctrine, (B) the independent contractor prong and its enumerated categories, and (C) the inalienability of termination rights.

A. The WMFH Employment Prong: Agency Formalism and Structural Continuity

1. Community for Creative Non-Violence v. Reid

The Supreme Court's decision in *Community for Creative Non-Violence v. Reid*[62] marked the first major recalibration of authorship under the 1976 Act. The Court confronted a threshold question left unresolved by the statute: what constitutes an "employee" for purposes of the WMFH definition?[63]

Rejecting both the "right to control the product" test and broader labor-law conceptions of employment,[64] the Court held that Congress intended "employee" to incorporate general common-law agency principles.[65] The Act's silence on the definition of "employee," combined with its use of traditional agency terminology such as "scope of employment," led the Court to conclude that copyright's WMFH doctrine must be grounded in settled common-law agency principles.[66]

This approach reinforced Congress's intent to provide a robust termination right by cabining the WMFH doctrine. Had the Court adopted a broader or more functional conception of employment—particularly one derived from labor

62. 490 U.S. 730 (1989).

63. *Id.* at 738–39.

64. *Id.* at 741–42. One of the cases that the Court cited rejected "agency law conception of employee[s] for purposes of the National Labor Relations Act." *Id.* at 740 (citing NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124–32 (1944), *superseded by statute as stated in* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992)).

65. *Id.* at 742–43.

66. *Id.* at 740–41.

law—large swaths of creative labor could have been reclassified as employment for copyright purposes.[67] Such a move would have dramatically contracted the scope of termination rights. By anchoring "employee" in common-law agency rather than collective bargaining status or economic dependency, the Court preserved the statutory termination right from being rendered hollow through expansive reclassification of creative labor as employment.

2. Horror Inc. v. Miller *and the Screenwriter as Independent Contractor*

The Second Circuit's decision in *Horror Inc. v. Miller*[68] provides the most important contemporary application of *Reid* in the entertainment industry. The case concerned whether Victor Miller, the screenwriter of *Friday the 13th*, authored the screenplay as an employee or independent contractor. If he were an employee, the screenplay would be a work made for hire—hence rendering termination unavailable. If he were an independent contractor, he could invoke termination and reclaim his transferred copyright.

The production company argued that Miller's membership in the Writers Guild of America and the existence of a collective bargaining agreement rendered him an employee for copyright purposes. The court rejected that argument unequivocally. The court held that copyright law, rather than labor law, governs the WMFH inquiry.[69] The fact that screenwriters may be "employees" for purposes of collective bargaining does not determine their status under Section 101.[70]

Applying the *Reid* factors, the court emphasized the limited control exercised over Miller's creative process, his status as a skilled, independently established writer, the absence of traditional employee benefits, the lack of tax withholding, the project-specific nature of the engagement, and his work from home using his own tools.[71] The court concluded that Miller was an independent contractor and therefore entitled to authorship rights and termination.[72]

The decision prevents motion picture studios from collapsing the termination regime by strategically reclassifying creative professionals as copyright "employees," thereby preserving termination's structural domain. *Horror Inc.* thus confirmed that the 1976 Act equilibrium still governs: industry cannot evade termination through formalistic recharacterization of creative labor relationships.

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67. Recognition of labor law would encompass various guilds covered by collective bargaining agreements. *See infra* Section III.A.2.

68. 15 F.4th 232 (2d Cir. 2021).

69. *Id.* at 242.

70. *Id.* at 247–48; 17 U.S.C. § 101.

71. *Horror Inc.*, 15 F.4th at 250–57.

72. *Id.*

3. The Limits of Copyright as Labor Policy

Recent scholarship has framed copyright doctrine as an instrument of labor policy. Professor Catherine Fisk's study of Hollywood authorship, for example, demonstrates how attribution and creative credit norms were constructed through collective bargaining rather than through statutory ownership rules.[73] Contemporary scholarship similarly explores the intersection of copyright, employment law, and economic dependency.[74]

These perspectives illuminate the hybrid nature of creative labor. Screenwriters, musicians, software developers, and other creators often occupy intermediate positions—neither traditional employees nor fully autonomous entrepreneurs. But the WMFH doctrine is not a labor statute; it is a boundary rule within a statutory recapture regime. Its function within the 1976 Act's architecture is more precise: it delineates the boundary between initial vesting in the creator and initial vesting in the hiring party.

When courts import broader labor-law concepts into copyright's authorship inquiry, they risk distorting that boundary. By contrast, when courts adhere to *Reid*'s common-law agency framework, they preserve the statutory compromise between author recapture and enterprise stability.

B. The Independent Contractor Prong: Enumeration and Structural Containment

The employment prong discussed above defines one boundary of termination; the independent contractor prong defines the other. Paragraph (2) of Section 101's definition of "work made for hire" permits specially ordered or commissioned works to qualify as works made for hire only if two conditions are satisfied: (1) the work falls within one of the enumerated statutory categories, and (2) the parties expressly agree in a signed writing that the work shall be considered a work made for hire.

As the legislative history demonstrates, Congress deliberately rejected an expansive treatment of commissioned works under the 1909 Act. Early drafts excluded commissioned works entirely; subsequent compromises added specific categories: contributions to collective works, parts of motion pictures or other audiovisual works, translations, compilations, instructional texts, tests, answer material for tests, atlases, and supplementary works.[75] The structure reflects containment. Only those categories deemed structurally necessary to preserve integrated production were included.

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73. *See* CATHERINE L. FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE (2016).

74. *See* Xiyin Tang, *Intellectual Property Law as Labor Policy*, 100 N.Y.U. L. REV. 62 (2025); Michael D. Birnhack, *Who Owns Bratz? The Integration of Copyright and Employment Law*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 95, 125, 140, 154–57 (2009).

75. *See supra* Sections II.D–II.F.

Strict adherence to enumeration preserves termination's domain. Broad judicial expansion of the independent contractor prong risks swallowing that domain.

The most dramatic stress test of the independent contractor prong arose in the context of sound recordings. Sound recordings were conspicuously absent from paragraph (2)'s enumerated categories.[76] Nevertheless, industry contracts routinely characterized them as works made for hire. Still, that contractual language could not apply to a category outside Congress's enumeration, rendering those contracts suspect.[77]

In 1999 legislation,[78] Congress stealthily amended the statute to include "sound recordings" among enumerated commissioned works.[79] When the underhanded nature of the amendment came to light the following year, Congress repealed it.[80] The episode revealed intense pressure to expand WMFH classification precisely because termination was functioning as designed—to afford independent creators an opportunity to reclaim their rights. The 2000 repeal reaffirmed the original enumerated structure.

Whether the so-called "time bomb" has fizzled or merely been deferred remains unclear.[81] Industry renegotiation practices may have mitigated large-scale litigation. The doctrinal lesson, however, remains clear: enumeration is the linchpin of structural containment.

But not all judicial developments have respected this containment logic.

C. Termination Inalienability and Judicial Resistance

If *Reid* and *Horror Inc.* demonstrate judicial fidelity to the boundaries of WMFH classification, the termination cases test the integrity of the recapture

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76. The reason is historical. The first recension of the language that was ultimately adopted dates back to 1965. *See supra* Section II.F. At that juncture, sound recordings stood outside of federal copyright protection. Although Congress amended the 1909 Act in 1971 to add federal protection for sound recordings, nobody went back to amend the enumeration in 17 U.S.C. § 101(2) to add that category to the statutory enumeration.

77. One vehicle to rehabilitate that language was to treat not the sound recording as a commissioned work, but instead the compilation or collective work of which it was a part (in the form of a record album). Record companies' success on that score has been spotty. *See, e.g.*, Waite v. UMG Recordings, Inc., No. 19-CV-01091 (LAK), 2023 WL 1069690, at *6–7 (S.D.N.Y. Jan. 27, 2023) ("Whether a sound recording qualifies as a contribution to a collective work or compilation is a fact-intensive question that requires investigating the circumstances in which the sound recording was produced and released.").

78. Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106–113, § 1011(d), 113 Stat. 1501A-523, 1501A-544 (repealed 2000) (inserting "as a sound recording" into paragraph (2) of the "work made for hire" definition in § 101).

79. *See* David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387, 390–95 (2001).

80. *See* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106–379, § 2(a)(1), 114 Stat. 1444, 1444 (2000) (codified at 17 U.S.C. § 101).

81. *See* Nimmer & Menell, *supra* note 79.

regime itself. Congress declared in unmistakable terms that "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary."[82] That language was designed to override *Fisher* and to ensure that future contractual arrangements could not neutralize the statutory right of recapture.

Yet, in a series of decisions beginning in the early 2000s, courts interpreted this inalienability language narrowly, permitting contractual restructurings that functionally eliminate termination rights.

1. Milne*: Rescission and Regrant as Structural Evasion*

In *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*,[83] the Ninth Circuit considered a renegotiated agreement entered during the statutory termination window. Rather than serving notice of termination, the grantee together with the holder of a potential statutory termination right in the work (namely, the author's son) rescinded the original grant and executed a new agreement on more favorable terms.[84] The court held that because the earlier grant had been superseded, there was no longer a pre-1978 transfer subject to termination.[85]

The decision treated rescission and regrant as a legitimate substitute for termination. By characterizing the later agreement as having extinguished the earlier grant, the court sidestepped Section 304(c)(5)'s command that termination may be effected "notwithstanding any agreement to the contrary."[86]

The structural implications are significant. If a grantee may eliminate a termination right through renegotiation and supersession, the statutory inalienability clause becomes contingent on the absence of subsequent contractual restructuring. In functional terms, termination becomes alienable through form rather than substance.

2. Steinbeck*: Leveraging Termination Without Exercising It*

The Second Circuit adopted similar reasoning in *Penguin Group (USA) Inc. v. Steinbeck*.[87] There, the court upheld a renegotiated agreement that replaced an earlier grant subject to termination. Although Congress later extended the copyright term and provided an additional termination opportunity, the court concluded that the prior renegotiation exhausted the statutory recapture mechanism.[88]

The court reasoned that the termination right had been used as leverage to secure improved contractual terms and that nothing in the statute entitled authors

82. 17 U.S.C. §§ 203(a)(5), 304(c)(5).
83. 430 F.3d 1036 (9th Cir. 2005).
84. *Id.* at 1040.
85. *Id.* at 1042–43.
86. *Id.* at 1045; 17 U.S.C. § 304(c)(5).
87. 537 F.3d 193 (2d Cir. 2008).
88. *Id.* at 204.

or their statutory successors to more than one opportunity to enhance bargaining power.[89] This reasoning reframes termination from a categorical right of recapture into a bargaining chip. It substitutes a contract-law lens—focused on renegotiation and fairness—for Congress's bright-line rule of inalienability.

3. The Return of Fisher

These decisions reflected a form of judicial resistance to inalienability. The concern is not that renegotiation occurs; renegotiation is inevitable. Rather, the concern is that courts have permitted contractual restructuring to displace the statutory right itself.

The legislative history of the 1976 Act makes clear that Congress enacted termination precisely because renewal had failed as a safeguard against unremunerative transfers.[90] Under the 1909 regime, advance assignments of renewal interests—validated in *Fisher*—allowed publishers to capture future value before authors could appreciate it.[91] Congress responded by creating an expressly inalienable termination right.

If rescission-and-regrant devices can eliminate termination through supersession, the logic of *Fisher* reemerges in modern form. The right nominally exists, but its exercise depends on bargaining dynamics and contractual timing rather than statutory command.

4. Mewborn *and the Limits of Evasion*

Not all courts have embraced this narrowing approach. In *Classic Media, Inc. v. Mewborn*, the Ninth Circuit distinguished *Milne*, holding that where a termination right had not yet vested, a purported reassignment could not extinguish it.[92] The court refused to treat the later agreement as barring future termination, emphasizing that termination rights cannot be waived in advance.[93]

Mewborn demonstrates that the judiciary has not uniformly retreated from inalienability. But the divergence among circuits underscores the fragility of the statutory scheme when courts import contract doctrines into termination analysis.

5. Newfound Vigor?

More recently, events indicate a pronounced swing of the termination pendulum. A series of cases decided at the start of this century largely invalidated efforts that statutory heirs assiduously made to enforce the termination right that

89. *Id.*
90. *See supra* Section II.A.2.
91. *See id.*
92. 532 F.3d 978, 989 (9th Cir. 2008).
93. *Id.*

Congress intended them to have. Those cases addressed efforts to terminate rights in the fantastically successful *Superman* comic books that were assigned long ago.[94] At the end of the day, even though the court recognized the "near-Herculean effort and diligence" that the statutory heirs' lawyers exercised to get everything right, they achieved success only as to the initial two weeks of newspaper strips.[95] As the opinions recognized in summarizing termination, "[t]hose intricate provisions oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship."[96] The paltry success that termination yielded for this blockbuster property cements the conclusion that termination has largely failed to live up to its promise.[97]

Consistent with that trend was the initial failure of author Harper Lee to terminate her rights in *To Kill a Mockingbird.* In an 881-page ruling, an arbitrator effectively gutted her ability to terminate—and the subsequent judicial challenge left that ruling intact, inasmuch as "legal error is not a legally permissible basis to vacate an arbitrator's award."[98] But this time, a new dynamic unfolded when heirs who had not been party to the arbitration challenged its interpretation. The Second Circuit rejected as "absurd[]" the arbitrator's "dead-hand interpretation" of the statute and thus vindicated the termination right.[99]

That 2025 ruling seems to be part of a trend contrary to what has come before. That same year, the Sixth Circuit considered a challenge to a termination of the assignment of "Que Sera, Sera" and other hits by Jay Livingston that had collectively generated over $400 million in sales.[100] It vindicated his surviving daughter's termination as valid.

Matters took an even more remarkable turn in 2026. In contrast to the Ninth and Second Circuits in *Milne* and *Steinbeck*—which construed seemingly unambiguous statutory text[101] safeguarding the rights of statutory heirs as powerless to prevent third parties from undermining those rights[102]—the Fifth Circuit ruled in *Vetter v. Resnik*[103] that other seemingly unambiguous language

94. At issue are five published opinions, which collectively consume over 250 pages of the *Federal Supplement*. For analysis, see 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.10[C][1] (2026).

95. Siegel v. Warner Bros. Ent. Inc., 658 F. Supp. 2d 1036, 1095 (C.D. Cal. 2009).

96. Siegel v. Warner Bros. Ent. Inc., 542 F. Supp. 2d 1098, 1114, 1117 (C.D. Cal. 2008), *rev'd in part sub nom.*, Larson v. Warner Bros. Ent., Inc., 504 F. App'x 586 (9th Cir. 2013).

97. *See* 3 NIMMER & NIMMER, *supra* note 94, § 11.10[C][1].

98. Dramatic Publ'g Co. v. Carter, 608 F. Supp. 3d 618, 624 (N.D. Ill. 2022).

99. Atticus LLC v. Dramatic Publ'g Co., 145 F.4th 257, 271, 280–81 (2d Cir. 2025).

100. Livingston v. Jay Livingston Music, Inc., 142 F.4th 433, 436–37 (6th Cir. 2025).

101. "Termination of the grant may be effected notwithstanding any agreement to the contrary." 17 U.S.C. §§ 203(a)(5), 304(c)(5).

102. *See supra* Sections III.C.1–2.

103. 163 F.4th 951 (5th Cir. 2026).

in the same provision cabining termination rights within the United States[104] had no such limitation. *Vetter* held that a notice of termination filed in the United States Copyright Office successfully recaptures rights under the copyright laws of nations around the world.[105] That ruling treats entitlements under Algerian, Brazilian, Canadian, Danish, and every other nation's copyright law as *arising* out of U.S. law[106]—a proposition that is doctrinally backwards.[107] In addition, one imagines that whatever the Fifth Circuit may pronounce will fail to divest existing copyright owners of their rights under the internal laws of those nations—and so may prove largely a dead letter.[108]

Whether a complete reversal in the polarity of termination rights is now underway remains to be seen.

IV.
CONCLUSIONS

In drafting what would become a key component of the Copyright Act of 1976, the Copyright Office confronted the dual challenge of establishing a right to reclaim copyright consistent with aligning U.S. copyright law with the international unitary duration norm (life of the author plus fifty years) and

104. "Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws." 17 U.S.C. §§ 203(b)(5), 304(c)(6)(E).

105. 163 F.4th at 956–64.

106. The linchpin for the decision was that "the grant of worldwide rights at issue in this case arose under U.S. copyright law rather than other . . . foreign laws." *Id.* at 961 (internal quotation marks omitted). To the contrary, each nation accords copyright under its own national scheme. Countries signatory to the Berne Convention can recognize grants made in other nations. But it does not follow that Algeria et al. recognize the entitlement as arising under U.S. *copyright* law. Instead, they accord recognition to *contracts* executed in other countries.

107. The international law framework protects works of U.S. origin pursuant to whatever rights are accorded to them under domestic law, and then requires each treaty nation to extend to that work rights under its own law pursuant to whatever comparable rights its own authors enjoy. *See* Berne Convention for the Protection of Literary and Artistic Works art. 5(1), (3), Sep. 9, 1886, S. TREATY DOC. NO. 99–27. Accordingly, to comport with that treaty, Brazilian law must grant to works authored in San Antonio whatever rights it gives to works composed in São Paulo. Under that framework, the Fifth Circuit was mistaken to conclude that "Vetter's rights arose under the U.S. Copyright Act, . . . including his copyright to the extent that it extends internationally." *Vetter*, 163 F.4th at 957. Furthermore, *Vetter* extrapolates Justice Breyer's questionable interpretation of "under this title" to reach this erroneous conclusion. *Id.* at 956–59 (construing Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013) (holding that "lawfully made under this title" has no geographic limitation)). We submit that the dissent from his opinion articulated a more convincing interpretation. *See Kirtsaeng*, 568 U.S. at 564–73 (Ginsburg, J., dissenting); 2 NIMMER & NIMMER, *supra* note 94, § 8.13[B][3][c][iii]; Peter S. Menell, *The Making of the Copyright Act of 1976: Part III—Statutory Interpretation* (forthcoming 2026).

108. *A* may own rights under copyright today under Canadian law and *B* may be comparably vested with rights under Danish law. To the extent that a litigant would purport to wrest away rights from *A* and *B* under authority of the Fifth Circuit's *Vetter* decision, the question is whether Canadian and Danish courts would assent to that determination trumping their own construction of domestic law. Prospects would appear dim.

without undermining exploitation of multi-author works. The drafters solved this puzzle by establishing an inalienable right to terminate transfers thirty-five years after assignment, subject to carve-outs for works created by employees within the scope of their employment and a set of collaborative works created by independent contractors.

The durability of the 1976 Act's author-empowerment architecture ultimately depends on judicial fidelity to both sides of the compromise: strict containment of work-made-for-hire classification and faithful enforcement of termination's inalienability. The inalienability clause is the keystone of the 1976 recapture regime. It preserves its force. The history of these doctrines confirms that Congress's recalibration of author and intermediary interests remains intact only so long as courts resist the gravitational pull of contractual formalism. When courts treat termination as merely a tool for renegotiation rather than a right that operates notwithstanding agreements to the contrary, the architecture shifts and the right to recapture is lost.

The post-1976 case law reflects two competing judicial instincts. In defining the boundaries of work made for hire, courts have largely adhered to the statutory text and preserved the equilibrium forged during the revision process. In construing termination inalienability, however, some courts have—despite the statutory directive that "[t]ermination of the grant may be effected notwithstanding *any* agreement to the contrary" [109] —allowed contractual restructuring to erode the recapture right Congress intended to secure.

109. 17 U.S.C. §§ 203(a)(5), 304(c)(5) (emphasis added).

The Influence of International Copyright Norms on the Evolution of the 1976 Act

Jane C. Ginsburg*

ABSTRACT

The 1976 Act, by vesting copyright in authors from the work's creation without precondition of compliance with formalities and for a unitary term of the life of the author plus 50 years, fundamentally changed the nature of U.S. copyright law. International norms, particularly those set out in the Berne Convention for the Protection of Literary and Artistic Works, substantially informed what then-Register Barbara Ringer hailed as a recentering of protection on the author. We recognized that maintaining American copyright exceptionalism disadvantaged our authors and cultural industries, but the insuperable impediments to complete conformity with Berne were clear from the start of the revision process. Nonetheless, the drafters understood that we could undertake some reforms that would reflect foreign practices and thus bring us up to many Berne standards. In addition, we could adopt other measures that would move us closer to Berne, inviting the prospect that future reforms, such as those enacted in 1988, 1990, and 1994, could significantly close the remaining gaps.

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The 1976 Act's international and comparative law-infused shift is all the more noteworthy for its contrast with the prior 200 years of U.S. resistance to international norms and international protection. I will therefore preface this examination of the influence of international norms on the development of the 1976 Act with a brief survey of U.S. copyright's relative imperviousness to those norms in the 1909 Act and its predecessors. I will then turn to the legislative history of the 1976 Act to consider how the Copyright Office and Congress resolved the principal points of divergence from international norms to draw U.S. law closer to international standards. I will examine the legislative history of aspects of the 1976 Act that embody Berne-relevant reforms in order to illustrate the role of international and comparative law concerns in shaping those changes to our domestic copyright law. With respect both to reforms Congress did enact and those it rejected, Appendices to this Article and on the website of the Kernochan Center for Law, Media and the Arts include charts detailing the evolution of proposed statutory language and relevant excerpts from Copyright Office Studies, Registers' Reports, House and Senate Reports and various hearings.

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I.
INTRODUCTION

Shortly after the 1976 Act's passage, former Register Barbara Ringer, a leading architect of the 1976 Act, declared, with some satisfaction:

> [T]here has been a shift in the philosophical base on which the copyright law of the United States rests. This change may not be readily apparent. Many people regard the establishment of a single federal system as a purely procedural matter, the change in the term of copyright as merely adding years, and the revisions in the sections on ownership and formalities as mere legalistic tinkering. But, taken as a whole, these changes mark a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.[1]

That shift reflects the United States' gradual acceptance of fundamental universal copyright norms, expressed in the Berne Convention. Although it would require three more amendments, in 1988, 1990, and 1994, to bring the United States into (almost) full Berne-compatibility, the 1976 Act took the essential step of vesting copyright in authors from the work's creation, without precondition of compliance with formalities, and lasting for a unitary term of the life of the author plus 50 years. International norms substantially informed this recentering of protection, ultimately placing authors at the fulcrum of a system formerly focused more on dissemination than creation.

That said, one cannot entirely attribute the 1976 Act's author-centrism to high philosophical principle. Most copyright laws worldwide are titled "*authors*' rights," for example: droit d'*auteur* in France, *Urheber*recht in Germany, *Chosa*kukenhō in Japan. The object of U.S. *copy*right law remains the "copy," that is, the incorporeal *work*.[2] Congress's perception of the need to align the United States with the rest of the world stemmed less from recognition of the theoretical centrality of authorship to our system than from pragmatic objectives to reduce the complexity of the 1909 Act regime and to promote the exploitation of U.S. works in foreign markets.

Whatever its motivation, this international and comparative law-infused shift is all the more noteworthy for its contrast with the prior 200 years of U.S. resistance to international norms and international protection. I will therefore preface this examination of the influence of international norms on the development of the 1976 Act with a brief survey of U.S. copyright's relative

1. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 490 (1977).

2. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903) ("Others are free to copy the original [in nature]. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature." (citation omitted)). "Copyright" is frequently misapprehended as the "right to copy," rather than the correct meaning of "rights in the 'copy,'" i.e., the work of authorship.

imperviousness to those norms in the 1909 Act and its predecessors. I will then turn to the legislative history of the 1976 Act to consider how the Copyright Office and Congress resolved the principal points of divergence from international norms to draw U.S. law closer to international standards. I will examine the legislative history of aspects of the 1976 Act that embody Berne-relevant reforms in order to illustrate the role of international and comparative law concerns in shaping those changes to our domestic copyright law. In addition to the central issues of the starting point for federal protection, duration, and formalities, I will consider the public performance right and some of its limitations. I will not cover some of the smaller reforms affected by foreign or international norms and practices, such as ephemeral recordings and library photocopying, nor, other than a brief mention, the jukebox exception. Similarly, despite abundant discussion in the legislative history, I will not devote much attention to proposed reforms influenced by foreign or international law that Congress did not adopt, such as elimination of the manufacturing clause and of the compulsory license for reproduction of nondramatic musical compositions in phonograms.

There are many other respects in which foreign and international norms permeate the 1976 Act's legislative history, but I will not detail them here. Rather, Appendices to this Article and on the website of the Kernochan Center for Law, Media and the Arts identify the issues implicating international norms in the drafts of Register's Reports and legislative committee reports leading up to the 1976 Act, and excerpt passages from the Reports and Hearings discussing those issues.

II.
AMERICAN EXCEPTIONALISM AND HISTORIC RESISTANCE TO INTERNATIONAL NORMS

While the earliest U.S. copyright law borrowed heavily from England, that assimilation also incorporated the isolationism of the Statute of Anne, which explicitly denied protection to "any books in Greek, Latin, or any other foreign language printed beyond the seas."[3] The 1790 Act, section 5 went even further in excluding foreign (including British) works:

> That nothing in this act shall be construed to extend to prohibit the importation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.[4]

3. Statute of Anne 1710, 8 Ann. c. 19, § 7 (Gr. Brit.).
4. Copyright Act of 1790, ch. 15, § 5, 1 Stat. 124, 125 (repealed 1891).

This provision effectively favored the pirating of British books and ultimately undermined domestic markets for U.S. authors undersold by the piracy-depressed pricing of British works.[5] It remained in U.S. copyright law for over 100 years, until its repeal by the Act of March 3, 1891, section 10. That text first instituted protection for foreign works but at the price of the introduction of the "manufacturing clause," which required that the books be printed in the United States. The clause persisted, in limited form, into the 1976 Copyright Act.[6]

Like its 1790 and 1891 predecessors, the 1909 Act paid scant attention to international standards. In the run-up to that revision, a presidential message of 1905 noted that countries around the world were revising their copyright laws in light of "modern conditions," but did not suggest that the United States should follow any of those countries' substantive leads.[7] Indeed, the Librarian of Congress testified in 1906 that:

> [The bill] is not an attempt at abstract and theoretic perfection, nor is it an attempt to transplant to this country theoretic or what might be charged to be *sentimental provisions of foreign law*. It tries to be a bill possible for this country at this time and under conditions local here.[8]

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5. *See generally* CATHERINE SEVILLE, THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY 150 (2006) ("In 1834 the average retail cost of a volume was $1.20 for American authors, and 75c for British and other foreign reprints. . . . A chilling effect on American literature seemed to be the obvious likely consequence.").

6. At the same time, state-based common law copyright revealed a more universalist perspective on foreign works. While foreign authors' published works fell prey to lawful piracy under federal copyright law, unpublished works came under the protection of state common law. New York, for reasons strongly evocative of natural rights, declined to discriminate against foreign authors, as an 1872 Court of Appeals decision illustrates:

> The right to literary property is as sacred as that to any other species of property. The courts of the State are open to an alien friend pursuing his property, and seeking to recover it from a wrong-doer; and there is nothing in any positive law, or in the policy of the government, which would close the door against the same alien friend seeking protection for the fruits of his mental labor, by restraining its publication against his wishes. The protection afforded by the common-law to literary labor is very slight at the best, but such as it is, it is accorded to alien friend and citizen alike, and both are regarded with equal favor.

See Palmer v. De Witt, 47 N.Y. 532, 539 (1872).

7. Abe A. Goldman, *Study No. 1: The History of U.S.A. Copyright Law Revision from 1901 to 1954*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST SESSION, STUDIES 1–4, at ix, 1 (Comm. Print 1960) [hereinafter STUDIES 1–4], *reprinted in* 1 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001) [hereinafter OMNIBUS].

8. *Id.* at 3 (alteration in original) (emphasis added) (quoting testimony of the Librarian of Congress).

Although the U.S. sent the Register of Copyrights, Thorvald Solberg, as an observer to the 1908 Berlin revision of the Berne Convention,[9] and he expressed his personal sympathy for its goals, he declined to take any positions on the matters under discussion, noting the pendency of the 1909 revision and his unwillingness "to engage the United States in a way that could embarrass the legislative Power and impede it from choosing the path it finds most opportune."[10]

The opportune path Congress chose in 1909 generally rejected or ignored international norms that would have required substantial changes to the U.S. system, notably respecting formalities and duration of copyright. The only reference to the substantive standards of the Berne Convention in the 1909 House Report concerns the 1908 Berlin Revision's authorization to member states to institute a compulsory license for the mechanical reproduction of musical compositions (thus representing one of the few instances in which the 1909 Act aligned with international standards).[11]

In an instance of direct confrontation between the prevailing international approach to duration, based on a unitary term concluding 50 years from the death of the author,[12] and U.S. law, which at the time provided for an initial term of 28 years and a renewal term of 14 years, upon which rights that authors had granted during the first term would revert to them, the Report recommended a longer renewal term (from 14 to 28 years) and declined to abandon the two-term structure that had characterized U.S. copyright from the outset. Solicitude for

9. *See* H.R. REP. NO. 60-2222, at 6 (1909) ("[A]t the [1908] Berlin conference [on revision of the Berne Convention] this country, with a number of others, had delegates present to make observations, but with no power to vote or take part in the discussions."); *see also* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 3.09 (3d ed. 2022) ("The US delegate made a similar declaration of interest, expressing his general sympathy with the objects of the Union, but stating that the US government was not at present in a position to adhere to the Convention."); *id.* § 3.09 n.65 ("[T]he US delegate was Thorvald Solberg, the first and longest-serving US Register of Copyright, whose statement was delivered in French translation by Dr Röthlisberger of the Berne bureau." (citing UNION INTERNATIONALE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES [INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS], ACTES DE LA CONFÉRENCE RÉUNIE À BERLIN DU 14 OCTOBRE AU 14 NOVEMBRE 1908: AVEC LES ACTES DE RATIFICATION [PROCEEDINGS OF THE CONFERENCE HELD IN BERLIN FROM OCTOBER 14 TO NOVEMBER 14, 1908: WITH THE ACTS OF RATIFICATION] 174 (1910) (Switz.) [hereinafter BERLIN CONFERENCE PROCEEDINGS])). A U.S. delegation also attended the 1886 conference establishing the first text of the Berne Convention, but only as observers. *Id.* § 2.51.

10. BERLIN CONFERENCE PROCEEDINGS, *supra* note 9, at 174 ("Quelques-unes des questions qui seront discutées ici sont pendantes devant le Congrès des États-Unis, sous forme d'un projet de loi sur le *copyright*, actuellement en discussion. C'est la raison pour laquelle je désire éviter de prendre position dans aucune des questions spéciales traitées, afin de ne pas engager d'avance les États-Unis de façon à embarrasser le Pouvoir législatif de mon pays et de l'empêcher de choisir la ligne de conduite qui lui paraitra opportune.").

11. H.R. REP. NO. 60-2222, at 6.

12. *See* Berne Convention for the Protection of Literary and Artistic Works art. 7(1), Nov. 13, 1908, 1 L.N.T.S. 217 [hereinafter Berne Convention (Berlin Revision)].

authors underlay this example of American exceptionalism. The United Kingdom originated and then abandoned both renewal and reversion of authors' rights; the United States copied that structure in the first copyright act and chose to retain it. The 1909 House Report stressed the importance of the renewal term as an opportunity for authors to right bargaining imbalances:

> It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.[13]

As the legislative history of the 1976 Act details, in the next general revision of copyright law Congress determined to retain the reversion right and to ensure that authors "could not be deprived of" it,[14] but having adopted a single term of life plus fifty, Congress could no longer peg the reversion to the renewal term. The story of the 1976 Act's termination right is recounted elsewhere in this Symposium.[15]

Although neither comparative law nor international law suffused the 1909 Act, there were several subsequent attempts to amend the U.S. copyright act to bring it in line with Berne Convention minima and thus to enable adherence to that international instrument. In 1929, Register Solberg combined high-minded and pragmatic justifications for Berne adherence:

> The purpose of international copyright is to secure to all authors, automatically, protection for their works *everywhere*. The product of an author's mind is property of a kind that lends itself to such world protection. Under modern conditions an author can send his work to all parts of the world, but he should be assured that it will be respected

13. H.R. REP. NO. 60-2222, at 14.

14. *Id*; *see* 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary . . . .").

15. *See* Peter S. Menell & David Nimmer, *Author Empowerment in the Copyright Act of 1976: Work Made for Hire and Termination of Transfers*, 41 BERKELEY TECH. L.J. 908, 909–919 (2026); *see also* Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 907, 909–19 (2011) (discussing the history of authors' reversion and termination rights).

wherever it goes.[16]

Between 1924 and 1940, six major bills were introduced (and another twenty or so modified and reintroduced); all failed.[17] The principal points of divergence between U.S. copyright law and evolving Berne standards [18] concerned

> Automatic copyright in the author upon creation of the work (i.e., without formalities such as notice, deposit of copies, and registration); removal of the requirement for domestic manufacture of foreign books and periodicals; retroactive copyright protection of foreign works; the duration of copyright for the life of the author and a period of years after his death; copyright in oral speeches; and the "moral" rights of authors.[19]

The United States's inability to accede to the principal multilateral copyright convention "because it embodied concepts at variance with American Copyright Law,"[20] disfavored U.S. economic interests in the post-World War II period of considerable expansion of exports of U.S. cultural productions. To protect our favorable balance of trade in cultural goods, we needed to join the international copyright fold, but rather than trying to shelter our sheep within the Berne Convention's enclosure, we built our own sheepcote. Rather than making our law conform to "variant concepts," we sponsored the creation of a new international instrument substantially made to our copyright order.

The Universal Copyright Convention (UCC) preserved member states' imposition of formalities, albeit in simplified form, and devised a minimum copyright term of 25 years from publication designed to accommodate our 28-year initial term (and to avoid controversies over renewal).[21] The UCC required

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16. Thorvald Solberg, *The United States and International Copyright*, *in* COPYRIGHT OFF., LIBR. OF CONG., THIRTY-SECOND ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1929, at 34, 39 (1929).

17. *See* Goldman, *supra* note 7, at 4–11.

18. During this period, the 1928 Rome Revision of the Berne Convention removed the possibility for member states to reserve from portions of the Convention, thus raising the bar for U.S. adherence. *Id.* at 8. That revision also added moral rights to the Berne minima. *Id.*

19. *Id.* at 11.

20. *See id.* at 12 (quoting S. EXEC. REP. NO. 83-5, at 3 (1954)). The report of the Senate Committee on Foreign Relations dealing with the Universal Copyright Convention states:

> [The United States] has found it impossible to subscribe to the [Berne] Convention * * * because it embodied concepts at variance with American Copyright Law. These concepts involved such matters as the automatic recognition of copyright without any formalities, the protection of "moral" rights and the retroactivity of copyright protection with respect to works which are already in the public domain in the United States. This revival of copyright under the retroactivity doctrine would have worked considerable prejudice to American motion picture, music, and publishing houses * * * .

Id. (quoting S. EXEC. REP. NO. 83-5, at 3) (alterations in original).

21. Universal Copyright Convention arts. III.2, IV.2(a), Sep. 6, 1952, T.I.A.S. No. 3,324, 216 U.N.T.S. 132 [hereinafter UCC].

us to extend protection to works first published in other member states or by authors domiciled in or nationals of those states, and to restrict the application of the manufacturing clause to foreign-printed works of U.S. nationals.[22] On the whole, however, the UCC was, in the words of the Senate sponsor of its ratification, "a document which not only embodies the most acceptable concepts of American and European practice, *but which recognizes the basic principles governing the Law of Copyright in the United States*."[23]

Nonetheless, over time, remaining outside Berne presented a variety of shortcomings. Many countries whose protection the United States would have sought were members of Berne but not of the UCC.[24] Moreover, Berne countries provided a higher level of substantive copyright protection than the UCC (protection we desired abroad, if not always at home). The "backdoor" to Berne coverage of U.S. works through simultaneous publication in Berne-member Canada may have offered an effective means for larger copyright holders able to absorb the cost of bona fide Canadian operations, but not for smaller businesses. [25] Moreover, as Georg Bodenhausen, the Director of United International Bureaux for the Protection of Intellectual Property at Geneva (BIRPI, the predecessor U.N. organization to the World Intellectual Property Organization), chided, "it seems ironic, at a time when a considerable part of the world looks to the United States for moral leadership, to find the U.S. requiring its nationals to pass through a backdoor in order to obtain protection without reciprocity."[26]

Indeed, U.S. stakeholders and officials had long recognized that several of the distinctive features of U.S. copyright, including our draconian formalities and our complicated duration of protection under state common law and short renewable terms under federal copyright law, were "hopelessly behind the

22. *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, *amended by*, Act of Aug. 31, 1954, Pub. L. No. 83-743, § 1, 68 Stat. 1030, 1031 (codified as amended at 17 U.S.C. § 9(c) (1958)); UCC, *supra* note 21, arts. II.1, III.1–2.

23. *See* Goldman, *supra* note 7, at 14 (emphasis added) (quoting statement of Senator Hickenlooper, in presenting the Convention to the Senate on June 25, 1954).

24. Georg H.C. Bodenhausen, *United States Copyright Protection and the Berne Convention*, 13 BULL. COPYRIGHT SOC'Y 215, 218 (1966).

25. *Id.* at 218–19.

26. *Id.* at 219.

times,"[27] "embarrassing,"[28] "undignified and criticized,"[29] "out of line with the rest of the Western World,"[30] and "out of step with most of the rest of the world."[31] Our outlier status kept us off the world stage at a time of increasing need for international cooperation. As Register of Copyrights Abraham Kaminstein acknowledged in the 1965 Supplemental Register's report:

> Since 1961 [when the Register's Tentative Draft first issued] I have also acquired a deeper understanding of the importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not enough for us merely to seek and extend as much international cooperation as possible.
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> It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations.

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27. Vincent A. Doyle, George D. Cary, Marjorie McCannon & Barbara A. Ringer, *Study No. 7: Notice of Copyright*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 7–10, at 1, 46 (Comm. Print 1960), *reprinted in* 1 OMNIBUS, *supra* note 7.

28. *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 43 (1966) [hereinafter *Hearings*] (statement of George D. Cary, Deputy Reg. of Copyrights) (regarding the term of protection, under which authors might outlive their copyrights), *reprinted in* 5–7 OMNIBUS, *supra* note 7; *see id.* at 1711 (statement of John Schulman) ("We are the only country of any consequence in the world that has retained that kind of system.").

29. Solberg, *supra* note 16, at 44.

30. STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 383 (Comm. Print 1963) [hereinafter DISCUSSION AND COMMENTS] (statement of Harriet F. Pilpel & Morton David Goldberg), *reprinted in* 3 OMNIBUS, *supra* note 7.

31. Doyle et al., *supra* note 27, at 55 (statement of Ralph S. Brown, Jr.). Some commentators argued instead for U.S. exceptionalism, claiming that there was no reason for the U.S. to change its copyright system to conform with those of other nations. *See, e.g.*, DISCUSSION AND COMMENTS, *supra* note 30, at 100 (statement of John R. Peterson, Cochairman, Comm. on Program for Revision of the Copyright L., A.B.A.) ("It used to be that we wanted to go to that system in order to get international protection under Berne. We have the UCC now. Let the other countries come into that, rather than our having to go backward in order to conform to Berne, and bring them on a similar standard."), *reprinted in* 3 COPYRIGHT LAW REVISION, *supra* note 7; *id.* at 134 (statement of Joseph S. Dubin, Universal Pictures Co., Inc.) ("I see no reason, if we continue to maintain deposit and registration as a condition of judicial enforcement for works of our own nationals, why we should relax that in favor of nonnationals of this country. I am not talking on a jingoistic basis, but why—this is very ill advised."); *Hearings*, *supra* note 28, at 1209 (statement of Hayward Cirker, President, Dover Publ'ns, Inc.) ("Also, we are not writing an international copyright law. We are writing a law for the United States of America. If you want to write an international copyright law, there are many aspects of our law which are very different than copyright laws in other countries of the world. We have punitive damages in our laws unlike the punitive damages that exist in most other countries.").

> The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes.[32]

And as Register of Copyrights Barbara Ringer testified in 1975, looking back on the revision process on the eve of enactment of the 1976 Copyright Act, "the achievement of bringing the United States into the international copyright community [through the Universal Copyright Convention] also served to dramatize once more how archaic and inadequate the U.S. copyright statute of 1909 had become."[33]

III.
INTERNATIONAL NORMS PERVADE THE DRAFTING OF THE 1976 ACT

To claim that aspiration to adhere to the Berne Convention primarily motivated the 1976 Act's principal reforms would overstate the role of that instrument's norms in the development of the 1976 Act. We recognized that maintaining American copyright exceptionalism disadvantaged our authors and cultural industries,[34] but the insuperable impediments to complete conformity with Berne were clear from the start of the revision process.[35] Nonetheless, the

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32. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, at xv (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT], *reprinted in* 4 OMNIBUS, *supra* note 7.

33. *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. 100 (1975) (statement of Barbara Ringer, Reg. of Copyrights, Libr. of Cong.), *reprinted in* 14 OMNIBUS, *supra* note 7; *Hearings*, *supra* note 28, at 43 (statement of George D. Cary, Deputy Reg. of Copyrights) (regarding the term of protection, under which authors might outlive their copyrights); *see id.* at 1711 (statement of John Schulman).

34. SUPPLEMENTARY REPORT, *supra* note 32, at xv ("It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes. And, even where copyright relations exist, the lack of uniformity in the scope and standards of protection results in unfairness and endless confusion.").

35. *See* S. REP. NO. 83-1936, at 4 (1954) (recognizing that "since [the UCC] does not have retroactive effect, nor provide protection for automatic copyright without formalities which rendered the Berne convention incompatible with the American copyright law, it avoids the objections which heretofore kept the United States from associating itself with an effective international system"); Goldman, *supra* note 7, at 11 ("It may be of interest to mention briefly the major issues on which the groups concerned differed during the efforts between 1924 and 1940 to revise the law. Among the most important differences were those concerning provisions deemed essential for adherence to the 1928 Rome Revision of the Berne Convention: Automatic copyright in the author upon creation of the work (i.e., without formalities such as notice, deposit of copies, and registration); removal of the requirement for domestic manufacture of foreign books and periodicals; retroactive copyright protection of foreign works; the duration of copyright for the life of the author and a period of years after his death; copyright in oral speeches; and the 'moral' rights of authors."); S. EXEC. REP. NO. 83-5, at 3 (1954) ("[T]his country has found it impossible to subscribe to the [Berne] convention itself because it embodied concepts at variance with principles of American copyright law.").

drafters understood that we could undertake some reforms that would reflect foreign practices and thus bring us up to Berne standards. In addition, we could adopt other measures that would move us closer to Berne, inviting the prospect that future reforms could close the remaining gaps.[36]

Most importantly, many of the revisions that aligned our law with international norms also fundamentally changed the nature of U.S. copyright, making it more consistent with international concepts of authors' rights. The new author-centrism of U.S. copyright that Barbara Ringer celebrated may have been more a consequence of pragmatically oriented changes to initial vesting of federal copyright protection, and to duration and formalities than an intentional philosophical shift. Or as then-Professor Benjamin Kaplan wrote in his 1958 Copyright Office Study of registration, debate on the question of formalities could proceed at a "high level of abstraction," pitting natural rights advocates (detractors of formalities) against social contractarians (supporters of formalities), "but it seems proper to forego [arguments of this kind] here, descend to particulars, and ask what are the benefits and countervailing disadvantages or demerits of a registration scheme on the present American lines."[37] Not surprisingly, then, the legislative history generally "descend[s] to particulars," and does not ascend to the abstraction of a widely-shared awareness of how changes to initial vesting, duration and formalities and other Berne-inflected reforms would combine to reorient U.S. copyright.[38]

That said, some participants in the process articulated philosophical as well as internationalist (or U.S. exceptionalist) arguments for (and against) changes to longstanding features of U.S. copyright. For example, Study No. 7 on Notice of Copyright observed that a leading argument for retaining the notice formality stressed its consonance with "the U.S. theory of copyright": "Copyright in the United States is a limited grant of a monopoly to provide an incentive to creation, rather than a natural right of the author. It is thus appropriate to require the author to fulfill certain conditions which are of benefit to the public."[39] And opponents

36. SUPPLEMENTARY REPORT, *supra* note 32, at xv–xvi ("The United States can, if it will, offer leadership in the effort to evolve a truly universal copyright system that takes account of national interests while at the same time offering effective uniformity and a fair reward to all authors. Many of the newly-independent nations are at a turning point in the development of their own copyright systems, and suggestions have been made for bridging the gap between the Berne and Universal Copyright Conventions. Copyright law revision is the first necessary step we can take in meeting this tremendous challenge.").

37. Benjamin Kaplan, *Study No. 17: The Registration of Copyright*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 17–19, at ix, 40 (Comm. Print 1960), *reprinted in* 1 OMNIBUS, *supra* note 7.

38. *See id.* at 40.

39. Doyle et al., *supra* note 27, at 47 (emphasis removed); *see also id.* at 55 ("Even if we are out of step with most of the rest of the world, the notice requirement does not preclude international cooperation, as exemplified by the UCC. The historic conception of copyright in this country as a legal

of the notice formality invoked natural rights principles: "Everyone is entitled to the fruits of his labor; the notice requirement, which forces an author to make an affirmative claim or forfeit copyright protection, is in basic conflict with this principle."[40] Nonetheless, while the legislative history incontestably shows that Congress was made acutely and repeatedly aware of the significant gaps between U.S. copyright law and the copyright laws of most other countries, including at the philosophical level, the primary motivation for aligning the U.S. with the rest of the world stemmed from pragmatic desires to reduce the complexity of the 1909 Act system and to promote the exploitation of U.S. works in foreign markets, rather than from sustained debate over the nature of copyright.

In preparation for what became the 1976 Act, the Copyright Office, starting in 1955, undertook a series of studies covering the issues to be resolved in a new copyright law. In addition to a specific study on international copyright law, the Studies included sections on foreign and international law, often highlighting differences between U.S. copyright and copyright laws elsewhere in the world. Simultaneously with the first of those Studies, a 1956 article by Herman Finkelstein, General Counsel of ASCAP, frequently cited in the legislative history, systematically examined what he considered "defects" in the 1909 Act and its predecessors; most of these reflected incompatibilities with foreign laws.[41] From the outset, then, the Copyright Office and Congress were fully apprised of contrasts between the U.S. and the rest of the world.

IV.
THE ROLE OF THE UNIVERSAL COPYRIGHT CONVENTION

Just as work on the future 1976 Act was to begin, the United States acceded to the Universal Copyright Convention. As mentioned in Section II, that treaty posed our answer to the Berne Convention, taking the appealing aspects of that convention, such as national treatment, but adopting a lower standard of substantive minimum protection, particularly regarding formalities and duration. Nonetheless, those reduced standards still marked important departures from our formality-fraught system. They made it easier to take the next step toward compliance with the more demanding international norms of Berne. One might surmise that Barbara Ringer, who was the principal drafter of the 1971 revision of the UCC, perceived international protection as a key element in the long game of domestic copyright reform.

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monopoly seems to require that some assertion should be made by those who wish to have the advantage of the monopoly." (quoting statement of Ralph S. Brown, Jr.)).

40. *Id.* at 46; *see also id.* at 56 ("I, however, . . . would approach the philosophy underlying the Berne Convention and the laws of the vast majority of foreign countries, to the effect that no copyright notice whatever should be required as a condition to the securing of copyright protection." (quoting statement of Walter J. Derenberg)).

41. Herman Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025 (1956).

The UCC hastened our relinquishment of formalities as a prerequisite to copyright protection by providing in art. III.1 that:

> Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as *deposit*, *registration*, *notice*, notarial certificates, payment of fees or *manufacture* or publication *in that Contracting State, shall regard [all] these requirements as satisfied with respect to all works protected in accordance with this Convention* and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.[42]

In other words, registration, deposit and domestic manufacture (3 of the 4 Horsemen of copyright divestment) were no longer required so long as the copyright proprietor conformed to a simplified (relative to the 1909 Act) form of notice (the fourth Horseman). The UCC did not oblige member states to give up formalities with respect to domestic works, which was made clear by article III.2 (like Berne art. 5(3):[43]

> The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.[44]

The UCC (like Berne) thus allowed member states to "two-tier" their approach to formalities: inverting the ancient Athenian practice of "democracy at home and imperialism abroad,"[45] the UCC permitted draconian formalities at home, so long as foreign works enjoyed the more forgiving UCC regime. Two-tier solutions, however, are predictably unstable: why should domestic authors and rightholders suffer from confiscatory formalities and domestic manufacturing requirements when foreign UCC works enjoyed a comparatively

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42. UCC, *supra* note 21, art. III.1 (emphasis added).

43. Berne Convention (1971 Paris Revision), *supra* note 12, art. 5(3) ("Protection in the country of origin is governed by domestic law.").

44. UCC, *supra* note 21, art. III.2.

45. *See* THE LANDMARK THUCYDIDES, A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR, at xi (Robert B. Strassler ed., rev. ed. 2008); *see also* Timothy J. Galpin, *The Democratic Roots of Athenian Imperialism in the Fifth Century B.C.*, 79 CLASSICAL J. 100, 100 n.2 (1983–1984) (comparing "the 'radical' democracy at home and the 'tyranny' of empire abroad" of Athens during the fifth century B.C.); Douglas B. Klusmeyer, *Contesting Thucydides' Legacy: Comparing Hannah Arendt and Hans Morgenthau on Imperialism, History and Theory*, 33 INT'L HIST. REV. 1, 18 (2011) (suggesting that Thucydides' portrayal showed the relation between Athens' "tyrannical policies abroad . . . and . . . democratic governance at home").

negligible burden of compliance? Or as Joseph A. Dubin, head of the legal department of Universal Pictures, queried during the Panel Discussion and Comments on the 1961 Register's Report "Why should we impose a greater burden on the works of our nationals, and give a greater right to works of nonnationals?"[46]

V.
THE ROLE OF COMPARATIVE LAW

While the UCC got us halfway there with respect to formalities, its elaborate (and U.S.-friendly) provisions on duration did not provide the impetus for adopting a unitary term of life plus fifty, running from the creation and fixation of the work, thus grounding federal protection in creativity rather than in subsequent dissemination of the fruits of intellectual labor. The driving force behind that most consequential 1976 Act reform was the desire for uniformity with the laws of foreign national markets for our works.[47] Since most of those countries were Berne members, that meant that the prevailing norm in comparative copyright law was 50 years *post mortem auctoris*. Berne membership also meant that in those countries, under the principle of automatic protection,[48] copyright arose in the works upon creation.

Conforming to the general standard would entitle us to reciprocal protection for duration; were we to maintain our comparatively truncated terms, we would come up against the "rule of the shorter term" incorporated in UCC art. IV.4. As applied to 1909 Act U.S. works, that rule meant that a life-plus-fifty member state incurred no obligation to protect a U.S. work past 56 years from publication, if the U.S. copyright had been registered and renewed; if the U.S. copyright had

46. DISCUSSION AND COMMENTS, *supra* note 30, at 135 (statement of Joseph A. Dubin, Universal Pictures Co., Inc.).

47. SUPPLEMENTARY REPORT, *supra* note 32, at 82 ("Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use of works on a national scale, but it also has tremendous importance when it comes to international dealings. A single national system of copyright from the creation of a work is now universal in foreign countries."); 122 CONG. REC. 26234 (1976) (statement of Sen. Hugh Scott) (entering into the record *Copyright for 1976*, N.Y. TIMES, Aug. 6, 1976, at A18); *Copyright for 1976*, *supra*, at A18 ("Under the revised law, literary and dramatic works would be protected for the life of their creator plus 50 years. This is the term already in effect in most Western nations. Bringing American copyright laws into closer alignment with the international scene would foster greater exchange of written and musical property between countries on a voluntary, negotiated basis, thereby encouraging international ideas to flow more freely."); STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 28 (Comm. Print 1964) [hereinafter FURTHER DISCUSSIONS AND COMMENTS] (statement of Morton Schaeffer, Schaeffer & Schaeffer) ("I believe, however, that because the European countries and most of the rest of the world have life-and-fifty years, we should put ourselves in a compatible position. That term of life and fifty years has proven satisfactory in the various European countries."), *reprinted in* 3 OMNIBUS, *supra* note 7.

48. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), July 14, 1967, 828 U.N.T.S. 221.

not been renewed, the UCC member state could cease protecting the U.S. work after 28 years from publication. As the legislative history frequently underscores, in a period of rapidly expanding exports of U.S. creative works, authors, rightsholders and government agencies including the Copyright Office and the State Department, perceived the gap between the U.S. copyright term and foreign laws to be increasingly untenable.[49]

Foreign, Berne-compliant, laws also played a significant role in our evolution away from a characteristic, albeit less momentous, aspect of the 1909 Act: under the 1909 Act the public performance right applied only to public performances "for profit"; the 1976 Act abandoned the for-profit predicate, replacing it with a series of specific exceptions. While the Copyright Office's 1961 Tentative Draft and 1963 Preliminary Draft perpetuated the "for profit" limitation, Barbara Ringer in the Panel Discussion on the 1963 draft confessed that "[i]t is probably fair to say that we've been surprised at the strength of the opposition to retaining the 'for profit' limitation."[50] While international norms

49. SUPPLEMENTARY REPORT, *supra* note 32, at 87 ("The ease and rapidity with which copyrighted materials can be transmitted across national boundaries are growing tremendously, and it is therefore increasingly important to have the duration of U.S. copyright conform to that prevalent abroad. At present American authors are often protected longer in foreign countries than they are in their own, leading to understandable resentment and occasional threats of retaliation."); *Hearings*, *supra* note 28, at 239 (statement of Burton Lane, President, Am. Guild of Authors & Composers) ("One reason for the proposed extension of the term for individual works, to 'life plus 50 years,' is that this prevailing term prevails in most countries of the free world. International uniformity of copyright term is most desirable and may well be a necessity, particularly in view of such developments as communication satellites."); *id.* at 1866 (statement of Abraham L. Kaminstein, Reg. of Copyrights, Copyright Off.) ("A uniform national term of the life of the author plus 50 years is prevalent throughout the world and, in an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally."); 122 CONG. REC. 3821–41 (1976) (statement of Sen. John L. McClellan) (entering into the record Letter from U.S. Dep't of State to John L. McClellan (Feb. 19, 1976)); Letter from U.S. Dep't of State to John L. McClellan ("The Department regards Section 302(a) as one of the most important, if not the most important, provision in the copyright bill from the viewpoint of international copyright relations. . . . A term of protection of life of the author plus fifty years would be more in accord with the practice of a large majority of other industrialized countries. Uniformity in term would facilitate international trade in copyrighted materials and thus would be of practical advantage to American authors and composers."); H.R. REP. NO. 89-2237, at 125–26 (1966) ("The main arguments in favor of a single Federal system, to which the committee subscribes, can be summarized as follows: . . . Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance."); FURTHER DISCUSSIONS AND COMMENTS, *supra* note 47, at 449 (statement of Elmer Rice) ("There is, I am aware, a difference of opinion about the desirable duration of the revised term. May I add my voice to those who favor an *extension of the copyright period to the author's lifetime plus fifty years?* Besides doing away with all the technicalities of renewal, this would bring American practice into conformity with that of other major countries: a very important consideration in a world in which international cooperation and communication are on the increase, and American cultural products are having ever wider circulation.").

50. STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON

by no means exclusively informed the Office's change of view, the 1965 Register's Report acknowledges:

> [W]e have concluded that the present blanket exemption has become too broad in its application to the new conditions of today, and that it would involve serious dangers to the author's rights if continued into the future. We have therefore adopted the approach, like that taken in foreign laws, of stating the public performance right in broad terms in section 106, and of providing the specific exemptions for educational and other nonprofit uses in section 109 [now 110].[51]

Comparisons with foreign laws did not efface all U.S. copyright anomalies, however. For example, the much-maligned jukebox exemption[52] became a compulsory license (and wasn't given up until we joined the Berne Convention).[53] Despite the Copyright Office's extensive study of foreign law practices,[54] and its initial recommendation to forego the mechanical rights compulsory license,[55] Congress determined to retain it. And, of course, we did not legislate in the area of moral rights, claiming (disingenuously?) that non copyright common-law rights supplied adequate coverage.[56] Neither did we go full Berne with respect to formalities: while they are no longer constitutive of protection nor divestitive of it, registration remains, for U.S. works, a prerequisite to suit,[57] and registration remains for all works a precondition to the remedies of statutory damages and attorneys' fees.[58]

THE DRAFT 135 (1964) [hereinafter PRELIMINARY DRAFT] (statement of Barbara Ringer), *reprinted in* 3 OMNIBUS, *supra* note 7.

51. SUPPLEMENTARY REPORT, *supra* note 32, at 21.

52. *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1076 (repealed 1976).

53. *See* 17 U.S.C. § 116 (1982).

54. *See* Harry G. Henn, *Study No. 5: The Compulsory License Provisions of U.S. Copyright Law*, *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, STUDIES 5–6, at ix, 36–44 (Comm. Print 1960), *reprinted in* 1 OMNIBUS, *supra* note 7.

55. *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at vi, 32–36 (Comm. Print 1961) [*hereinafter* 1961 REGISTER'S REPORT], *reprinted in* 3 OMNIBUS, *supra* note 7.

56. Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 518–25 (1967); 1961 REGISTER'S REPORT, *supra* note 55, at 4 ("In the United States the moral rights of authors have never been treated as aspects of copyright. But authors have been given much of the same protection of personal rights under general principles of the common law such as those relating to implied contracts, unfair competition, misrepresentation, and defamation."); William Strauss, *Study No. 4: The Moral Right of the Author* ("[S]ince a decision in favor of the artist could have been reached under common law principles, it seems unjustifiable to attack the court . . . for its refusal to adopt the moral right doctrine as such."), *in* STUDIES 1–4, *supra* note 7, at 109, 131.

57. 17 U.S.C. § 411(a).

58. § 412.

Perhaps curiously, a mistaken understanding of foreign law was invoked to justify a notably author-unfavorable feature of the 1976 Copyright Act: the designation of employers for hire as "authors." The 1961 Register's tentative draft set out the Copyright Office's initial recommendation regarding works made for hire: "in the case of a work made for hire (defined as a work created for an employer by an employee within the regular scope of his employment), the employer should have the right to secure copyright."[59] The recommendation neither extended works made for hire status to commissioned works, nor bestowed authorship status on the employer. The 1963 draft, however, provided that "[i]n the case of a work made for hire, the employer shall, for purposes of this title, be considered the author and shall have all of the rights comprised in the copyright unless the parties have expressly agreed otherwise."[60] This draft continued to exclude commissioned works. By 1965, the draft works made for hire provision not only assigned authorship status to employers for hire, but also encompassed certain commissioned works, notably contributions to audiovisual works. Why did it not suffice to vest all rights in the employer, but leave authorship status to the actual creator, particularly of commissioned works? The legislative history indicates that the motion picture industry stressed the need to designate employers and film-commissioning parties as "authors" because only that status would ensure that motion picture producers would enjoy the full panoply of rights under copyright abroad. As a lawyer for Universal Pictures urged in 1962:

> I should like to address myself to the proposal . . . , that instead of indicating that the employer is the author, it should merely provide that the right to secure copyright vests in the employer. I think that the producers of motion pictures would be very much prejudiced because certain rights are said to flow to an author—particularly in foreign countries, which would vest in others than the employer unless the employer were designated as the author.[61]

This declaration may have persuaded the Copyright Office, but it overoptimistically assumed that foreign authorities would accept the U.S.' definitional sleight of hand divesting creators of the title of "authors." In fact, when the question squarely arose, France's highest civil law court in its 1991

59. 1961 REGISTER'S REPORT, *supra* note 55, at 155.

60. PRELIMINARY DRAFT, *supra* note 50, at 15.

61. DISCUSSION AND COMMENTS, *supra* note 30, at 153 (statement of Adolph Schimel, Universal Pictures Co., Inc.). To the same effect, see *id.* at 156 ("The difficulty arises in the difference in concept of authorship in the United States and abroad. So far as the United States is concerned, I think that the protection could be accorded no matter what words are used. But the mere use of a word 'author' creates certain concepts abroad which we have been struggling with over a period of years. And if we add to the confusion by saying that the employer for hire is not the author, we would just be riding in the face of the problems that we've been having over the years.").

Huston decision[62] spurned our characterization of film producers as authors and applied French law concepts of indefeasible authorship.

VI.
CONCLUSION

The 1976 Act occasioned a fundamental change in the orientation of U.S. copyright law from dissemination, subject to compliance with formalities, to creation and fixation of the work of authorship. The initial vesting of exclusive rights in authors, and the consequent reforms, especially to duration and formalities, aligned the U.S. with most of the rest of the world, to the benefit of our balance of trade in cultural goods. The legislators and lobbyists behind those changes may not all have appreciated the significance of the shift to a system grounded in authorship, though policy-makers especially knowledgeable about copyright law, most notably Barbara Ringer, certainly did. Initial vesting of federal copyright upon creation for a duration of fifty years *post mortem auctoris* and elimination of the constitutive role of formalities brought the universalism of the Berne Convention within reach: you create it, it's yours, automatically and simultaneously throughout the world.[63]

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62. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 28, 1991, JCP 1991, II, 21731 note A (Fr.); *see* Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135 (1991).

63. For an example of the predominance of economic pragmatism over objections that adopting a life-plus-50 term of protection reflected "European," i.e., non-American, concepts of copyright, see, for example, 122 CONG. REC. 3829 (1976) (statement of Sen. James Abourezk); *id.* (statement of Sen. John L. McClellan) (dismissing the former's objections as "somewhat theoretical"). Senator Hugh Scott stated most clearly the United States' interests in joining the international fold:

> [I]n order to maintain the favorable economic status books, music, and other works of art have in the export arena, it has become increasingly clear that the United States must become a party to the Berne Copyright Union. However, the major stumbling block to our adherence to Berne is the requirement of a term of copyright of life of the author plus 50 years. Without the change in our copyright laws, the possibility of future U.S. adherence to the Berne Conventions would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.
>
> . . . .
>
> It is time for the United States to take the leadership in the world copyright community, and without the life-plus-50 term of copyright, this will prove to be an impossible task.

See id. at 3834 (statement of Sen. Hugh Scott).

APPENDIX A:
DURATION OF COPYRIGHT

When does copyright protection begin? How long does it last? Unitary system for published and unpublished works

Topic	Issue	Register's Tentative Draft 5/61[64]	Preliminary Draft 1/16/1963[65]	S. 3008 [H.R. 11947] 7/20/64[66]	1976 Act Language[67]
"Subsist"	**When does copyright protection begin in a work?**	Chapter II Copyrightable Works A. General Standards of Copyrightability. 3. Recommendations. a. The statute should mention the general requirements that any work, in order to be copyrightable, must be fixed in some tangible form and must represent the product of original creative authorship. b. The statute should make it clear that these requirements apply to new versions of pre-existing works.	§ 1 SUBJECT MATTER OF COPYRIGHT: IN GENERAL (a) Copyright protection under this title **shall be available** for an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be visually or aurally perceived, reproduced, performed, or represented, either directly or with the aid of a machine or device. . .	§ 1 Subject Matter of Copyright: In general Copyright protection **subsists, in accordance with this title,** in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device.	§ 102(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

64. 1961 REGISTER'S REPORT, *supra* note 55, at 9.
65. 1 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 21–22 (Alan Latman & James F. Lightstone eds., 1981) (emphasis added).
66. *Id.* at 27 (emphasis added).
67. *Id.* at 54.

Evidence of Foreign Influence	**Copyright Law Revision Study No. 29 Protection of Unpublished Works (William S. Strauss), 1957[68]** "The distinction between published and unpublished works is significant under the UCC for the following purposes: . . . (3) The period of protection may be computed from the date of first publication or from the date of registration prior to publication." "The Berne Convention protects, in all member countries other than the country of origin, works first published in a member country and unpublished works by nationals of member countries of the Convention. **This protection is granted without formalities and subsists, normally, for the life of the author and fifty years after his death. [T]he distinction between published and unpublished works is not of importance in regard to formalities and the normal term of protection. . . ."** "The Dallinger bill . . . was designed to enable the United States to adhere to the Berne Convention as revised in Berlin in 1908, and its basic principle—of **copyright from creation without compliance with formalities**—was a complete departure from the traditional concept of American copyright law. . . **Copyright was to vest in the author immediately upon creation of a work and, subject to any contracts, he was to be the first copyright owner. No registration was necessary for the author to obtain copyright or to maintain his rights as the first owner of the copyright.**" "[The Perkins Bill] . . . **provided for copyright in all the writings of authors from the time of the making of their works, whether published or unpublished,** without accomplishment of any conditions or formalities." Vestal H.R. 12549 (passed House): **"copyright was granted to authors from and after creation in all their writings, published or unpublished, and without compliance with any conditions or formalities."** Sirovich Bill H.R. 10364: "The copyright was to begin upon creation of the work and to continue until the expiration of fifty-six years from the date of first public presentation of the work."

68. William S. Strauss, *Study No. 29: Protection of Unpublished Works* (emphasis added), *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION, STUDIES 29–31, at ix, 15–16, 20–24 (Comm. Print 1961), *reprinted in* 2 OMNIBUS, *supra* note 7.

	[**Cutting Bill S. 1928 (1933)**[69] at 39: "A bill to enable the United States to enter the International Copyright Union . . . [C]opyright throughout the United States and its dependencies **shall subsist in the work of alien authors**, not domiciled in the United States, by virtue of the adherence of the United States to the Convention of Berne for the Protection of Literary and Artistic works of September 9, 1886, as revised at Rome on June 2, 1928."] Shotwell Bill: "In 1938, the Committee for the Study of Copyright of the National Committee of the United States on International Intellectual Cooperation (the 'Shotwell committee') began studies on a general revision of the copyright law which finally resulted in the bill introduced by Senator Thomas. This bill (sometimes referred to as the 'Shotwell bill') provided for copyright in published and unpublished works **from and after the creation of the work and without compliance with any conditions or formalities**. However, the failure to deposit copies of a published work or to deposit 'a copy or manuscript of a completed unpublished work' made statutory damages unavailable." Comments on CRO Study **Walter Derenberg [United States Copyright Society]:**[70] "I **would therefore favor Alternative 0, under which the federal statute would be applicable to all works from their creation, without regard to publication or public dissemination.** Having in mind the ultimate possibility of assimilating the Berne Convention and the Universal Copyright Convention and for other reasons well summarized in Mr. Finkelstein's recent article, "The Copyright Law—A Reappraisal" (104 U. of Pa. L. Rev. 1025 (June 1956)). I would also favor the idea that such uniform federal statutory protection should be for the life of the author and 50 years thereafter." **Discussion of Register's Report:**[71] 9/14/1961

69. S. 1928, 73d Cong. (1933).
70. Strauss, *supra* note 68, at 43 (emphasis added).
71. DISCUSSIONS AND COMMENTS, *supra* note 30, at 1, 2, 16–17 (emphasis added).

	Samuel W. Tannenbaum [Chairman of the Copyright Division, Section of Patent, Trademark and Copyright Law, ABA]: "**We may derive some benefit from an examination of the well-drawn British act of 1956, in determining what copyright embraces and how to enumerate the protection. Briefly, section 2 of that act states:** **Copyright in literary, dramatic, and musical works: (1) Copyright shall subsist subject to the provision of this act, in every original literary, dramatic, or musical work which is unpublished.** "Then it goes on later to cover specific provisions with respect to copyright in published works such as literary, dramatic, or musical works, artistic works, cinematograph films, broadcasts, and describes in detail the elements necessary for the protection of these various works. Why could we not adopt their approach, insofar as it may be applicable to our system, instead of our using general language that might require judicial classification. Is there anything in the British system that could not apply to our system?" **Abraham Kaminstein [Register of Copyrights]**: "The report says we would like to see more work done in this area."				
Topic	**Issue**	**Register's Tentative Draft 5/61**[72]	**Preliminary Draft 1/16/1963**[73]	**1964–1975 Relevant Bills**	**1976 Act Language**[74]
Preemption and	**Whether common**	Recommendations 1. The statute should apply, and common law rights should end, **when a copyrightable work is publicly disseminated** in any manner. . . .	§ 19. PRE-EMPTION WITH RESPECT TO OTHER LAWS **(a)** On and after the effective date of this act, **all rights in the nature of copyright in works for which copyright protection is**	**S. 3008 (1964),**[75] **H.R. 4347 (1965)**[76] [Minor changes of wording] **H.R. 4347 (1966)**[77]	§ 301. Preemption with respect to other laws (a) On and after January **1,** 1978, all legal or equitable rights that are equivalent to any of the exclusive rights

72. 4 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 3–4 (Alan Latman & James F. Lightstone eds., 1983) [hereinafter 4 KAMINSTEIN] (emphasis added).
73. *Id.* at 12 (emphasis added).
74. 17 U.S.C. § 301 (1982).
75. 4 KAMINSTEIN, *supra* note 72, at 15–16.
76. *Id.* at 19–20.
77. *Id.* at 27.

Common Law Copyright **§ 301**	**law copyright should continue or statutory copyright should displace it?**	3. **Common law protection should be left in effect for copyrightable works not publicly disseminated.** The privilege of securing statutory copyright in lieu of common law protection, by voluntary registration in the Copyright Office, should be extended to all copyrightable works.	**available under sections 1 and 2, whether created before or after that date and whether published or unpublished, shall be governed exclusively by this title**. Thereafter, no person shall be entitled to copyright, to literary or intellectual property rights, or to any equivalent legal or equitable right in any such work under the common law or statute of any State. (b) Nothing in this title shall annul or limit any rights or remedies under the law of any State: (1) With respect to material for which copyright protection is not available under sections 1 and 2; (2) With respect to any cause of action arising from undertakings commenced before the effective date of this act; (3) With respect to activities constituting breaches of trust, invasion of privacy, or deceptive	Pre-emption with respect to other laws (a) On and after January 1, [1967] 1968, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to [:] - (1) unpublished material that does not come within the	within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

			trade practices including passing off and false representation.	subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; (2) any cause of action arising from undertakings commenced before January 1, [1967] 1968; (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation. **H.R. 2512 (1967)**[78] updated the dates referenced in the statute.	**(1) subject matter** that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or (2) any cause of action arising from undertakings commenced before January 1, 1978; or (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106. [(c) is about sound recordings.]

78. *Id.* at 28.

Evidence of Foreign Influence	**Copyright Law Revision Study No. 29 Protection of Unpublished Works (William S. Strauss), 1957**[79] **"The copyright statutes of foreign countries generally provide for protection of all unpublished as well as published works. The dual system in the U.S. of common law protection for works while they remain unpublished, and statutory protection after they are published, has no counterpart in any other country.** Even in Great Britain, where this dual system originated, and in the other countries of the British Commonwealth, common law protection for unpublished works has been abolished, and protection of unpublished as well as published works is governed by the copyright statute. "Broadly speaking, the foreign laws treat published and unpublished works alike in many respects, but they have found it necessary to differentiate between the two for some purposes. . . , "Where the duration of copyright is based on the life of the author, as it is in most foreign countries, that term—for works by identified natural persons—is usually applied to published and unpublished works alike. But it is not feasible to base the duration of copyright on the life of the author in the case of anonymous or pseudonymous works, or works by juridical entities. For such works foreign laws usually provide for a term of copyright computed from the date of first publication or, in a few instances, from the date of first public dissemination, and no specific provision is made for the duration of copyright in such works that are not published or not publicly disseminated. "Some foreign countries also provide a special term based on the date of publication or public dissemination for works that are not published or not disseminated until after the death of the author. In France, and Mexico, for example, the term for posthumous works is a period of years after publication. In Japan, the term for works first published or publicly performed after the death of the author is 30 years from such publication or public performance; and in Italy, works disseminated for the first time within 20 years after the author's death are protected for 50 years after such dissemination. In Germany, where the basic term of protection for both unpublished and published works runs for 50 years after the death of the author, a work first published more than 40 years after the author's death is protected for 10 years from publication. Under the new law of the United Kingdom, if a work has not been disseminated (by publication, public performance, offering for sale of records, or broadcasting) before the death of the author, copyright continues to subsist until 50 years after such dissemination; presumably copyright in works not disseminated continues indefinitely." **Discussion of Register's Report 11/10/61**[80]

79. Strauss, *supra* note 68, at 17–19 (emphasis added).
80. DISCUSSION AND COMMENTS, *supra* note 30, at 55–56, 77–78 (emphasis added).

	John Schulman [Chairman of the American Patent Law Association Committee on Copyright]: "There is no reason why the statute should not embrace all literary, artistic, and scientific works, with an exception carved out for 'private letters, private diaries, and material lodged with libraries.' Now, we could do that by exclusion of a small category of material, instead of trying to apply the exception to the large category. "**Foreign countries have handled this factor quite well. They provide—as for instance in the British statute—that if a work is not made public during the lifetime of its author, the person who owns the manuscript after the author's death may make it public for the first time.** But the author is given the privilege throughout his lifetime of determining whether or not his work, even though deposited with a library, shall be made available to anybody but the people he designates. It should not be necessary to leave a large body of works in an ambivalent position—where nobody knows whether they come within the statute or whether they remain subject to common law rules—in order to preserve the historians' interest in privately deposited material." **1965 Supplementary Report of Register of Copyrights**[81] "Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use of works on a national scale, but **it also has tremendous importance when it comes to international dealings. A single national system of copyright from the creation of a work is now universal in foreign countries. . . .** "The difficulties arising from improvisatory or impromptu performances, from revisions during rehearsals, and from the development of successive versions of a work, were emphasized, and the confusing use of a new term, 'public dissemination' (which was required by a narrower definition of 'publication' in the Universal Copyright Convention),was forcefully criticized." **Hearings before Subcommittee on Patents, Trademarks and Copyrights of Committee on Judiciary (Senate)** on S. 1006**, 89th Cong., 1st Sess. (1965) (8/18–20/65)**[82]

81. SUPPLEMENTARY REPORT, *supra* note 32, at 82–83 (emphasis added).

82. *Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Pats., Trademarks, and Copyrights of the H. Comm. on the Judiciary*, 89th Cong. 68 (1967) [*hereinafter S. 1006 Hearing*] (statement of Abraham L. Kaminstein, Reg. of Copyrights) (emphasis added), *reprinted in* 8 OMNIBUS, *supra* note 7.

	Abraham Kaminstein [Register of Copyrights]: "**A uniform national term of the life of the author plus 50 years is prevalent throughout the world and, in an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally.**" (p. 68) **Address on copyright revision by Rep. Herbert Tenzer, introduced into Record by Rep. Robert W. Kastenmeier, 112 Cong. Rec. 9407-09 (4/28/66)[83]** "Under the bill statutory copyright would begin automatically upon the creation of the work, and the present perpetual common law copyright in unpublished works would be superseded by Federal copyright protection. This would accomplish the goal of national uniformity about which Madison wrote, and I am acutely aware that the single Federal system, coupled with the life-plus-50 term, would have other great advantages for the United States. Last fall, during a personal vacation in Europe—while all international travel was at my own expense, I accepted several assignments from the chairman of the Judiciary Committee—I spoke to the representatives of several foreign countries in the copyright field, and I was most impressed with the importance of copyright law revision to the future of the United States in the vital field of international copyright. The advantages of adopting a term uniform with practically all other nations hardly needs underlining. "Despite some scattered or secondary opposition, the bill's provisions on duration of copyright seem to have achieved general acceptance, in which I have come to share." **H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) [Submitted with H. R. 4347] (10/12/66)[84]** The main arguments in favor of a single Federal system, to which the committee subscribes, can be summarized as follows: **"(4) Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance."**

83. 112 CONG. REC. 9407–09 (1966) (address on copyright revision by Rep. Herbert Tenzer, introduced by Rep. Robert W. Kastenmeier).
84. H.R. REP. NO. 89-2237, at 126 (1966) (emphasis added).

	H.R. Rep. No. 83, 90th Cong. 1st Sess (1967) [Submitted with H.R. 2512] (3/8/67)[85] "(4) Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. **No other country has anything like our present dual system.** In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance." *This language is repeated in further reports (S. Rep. No. 983 7/3/74;[86] S. Rep. No. 473 11/20/75[87]).				
Topic	**Issues**	**Register's Tentative Draft 5/61[88]**	**Preliminary Draft 1/16/1963[89]**	**S. 3008 7/20/64[90] (note that H.R. 4347 language is the same with updated dates[91])**	**1976 Act Language[92]**
Duration § 302	**At what point should the statutory term of protection run from?**	With respect to copyrights secured under the new law: a. The copyright should endure for an original term of 28 years from the first public dissemination of the work in any manner (i.e., publication of	SECTION 20: ALTERNATIVE A § 20. DURATION OF COPYRIGHT: WORKS CREATED AFTER [EFFECTIVE DATE OF THIS ACT] Copyright in a work created after the effective date of this act shall subsist from its creation, and shall endure for a **term**	§ 20. Duration of copyright: works created after *January 1, 1967*. (a) In General.—Copyright in a work created after *January 1, 1967*, subsists from its creation and, except	§ 302. Duration of copyright: Works created on or after January 1, 1978. (a) IN GENERAL.—Copyright in a work created on or after January 1, 1978, subsists from its

85. H.R. REP. NO. 90-83, at 97 (1967) (emphasis added).
86. S. REP. NO. 93-983, at 164 (1974).
87. S. REP. NO. 94-473, at 113 (1975).
88. 4 KAMINSTEIN, *supra* note 72, at 58.
89. *Id.* at 69 (emphasis added).
90. *Id.* at 76–77.
91. *Id.* at 80–81.
92. *Id.* at 122–25.

	Should it be a fixed term set from first public dissemination, or should it be a term based on the death of the author? **How long should the statutory term of protection run for?**	copies, registration, public performance or exhibition, public distribution of recordings, or other public disclosure). b. Any person claiming an interest in a copyright should be entitled to renew it by filing an application for renewal in the Copyright Office during the last five years of the original term. Renewal by any interested person should extend all rights in the copyright to endure for a total of 76 years from first public dissemination. c. An alternative term should be provided in cases where a work (1) is first publicly disseminated otherwise than by the publication of copies, (2) is later published during the original 28-year term, and (3) is not renewed before the end of the original 28-year term. In such cases the copyright should continue for 28 years	**of 75 years from the year of registration in unpublished form or of first publication, or a term of 100 years from the year of creation, whichever expires first.** SECTION 20: ALTERNATIVE B § 20. DURATION OF COPYRIGHT: WORKS CREATED AFTER [EFFECTIVE DATE OF THIS ACT] (a) In general. Copyright in a work created after the effective date of this act **shall subsist from its creation** and, except as provided in the following subsections, shall endure for a term consisting of the life of the author and 50 years after his death. (b) Joint works. In the case of a joint work of two or more authors, the copyright shall endure for a term consisting of the life of the second of the authors to die and 50 years after his death. (c) Anonymous works, pseudonymous works, works made for hire. In the case of an anonymous work, a pseudonymous	as provided by the following subsections, endure*s* for a term consisting of the life of the author and 50 years after his death. (b) Joint Works.—In the case of a joint work *prepared by* two or more authors *who did not work for hire*, the copyright endure*s* for a term consisting of the life of the second of the authors to die and 50 years after his death. (c) Anonymous Works, Pseudonymous Works, *and* Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endure*s* for a term of 75 years from the year of *its* first publication, or a term of 100 years from the year of *its*	creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after *the author's* death. (b) JOINT WORKS.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after *such last surviving author's* death. (c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.—In the case of an anonymous work, a pseudonymous work or a work made for hire, the copyright endures for a term of seventy-five years

		from first publication and then expire. d. All terms should run to the end of the calendar year in which they would otherwise expire.	work, or a work made for hire, the copyright shall endure for a term of 75 years from the year of registration in unpublished form or of first publication, or a term of 100 years from the year of creation whichever expires first. If, before the end of such term, the identity of the author of an anonymous or pseudonymous work is revealed in the registration or other public records of the Copyright Office, the copyright in such work shall endure for the term provided in subsection (a). (d) Presumption as to author's death. (1) After a period of 75 years from the year of registration in unpublished form or of first publication, or a period of 100 years from the year of creation, whichever expires first, each author of a work shall be presumed to have been dead for at least 50 years except where: (i) A statement of the date of his death has been recorded in the Copyright Office, or	creation, whichever expires first. If, before the end of such term, the identity of the author of an anonymous or pseudonymous work is revealed in the registration or other public records of the Copyright Office, the copyright in such work endure*s* for the term *specified* in subsections (a) *or (b)*. (d) *Records Relating to Death of Authors.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and*	from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified in subsections (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in

			(ii) A statement that the author is still living has been recorded in the Copyright Office, in which case the author shall be presumed to have died ten years after the recordation of the last such statement. (2) The statements provided in this subsection may be recorded at any time and shall comply, in form and contents, with requirements which the Register of Copyrights shall, by regulation, prescribe. (3) Reliance in good faith upon any such recorded statement or its absence shall be a complete defense to any action for infringement under this title.	*the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.* *(e)* Presumption as to Author's Death.—After a period of 75 years from the year of first publication *of a work*, or a period of 100 years from the year of *its* creation,	records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of *that person's* interest, the source of *the* information *recorded*, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. (d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a

				whichever expires first, *any person who obtains from the Copyright Office a certified report that the records provided in subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefits of a presumption that the author has been dead for at least 50 years. Reliance in good faith upon this presumption shall be a complete defense to any any [sic] action for infringement under this title*.	statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of *that person's* interest, and the source of *the* information *recorded*, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent *the Register* considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

Evidence of Foreign Influence	**Register's 1961 Report (House Judiciary Committee Print (7/10/61)**[93] "1. ALTERNATIVE APPROACHES "In fixing the base point from which to compute the term, either of two general approaches may be taken: (a) To measure the term from the inception of copyright. This is the approach taken in our present law. (b) To measure the term from the death of the author. **Most foreign laws adopt this approach**. . . . "3. TERM BASED ON DEATH OF THE AUTHOR "**In most foreign countries, copyright begins upon creation of the work, and the term for works in which the author is identified is computed from the date of the author's death.** A number of persons have urged that a term based on the author's death be adopted in our law. "For many works, however, the date of the author's death could not be used as the base for computing the term. About 40 percent of all works registered in the Copyright Office are 'corporate works'—that is, works prepared for corporations or other organized bodies by their employees. Many works of individual authors are also disseminated anonymously. The term for corporate and anonymous works would have to be based on something other than the death of the author. **In most foreign countries, the term for these works is computed from first publication, and no term provision is made for corporate or anonymous works that are not published. . . .** "Basing the term on the death of the author—with a different basis for corporate and anonymous works—would have the following advantages: **(1) It would bring our term in line with that in most foreign countries. . . .** "Evaluation of advantages . . . "(3) *Protection for the author's lifetime and beyond*.—We believe that the benefits of copyright should be available to an author for his lifetime and to his dependents if he dies prematurely. **This appears to be the premise that has led most foreign countries to adopt a term enduring for the life of the author and a number of years after his death**. But, as we shall point out below, this objective can also be achieved by making the term based on dissemination sufficiently long. "(4) ***Correspondence of U.S. term with that of foreign countries*.—In most foreign countries the term for works of an identified individual author runs for his life (or, if there is more than one author, for the life of the last survivor), and a stated number of years after his death. For corporate**

93. 1961 REGISTER'S REPORT, *supra* note 55, at 47–51 (emphasis added).

	or anonymous works, and also for works first published after the author's death, the term runs for a like number of years after first publication. Though the specified period varies in the foreign laws, ranging from 15 to 80 years, the most prevalent pattern is a term expiring 50 years after the death of the author or after publication. "**It would, of course, simplify international copyright protection if the term in all countries were the same. And there is much weight to the argument that the United States should give foreign works protection equal to that given by foreign countries to the works of U.S. authors. In our discussion below of the length of the term, we adopt the approach of making our term equivalent in length with the term most prevalent in other countries.** "5. CONCLUSION "We believe that a term based on dissemination has the greater advantages for the public, and that the principal purposes of a term based on the death of the author can be achieved by a sufficiently long term based on dissemination." **"C. Length of Term . . .** **"2. TERM EQUIVALENT IN LENGTH TO THAT IN OTHER COUNTRIES** **"We are also sympathetic to the view that our maximum term should be generally comparable to the term given our works in most other countries. The term of 56 years, measured from first public dissemination, is considerably shorter on the average than the term of 50 years after the author's death. In most instances dissemination will precede the author's death by substantially more than 6 years. . . .** "3. CONCLUSION "A term of **76 years from first public dissemination would be generally equivalent to the term most prevalent in foreign countries**. And it would virtually assure protection for the author's lifetime or, if he dies prematurely, for his dependents during a reasonable period after his death. Thus, in addition to the advantages of being based on ascertainable events and of being applicable to all works, this term would achieve the main purposes of those who have advocated a term of 50 years from the death of the author."

	Panel Discussion and Comments on 1961 Report (Part 2) (11/10/61)[94] **Abraham Kaminstein [Register of Copyrights]:[95] "I am sure that all of you are aware that we struggled with this—that we are concerned about the fact that most European terms, practically all of them, run for the life of the author plus a term of years—but that we are also concerned with the fact that an increasing number—we estimate some 40 percent—of the works deposited for registration with us, for example, are corporate works, or anonymous works. In these cases there would have to be a specific term of years.** "We are also impressed with the fact that this has been the practice under the American law up to this point, that another system would require other changes, and that opinion is divided—some favoring a specific term of years and others, from an author's point of view, preferring a life-plus term. **"On the length of the term—to skip inception, we have tried to adjust the differences between our present system and the European system by computing what we think would be the equivalent to a term of life-plus-50. And while this would not work out in all cases, in many cases our proposals would actually result in a longer term than the European life-plus."** **Joseph A. Dubin [Universal Pictures Co., Inc.]:[96] "Evidently the framers of the revisions in the various European countries must have thought of it. England adopted a new copyright law in 1956 and continued with a term of 50 years after death or, in the case of corporate works, 50 years from manufacture or publication. France continued its term of protection of 50 years after death. India passed a new law—50 years after death. The new Swedish law, just enacted, increased it from 30 to 50 years after death. As far as I can check, we and the Philippines are the only two major countries in the world that have a term of protection running, in our case, from publication, and in the Philippines from registration.** "Let's see what problems would be resolved if we had a term of protection of 50 years after death. . . . **Anonymous works? That's no problem because under the European system the term runs from the date of publication in the case of an anonymous work, but if the creator makes his name known prior to the termination of that period of time, then it runs 50 years after his death.**

94. DISCUSSION AND COMMENTS, *supra* note 30, at 55.
95. *Id.* at 55, 84 (emphasis added).
96. *Id.* at 55, 86–88 (emphasis added).

	"Joint works? You can take your druthers. **You can take the old English system, where it would run 50 years from the date of the first to die, or until the date of the last to die, whichever was later**; or, you can take 50 years from date of the last to die, in the case of joint works." **Ralph S. Brown, Jr. [Yale Law School]:**[97] "I don't mean to be frivolous about this, but I do suggest strongly that, if we move to a life-plus term-of-years approach, we shouldn't just take for granted that to the legislature or to the public life-plus-50 is acceptable. **I have in the past myself thought a term such as that proposed by the Office was better but, as I stated in my comments, I am so appalled by the complexities that result in trying to mesh a straight term with the provisions of the UCC, that I think we may well come out with life-plus-years for live authors.** And that is why I wish to raise this point as to 'Why life-plus-50?'" **John R. Peterson [Cochairman, Committee on Program for Revision of the Copyright Law, ABA]:**[98] "The **other argument there, in life-plus-50 years, is the fact that many other countries, most other countries, do use that system. Nevertheless, the United States is by far the largest producer of copyrighted materials. It would seem important that a system which we have worked out for many years—if we can improve on it, as I think the recommendations would unquestionably do—be preserved rather than junked just in order to follow the other countries' leads. I think the other countries could more easily follow our leads than theirs.** "**I think a lot of our argument, a lot of our sentiment, in favor of life-plus-50 years, is historical. It used to be that we wanted to go to that system in order to get international protection under Berne. We have the UCC now. Let the other countries come into that, rather than our having to go backward in order to conform to Berne, and bring them on a similar standard.**" **Walter J. Derenberg [U.S. Copyright Society]:**[99] I look upon this like I do about driving on the left side in England. Unless there are strong reasons why the system of life plus would not work, **I think it would be a step forward, in the international sense, if we would try to come to a system which**

97. *Id.* at 55, 90 (emphasis added).
98. *Id.* at 55, 99–100 (emphasis added).
99. *Id.* at 55, 101 (emphasis added).

	would be more similar to that which is in operation in practically all countries in the world except the Philippine Islands and our own country. And I have heard very little here, except for the last speaker, that would count against our adoption of a life-plus system. . . . **"The main reason why I asked to be heard was to be on record as one of those who would favor our adopting the Berne system, that is, a term of life plus a number of specified years."** **American Book Publishers Council, Inc., and American Textbook Publishers Institute (3/9/62):**[100] "Since the interested authors' organizations appear unanimously to favor a term commencing upon copyright of the work and continuing for the life of the author plus 50 years (with corporate works and anonymous works protected for a period of at least 50 years from the date of publication), we favor such a term**. As indicated in the Register's report, such a term has the additional advantage of bringing the U.S. copyright term in line with that of most foreign countries.**" **American Guild of Authors and Composers (7/25/62):**[101] "The subjects of term of copyright, and the manner in which it commences, are in part inseparable. "**One term only has been proven to be practicable and satisfactory: 'Life of the author plus 50 years,' the term that prevails in Europe.** **"The measurement of that term is a comparatively simple matter.** **"The European experience in respect of the date of the author's death as the basic point for computing the term of copyright, has been directly brought to the attention of the Registe**r: Under date of September 1961 the British Joint Copyright Council submitted its 'Memorandum on the report of the Register of Copyrights on the Revision of the U.S.A. Copyright Law.' For those reading this statement, who have not received a copy of that eloquent memorandum, a copy of its 'Chapter V—Basic Point for Computing the Term of Copyright' is annexed to this statement. . . . "**A further, important reason for that term, is the desirability of providing for nationals of foreign countries a period equal to the prevailing period of protection which those countries grant to our authors under the applicable international conventions.**

100. *Id.* at 226, 229 (emphasis added).
101. *Id.* at 233, 235–37 (emphasis added).

	"The recent appearance of Telstar, the space satellite through which television programs can be broadcast in one continent and be immediately seen and heard in other continents, will affect not only the actual firmament, from the viewpoint of communications, but the copyright firmament as well. **"For one thing, if the copyright term in this country is less than 'life plus 50 years,' it is possible that a foreign work, telecast in the United States and immediately seen and heard in Europe, may be in the public domain here because of prior expiration of that term, and still be protected in Europe**. Hence, the European proprietor and writer may go entirely unpaid for this telecast of the work. If such payment is made with respect to the reception in Europe, by reason of law or contract, foreign irritation will nevertheless be heightened by the fact that the work has lost protection here." **The Authors League of America, Inc. (2/23/62):**[102] "We believe that an author is entitled to have the copyrights in his work continue during his lifetime and for 50 years after his death—that this is the decent minimum of protection that should be granted in a book or play that he has created. . . . "A discussion of the duration of copyright inevitably draws, in opposition, a miscellany of objections: That the author has no legal rights in his work entitling him to make any claim on Congress with respect to the term of copyright; that copyright is a 'monopoly' (with all the restrictive effects of a patent); and that it is in the public interest to terminate copyrights as soon as possible. **No doubt authors in the United States have long been denied the same protection that prevails in almost every other civilized country—because one or more of these spurious arguments have misled Congressmen, who are not familiar with copyright. Any draft of a copyright bill which the Copyright Office sends to Congress should, we believe, be accompanied by a statement of the facts which would dispel these illusions.**" **Ralph S. Brown, Jr. [Yale Law School] (5/31/61):**[103] "Each leg of the stool—public dissemination as the basis for inception of copyright; an affirmative claim of copyright as essential to protection; a period of duration that releases most works to the public domain in a relatively short time—is solid enough; but the finished product is unstable. "This is so largely because it must rest on two awkward bumps in the Universal Copyright Convention—the third paragraph of article IV.2 and article VI. In the case of a state which, like the United States, does not **compute duration by the life of the author plus a term of years, article IV requires a**

102. *Id.* at 247–48 (emphasis added).
103. *Id.* at 265–66 (emphasis added).

	term of not less than 25 years from registration or publication; and article VI defines publication in classical terms—the distribution of tangible copies, readable or otherwise visually perceptible. "All this is made clear enough in the report, as are the solutions which attempt to bring dissemination without publication into the statutory scheme, and, at the same time, t**o satisfy the UCC requirements as to duration, and our American ideas about notice. I will not comment in detail on the proposed solutions, because the restatement of the problem has been too lengthy already; but I have to observe that they seem to me complicated and awkward. I am also struck by the complexity of the proposals for transition to a lengthened second term of 48 years. This is to some extent a separate matter from the difficulties outlined above; I note only in passing that the period of transition, which in many cases will have the practical effect of dividing the total term into three parts, will continue for a long time.** **"What is the way out of these difficulties, short of attempting to change the UCC? I suggest that, though I share the preferences of the report for a fixed term of years, it may have to be abandoned for human (as distinct from corporate) authors. The UCC requirement of a term not less than life plus 25 years (IV.2., first paragraph) was made attractive by a presumably deliberate omission of any definition of the mode of inception. It can, I take it, be easily assimilated to any conventional mode—dissemination, publication, registration. This bait may be too tempting to resist.** My other hasty suggestion is that we ought to think more about the question of requiring a claim of copyright—something akin to the printed notice—upon any kind of dissemination. If the public is entitled to be advised that a printed work is subject to copyright, there seems to be some merit in applying the same criterion to other works." **Further Panel Discussion, Discussions of Preliminary Draft 19-23, August 15–16, 1963**[104] **Leon Kellman [American Guild of Authors & Composers]:**[105] "My own feeling is that the only term that should be considered is life-plus-fifty years. Certainly, even if there were no other considerations, then the international complications, which have been brought about by Telstar and improvements and variations upon the space systems of communication, will, I think, make this term a necessity."

104. FURTHER DISCUSSIONS AND COMMENTS, *supra* note 47, at 1.
105. *Id.* at 1, 19.

	Morton Schaeffer [Schaeffer & Schaeffer]:[106] **"**The statement by Harry Olsson points up that we have a difference of opinion between creators who want a long period of time and users who desire to shorten the period as much as possible. **I believe, however, that because the European countries and most of the rest of the world have life-and-fifty years, we should put ourselves in a compatible position. That term of life and fifty years has proven satisfactory in the various European countries."** **Elliot H. Levitas [Arnall, Golden & Gregory]:**[107] "A second point is as to this period of 100 years. . . . "I suggest that, as between the alternative theories being set forth in Alternatives A and B, the suggestion for life-plus-50 years is by far preferable, **if for no other reason than the international considerations that have been alluded to previously. As Telstar and other devices begin to hurl around the world, the question of expiration of copyright at one time in one country and at another time in another country will come up unless we now begin to strive for some attempt to get uniformity in these terms of copyright. The term of life-plus-50 years as employed by most of the European nations seems to have worked satisfactorily, and it would be a good and propitious time for the United States to join that group.** "I might also add, in light of my previous remarks about the lengthenings of terms which have been suggested, that the example of the European countries could be cited to Congress as an argument in favor of life-plus-50 as not being an unreasonable term. Perhaps Congressmen are more sophisticated than the general run-of-the-mill lawyer, but they just might view 75 years as being a longer period of time than life-plus-50 years." **Herman Finkelstein [American Society of Composers, Authors and Publishers (ASCAP)]:**[108] "Now I think that adoption of the life-and-50 term is important, not only because of the Telstar situation just mentioned, but because there is going to come a time when we say that there ought to be one universal copyright system governing our international relations. **We're not going to go on forever with Berne and the Universal Conventions. Somewhere along the line these two systems are going to be merged. If we have a term of life-and-50, and we go that far in their direction, I think we can pull them pretty far in our direction in trying to eliminate those things in the Berne Convention that are objectionable to us**. So I think that, if we cure our domestic law on the term of copyright, we put ourselves in a fine negotiating position."

106. *Id.* at 2, 28 (emphasis added).
107. *Id.* at 1, 32–33 (emphasis added).
108. *Id.* at 1, 34–35 (emphasis added).

	Abraham Kaminstein [Register of Copyrights]:[109] "I do want to add one thing. I think Mr. Levitas has a point, and I don't think it can be glossed over. **The very fact that we have mentioned 100 years startled Europeans with whom I discussed this on my trip. The fact is that the term of 75 years for corporate works goes much further than the European laws do."** **Irwin Karp [The Authors League of America]:**[110] "Seventy-five is longer than 50, but remember that 50 years from publication in Europe means an indefinite period of time before publication. We are cutting that down quite considerably." **Comment of Elmer Rice [American playwright[111]] (2/25/63):**[112] "There is, I am aware, a difference of opinion about the desirable duration of the revised term. May I add my voice to those who favor an *extension of the copyright period to the author's lifetime plus fifty years?* **Besides doing away with all the technicalities of renewal, this would bring American practice into conformity with that of other major countries: a very important consideration in a world in which international cooperation and communication are on the increase, and American cultural products are having ever wider circulation.**" **Hearings before Subcommittee No. 3 of the Committee on the Judiciary (House), 89th Cong., 1st Sess. (5/26–28; 6/2–4, 9, 10, 16, 17, 23, 24, 30; 8/4, 5, 11, 12, 18, 19, 26; 9/1, 2/65) (37, 44)**[113]

109. *Id.* at 1, 37 (emphasis added).
110. *Id.*
111. *See id.* at 449.
112. *Id.* (emphasis added).
113. *Hearings*, *supra* note 28.

	Herman Finkelstein [American Society of Composers, Authors and Publishers]:[114] **"Now actually, in practically every country in the world—not just Europe, but throughout the world, outside of the Iron Curtain countries and the Bamboo Curtain countries—they have the term of life and 50 years.** Now some of the emerging nations will not have that period of protection. They probably will not have it, so that they may make freer use of the works of other countries, and there may be some arrangement in the international conventions that will permit that; but the term of copyright in H.R. 4347 expresses the concept that is prevalent throughout the democratic world today. . . . "The basic approach of HR. 4347 is in line with developments which have occurred throughout the world in the past half century. **"Most other countries have adopted the principle that the term of copyright should equal the life of the author and 50 years after his death."** **George D. Cary [Deputy Register of Copyrights]:**[115] "**Secondly, the life-plus-50-years concept will place this copyright law of our country pretty squarely in alinement with the laws of most other countries of the world. We have had a rather unique term as far as most countries at concerned. It is rather embarrassing, I think, at times to find that an American author outlives his copyright in this country and yet is able to receive royalties from the use of his work in Europe, for example.** "I think with the increasing use of communications that we have today and the increasing use of American works abroad—motion pictures, phonograph records, books, for example, are widely circulated in Europe—it seems to me in all fairness Americans should receive the benefit here that they graciously receive abroad." **Rep. Robert W. Kastenmeier [Member of House Subcommittee No. 3 of the Committee on the Judiciary]:**[116] "In this connection there was some reference to the new formula on the duration of the copyright. One was increased longevity in line with the Europeans. In this connection, if the Europeans had now, as we did at one time, 14 and 14—we changed it in 1831 to 14 and 28, finally to 28 and 28 in 1909—do you think we would want to bring ourselves into alinement with them?"

114. *Id.* at 170–71, 175 (emphasis added).
115. *Id.* at 29, 43 (emphasis added).
116. *Id.* at ii, 58–59 (emphasis added).

	George D. Cary [Deputy Register of Copyrights]: "Historically our copyright law took its key from that of England. The first real copyright law in the Western World was the Statute of Anne in 1710. This was a British law. If you take the Statute of Anne in 1710 and look at our law you will find very close similarities. **"But in 1886, there was created on the Continent of Europe an international convention known as the Bern Convention. This Bern Convention alined** [*sic*] **most of the European countries together in a system whereby protection could be obtained automatically from one country to the other.** **"Now, in order to join that Convention, Great Britain had to change its law, which it did in 1911, 1 believe. In so doing it departed from the concepts that it had maintained ever since the Statute of Anne. So, today the law of Great Britain has alined** [*sic*] **itself with the Continent of Europe, and we are still on the outside in that sense.** **"I don't think that that is necessarily in error, for example, but I mention that we were alining** [*sic*] **ourselves with Europe on the term problem simply because, well, for one example, if you take a song that is in the public domain in the United States and a television broadcast by means of Telstar is directed to Europe, and assume that that same song is still under copyright protection in Europe, you are going to have a host of legal problems.** **"Has there been an infringement? Where has infringement taken place? Who has done the infringing? If you aline** [*sic*] **our term at least, and this is what we are trying to do, then you won't have this type of problem arise."** **Rep. Robert W. Kastenmeier [Member of House Subcommittee No. 3 of the Committee on the Judiciary]**: "This explanation is very interesting. It is suggestive of a piece in the paper yesterday that Great Britain was going to adopt the European metric system. It might suggest that we are in line for that eventually as in the case of copyright term." **Burton Lane [President of American Guild of Authors & Composers]:**[117] "We believe that the protective provisions of a new American copyright law should be based on the best possible examples that exist in the civilized world. With respect to duration of copyright, the period coincident with the life of the author plus 50 years seems to be customary, humane, and realistic."

117. *Id.* at 227–28, 232, 239 (emphasis added).

	"One reason for the proposed extension of the term for individual works, to 'life plus 50 years,' is that this prevailing term prevails in most countries of the free world. International uniformity of copyright term is most desirable and may well be a necessity, particularly in view of such developments as communication satellites. It is surprising to us that the Federal Communications Commission should in effect express opposition to such international uniformity. . . . "W**e do not know, for example, whether the Commission has taken cognizance of the experience of the European nations which have long had the 'life plus 50' term. The aforesaid memorandum of the British Joint Copyright Council contains the following, regarding this point:** **"'We wish to state, however, that long experience in Europe refutes the belief expressed in the report that the date of death of an author is often difficult to ascertain. . . .** **"'We * * * submit that using the date of death as the basis for computing the term of copyright is the most practical system; the one which is most equitable to the author; and, as the one used in most countries, the one best adapted to the situation which obtains under international copyright conventions**.'" **Leon Kellman [American Guild of Authors & Composers]:**[118] "**The new term will also place this Nation in a more equitable position in relation to most. of the civilized world with whom we live and trade, who have long had the same copyright term.** "I would like to say that this term has been found to be workable and practicable by the nations that have it, as evidenced by a statement on this subject by the British Joint Copyright Council that was filed with our Register of Copyrights 3 years ago." **Statement of Philip B. Wattenberg [Music Publishers' Association of the United States, Inc.]:**[119] "If the bill is enacted into law, it will accomplish at least the following results: **(1)** Greatly stimulate creativity in all fields of art and increase activity in industries dependent upon copyright. (2) Remove inequities which abound in the **1909** law.

118. *Id.* at 233 (emphasis added).
119. *Id.* at 276–77 (emphasis added).

	(3) Increase the prestige of the United States in foreign countries which look upon our law of 1909 as antiquated. **(4) Afford copyright protection in this country equal to that afforded in most foreign countries. . . .”** **Life Plus 50 in American Copyright Law, from American Bar Association Journal, August 1965, by Leon Kellman [American Guild of Authors & Composers]:**[120] “‘In the liberal countries outside the United States of America the original copyright grants the author the rights to his work for lifetime plus 50 years. Thus the writer may enjoy for a lifetime whatever profits accrue from the labor of writing; and the heirs to such properties may benefit from them for whatever period up to half a century after the writer's death. An appeal against this unjust and unique copyright law in the United States now is being made.’ . . . “It will be seen, then, that statutory copyright In the United States, in respect of duration, takes away rather than gives to a creator—a grave diminution in the case of works primarily intended to be performed rather than published. “The two most important questions with respect to duration of copyright are (1) whether the term should be measured by a number of years (with or without provision for renewal or reversion) and (2) what length of term is most advisable in order to carry out the intent of the constitutional provision. “As Mr. Guinan states in his study, ‘It would be impossible to determine precisely what term would best carry out the constitutional purpose.’ “This factor militates strongly against any attempt to measure copyright solely by a numerical term of years. Other objections to a term measured solely by years are that (a) it is desired to remove copyright protection from the common law and place it within the statute, with respect to the works covered by the statute, (b) it is desired to eliminate the problem of the determination of the acts or formalities which will commence copyright in given cases (a subject which has been the center of intense controversy in the discussions on the proposed law) and **(c) if protection is measured in whole or part by the death of the author (an event which is readily ascertained, as experience has amply demonstrated in those countries where the ‘life plus 50’ term is in force) all the works of that author enter the public domain at the same moment, eliminating doubts and difficulties in tracing the status of his respective works.**

120. *Id.* at 242, 245, 247 (emphasis added) (quoting Leon Kellman, *Life Plus Fifty in American Copyright Law*, 51 A.B.A. J. 721, 721 (1965)).

	"As mentioned in Mr. Guinan's aforesaid study: The provisions governing duration, in the successive copyright laws of the United States, are based upon the Statute of Anne, enacted In England in 1709. However, in England, as far back as 1814 the period was changed to one centering about the life of the author, and in 1912, the term became the life of the author plus 50 years. . . . "A further element must be given its due weight. The international aspect of copyright today is of great importance. The relations of this Nation with its neighbors (and its neighbors today are all the countries of the world) was an important reason for our adherence to the Universal Copyright Convention. It does not make for good international relations between this country and another country, when the works of our authors are given protection there, long after protection accorded to the work of their nationals has expired here. Today the very usage of a copyrighted work can be simultaneously international, as by means of communication satellites which instantaneously transmit the sights and sounds of a copyrighted composition throughout the world." **S.A. Russell [President of Russell & Russell, Inc.** (book publishers)**]:**[121] "In addition to which, I would suggest that if we are to, as we should, **find a way to approaching the spirit and form of other countries belonging to the international copyright union, the British copyright law provides that at 25 years from the date of original publication** the terms of the contract between the author and the publisher are over, and the author is free to take his property elsewhere then. "It seems to me that this is a necessary addition, in the case of a life-plus-50 copyright, that at some point there must be a provision to permit the author to reissue his work or obtain new publication." **Supplementary Report of Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, May 1965**[122] "The focal point of opposition to the *Report* was its proposal on the start and length of the copyright term, which lay at the heart of the entire revision program. We had recommended that copyright begin with the 'public dissemination' of a work—a concept that would include public performance as well as the distribution of copies and sound recordings—and that it last for a first term of 28 years, renewable for a second term of 48 years. There was very little support for these recommendations, and there was strong sentiment favoring copyright from creation of the work, and **the term most common in foreign copyright laws**, based on the life of the author and a period of 50 years after his death. . . .

121. *Id.* at 1196–97 (emphasis added).
122. SUPPLEMENTARY REPORT, *supra* note 32, at x, xv–xvi, 87–88 (emphasis added).

	"Since 1961 I have also acquired a deeper understanding of the **importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not enough for us merely to seek and extend as much international cooperation as possible.** "It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, **that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes. And, even where copyright relations exist, the lack of uniformity in the scope and standards of protection results in unfairness and endless confusion.** "The United States can, if it will, offer leadership in the effort to evolve **a truly universal copyright system that takes account of national interests while at the same time offering effective uniformity and a fair reward to all authors. Many of the newly-independent nations are at a turning point in the development of their own copyright systems, and suggestions have been made for bridging the gap between the Berne and Universal Copyright Conventions. Copyright law revision is the first necessary step we can take in meeting this tremendous challenge**. . . . "One of the most frequent criticisms of the *Report*'s recommendations on duration was directed to their **'appalling complexity,' which was partly the result of the difficulties of conforming a straight-term copyright system with our treaty obligations under the Universal Copyright Convention. . . .** "'A copyright term of the life of the author and 50 years after his death has been adopted in the very large majority of foreign countries outside the Communist bloc. **The ease and rapidity with which copyrighted materials can be transmitted across national boundaries are growing tremendously, and it is therefore increasingly important to have the duration of U.S. copyright conform to that prevalent abroad. At present American authors are often protected longer in foreign countries** than they are in their own, leading to understandable resentment and occasional threats of retaliation. **In addition to the advantages of certainty and simplicity in business dealings, a change in the basis of the copyright term could not fail to improve our international copyright relations and lead to closer ties that would directly benefit American and foreign authors alike.'** . . . "In general we agree with these arguments and **we find the second one—the effect on our international relations of adopting a life-plus term—of compelling importance**. The 1965 bill therefore adopts a basic term of copyright beginning upon the creation of a work and enduring for the life of its author and for 50 years after his death."

	Hearings on S. 1006 before Subcommittee on Patents, Trademarks and Copyrights of Committee on Judiciary (Senate), 89th Cong., 1st Sess. (1965) (8/18–20/65)[123] **Abraham Kaminstein [Register of Copyrights]:[124] "A uniform national term of the life of the author plus 50 years is prevalent throughout the world and, in an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally**. Life-plus-50 years is roughly equivalent, on the average, to a term of 75 years from publication, and is not too long in view of the increased longevity of authors. There may be uncertainty in some cases as to when an author died; **computing the term on the basis of the author's death has not been a major problem in other countries,** and would be solved for all practical purposes by the system of presumptions established in the bill." **Statement of John Schulman [Chairman for Revision of Copyright Law, American Bar Association]:[125] "On the other hand, the method of basing the term of copyright upon the life of the author is one which not only prevails in most countries of the world, but is one which has proven over the years to be practical. The adoption of a similar formula will not only bring us in line with these other countries, but will provide various advantages in the area of international copyright dealings**. **"Under Article IV, section 4 of the Universal Copyright Convention, the foreign copyright term in an American work could be limited in the convention countries, to the period provided by our statute. If an American author died in the fiftieth year of the copyright term, his rights in a foreign country might terminate in six years (the term presently in effect), or in twenty-six years if the earlier proposal of the Register were to be adopted. This curtailment of the term might take place even though the term of a national of that country were to extend for fifty years beyond his death. The adoption of the term proposed in the present bill, would safeguard American literary property abroad against this discriminatory treatment, because the terms would then be substantially the same as the terms which prevail in most foreign countries where our works are used.**

123. *S. 1006 Hearing*, *supra* note 82.
124. *Id.* at 63, 68 (emphasis added).
125. *Id.* at 94, 103 (emphasis added).

	"The term proposed in the present bill would also serve to simplify clearances for works used in international communication, particularly in international broadcasting. Works protected for comparable periods would require comparable clearances, and those which fall into the public domain in one country would likewise be in the public domain in others as well. **Clearly, the adoption of a term of copyright consistent with that which prevails in other countries would tend to eliminate or minimize the barriers to international communication**." **John Schulman [Chairman for Revision of Copyright Law, American Bar Association]:**[126] "Under this bill the term of all works would terminate, even that on unpublished works would terminate at the end of the author's life and 50 years thereafter. We would have a uniform system all down the line, which, at least from my experience, would prove to be a salutary arrangement. **"But let us consider the situation in the international field. We are members of, or adherents to, a treaty with about 50 countries. It is called the Universal Copyright Convention. That convention has a provision whereby any country can limit the term of the copyright in a work to the laws of the country of its origin. So if our works are produced let's say in France, France can limit our copyright term to 56 years, even though it provides life and 50 years to its own citizens.** **"That puts us at a disadvantage vis-a-vis other people in our export markets. But take another factor. In the northern part of the country we border Canada, and a broadcast coming out of Buffalo or Detroit or one of the cities in the northern tier is transmitted to Canada. Now Canada has the term of copyright consisting of life of the author and 50 years. So if a work goes into the public domain in the United States, it isn't necessarily free for use in broadcasting to Canadian stations because it isn't cleared in Canada.** "Now consider Comsat. We are going to broadcast works throughout the world through Early Bird, Comsat; **one can envision the difficulties of trying to make adjustments arising out of the difference between the term based upon our system and a fairly uniform system of copyright which prevails throughout the rest of the world."** **Sen. Quentin N. Burdick [Member of the Senate Subcommittee on Patents, Trademarks, and Copyrights]**: "Is this period of 50 years from death, quite uniform?"

126. *Id.* at ii, 113–14 (emphasis added).

	John Schulman [Chairman for Revision of Copyright Law, American Bar Association]: "Yes, sir. **Under the Berne Convention to which we are not parties, but to which most of the British Commonwealth countries, the Western European countries and others are adherents, it is mandatory to have a minimum term of a life of the author and 50 years. So this would fit into the whole picture of international relationships.** **"This is one reason we never joined the Berne union, not the only reason but one of the principal reasons, because our method of determination of the term was different.**" **Statement of Harold E. Wigren & Harry N. Rosenfeld [Ad Hoc Committee (of Educational Institutions and Organizations) on Copyright Law Revision]:**[127] "Conformity to foreign laws: "One of the principal reasons advanced for S. 1006's radical departure from the 175-year old American copyright renewal practice is to have our duration provision correspond with that in foreign countries. There are many answers to this enforced conformity of our law to foreign law: **"*First*, the U.S. Constitution itself set our copyright law apart from all foreign copyright laws; the Constitution permits copyright only 'for limited times.' The Copyright Act passed immediately after the adoption of the Constitution regarded 14 years as a limited time for initial terms, and the patent law (which comes under the same Constitutional provision) still has only a 17 year term. Thus, the drive for conformity to foreign laws seems to ignore the fundamental limitation in our Constitution**. **"*Second*, the best interests of the American people must prevail over any mechanical concept of conformity to foreign la**w. As already demonstrated, such conformity is detrimental to the some 45,000,000 school children of America. **"*Third*, adoption of conformity-to-foreign-law as a principal basis for copyright law revision sets a dangerous precedent.** For example, most foreign countries have no copyright notice requirement except for special kinds of works. Also, major foreign countries have no system of copyright registration and deposit of copyright material. By adapting the conformity-with-foreign-law rationale, do we say that henceforth copyright notice and copyright registration and deposit will also be eliminated although notice has been part of our copyright law since 1802 and registration since 1790?

127. *Id.* at 118, 128–29 (emphasis added).

	"*Fourth*, the proposed term of life-plus-50 is unnecessary, according to the Register's 1961 Report, even if Congress wants to make our maximum term generally comparable to that given American works in other countries. All that is necessary, the Register said, is to increase the total term from the present 56 years to 76: "'A term of 76 years from the first public dissemination would be generally equivalent to the term most prevalent in foreign countries . . . Thus . . . this term would achieve the main purposes of those who have advocated a term of 50 years from the death of the author.' "For these aforesaid reasons, the Ad Hoc Committee opposes Chapter 3 of S. 1006 in its present form and urges continuation of the provisions of § 24 of the present law (28 years plus 28 years) or, as an alternative, adoption of the Register's 1961 recommendation for an initial term of 28 years plus a 48 year renewal term. We favor a short first term and a longer second term instead of a single term." **Hearings before Subcommittee No. 3 of the Committee on the Judiciary (House), 89th Cong., 1st Sess. (5/26–28; 6/2–4, 9, 10, 16, 17, 23, 24, 30; 8/4, 5, 11, 12, 18, 19, 26; 9/1, 2/65) (37, 44) (Part 3)**[128] **Statement of Rep. Emanuel Celler [Chairman of the House Judiciary Committee]:**[129] "The proposal to extend the term of copyright to life of the author plus 50 years seems to me to be eminently wise and I predict that you will favorably report it. Our country has been a laggard in the protection of its authors. Even in 1909, when the present term of 56 years was enacted, all major countries except Holland and the United States were protecting their authors at least for the duration of their lives. . . . "Finally, the life-plus-50-year term is in effect in most copyright nations of the world. Once it is recognized that the term of copyright should exceed the life of the author, there is little choice other than for the internationally prevalent term of life plus 50." **Statement of Abraham Kaminstein [Register of Copyrights], accompanied by Barabara Ringer [Assistant Register of Copyrights for Examining] and Abe A. Goldman [General Counsel, Copyright Office]:**[130]

128. *Hearings*, *supra* note 28, at 1383.
129. *Id.* at 1851, 1853–54.
130. *Id.* at 1857, 1866–67 (emphasis added).

	"I consider the provisions of chapter 3, establishing a single Federal system of copyright and a term of the life of the author plus 50 years, as the most important group of sections in the bill. **It is undeniably true, as has been pointed out here, that this represents a major reversal of the recommendations, made by us in the Register's report in 1961; but I am now firmly and genuinely convinced of the validity of the arguments supporting the changes in chapter 3, and I regard them as a fundamental and essential part of the revision program. . . .** "(3) A uniform national term of the life of the author plus 50 years is prevalent t**hroughout the world and, in an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally.** "(4) Life plus 50 years is roughly equivalent, on the average, to a term of 75 years from publication, and is not too long in view of the increased longevity of authors. W**hile there may be uncertainty in some cases as to when an author died, computing the term on the basis of the author's death has not been a major problem in other countries, and would be solved for all practical purposes by the system of presumptions established in the bill.**" **Statement of the Authors League of America [Irwin Karp]:**[131] **"**We have long needed a system of measurement that conforms to that used throughout the world--ours conforms only to that used by the Philippines. As time passes the need will increase. Publishing, motion picture production, record manufacturing, to say nothing of television, all function in an international copyright community. It is pointless to behave as if it didn't exist. . . . "**We believe that a term ending 50 years after death is reasonable—by comparison to the term granted in most other countries; by comparison to the perpetual term of common law protection which would be eliminated by the bill; by comparison to the perpetual tenure for other forms of property."** **John Schulman [Chairman for Revision of Copyright Law, American Bar Association]:**[132] **"I suggest the adoption of this term not because it is a European system but because it has proven worthwhile. It has worked in all of Western Europe for years. It was adopted by Britain in 1911 and it has worked well there. In other countries, such as those in South America, they have a shorter term after death but nevertheless based on the date of death.**

131. *Id.* at 1752, 1764 (emphasis added).
132. *Id.* at 1694, 1712 (emphasis added).

	"The change would help us in our foreign relations. Take for instance a broadcast which originates in Buffalo and reaches Canada and is rediffused in Canada. If a song is performed on the program in Buffalo, and is in the public domain in the United States because the 56-year term has expired, it is not public domain in Toronto, Montreal, and other cities and the stations in those cities are liable for infringement for picking it up." **Statement of Frederick Burkhardt [American Council of Learned Societies], accompanied by Martin F. Richman:**[133] "[O]n consideration of all the factors involved we have decided to support the basic change to a system of copyright based on the life of the author plus 50 years**. . . .** **"Perhaps just as important as any of the other reasons is the fact that it will help to promote international uniformity of copyright protection for published works. The British system has, I believe, exactly this same length of time."** [Full Statement]:[134] "In the abstract, it might seem that a term consisting of the life of the author and 25 years after his death (the minimum term under the Universal Copyright Convention) is sufficient to protect the dependent widow and children of an author from an economic point of view and to satisfy considerations of artistic control with respect to dissemination, adaptation, and other uses of a person's writings**. However, the term of life plus 50 years is almost universally that used in other countries, including Great Britain, in which the works of American scholars and the works of others in which they would be interested are likely to have copyright protection. Once the 'life plus' principle is adopted, there are many advantages in enhancing international uniformity as to the duration of the term after death in published works.** "**Accordingly, the term of life plus 50 years for the published works of identified natural authors appears to be the most logical change to make**." **H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) [Submitted with H. R. 4347] (10/12/66)**[135] **"A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, 'and with the techniques now in common use this movement has in many cases become**

133. *Id.* at 1548–49 (emphasis added).
134. *Id.* at 1551–52 (emphasis added).
135. H.R. REP. NO. 89-2237, at 130–31, 138 (1966) (emphasis added).

	instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community, and would bring about a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike. . . . "**The committee was impressed by the arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity, that would result from adoption of a life-plus-50 term. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier.** The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died." "Section 305: Yearend Expiration of Terms "Under section 305, **which has its counterpart in the laws of most foreign countries,** the term of copyright protection for a work extends through December 31 of the year in which the term would otherwise have expired. This will make the duration of copyright much easier to compute, since it will be enough to determine the year, rather than the exact date, of the event from which the term is based." **Hearings before Subcommittee on Patents, Trademarks, and Copyrights of Committee on Judiciary (Senate), 90th Cong., 1st Sess. (1967) (Parts 1–4) (3/15–17, 21, 4/4, 4/11–12, 4/28/67) (62) Part 1 Part 2 Part 3**[136] **Statement of the Authors League of America [Elizabeth Janeway]**: "*International Uniformity on Copyright*: Increasingly copyrighted works are published, broadcast and otherwise disseminated in many countries—often simultaneously. It has long been evident that there is a 'need to confirm the duration of U.S. copyright to that prevalent throughout the rest of the world' (H. Rept., p. 130) and the House Committee stated it 'was impressed by the arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity, that would result from adoption of a life-plus 50 term' (H. Rept., p. 131)"

136. *Copyright Law Revision: Hearings Before the Subcomm. on Pats., Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 48, 51 (1967), *reprinted in* 14 OMNIBUS, *supra* note 7.

	Second supplementary report of the register of Copyrights (1975) 10/75[137] **"A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation.** Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. **Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accure [sic] directly to American and foreign authors alike."** **Hearings Before Subcommittee on Courts, Civil Liberties, and Administration of Justice, 94th Cong., 1st Sess. (1975) on H.R. 2223 (5/7, 8, 14, 15; 6/3, 5, 11, 12; 7/10, 17, 23; 9/11, 18, 11/6, 20; 12/4/75) (127, 129, 132, 136)**[138] **Testimony of Joel W. Biller [Secretary for Commercial Affairs and Business Activities, Department of State]:**[139] Section 302 deals with the duration of copyright, that is, term of protection. It is one of the most important, if not the most important provision in the copyright revision bill. Essentially, section 302(a) provides for a copyright term of the life of the author plus 50 years after his death. **Such a term of protection would be more in line with the practice of most countries of the international copyright community and would also remove a major obstacle to the possible adherence of the United States to the Berne Convention for the Protection of Literary and Artistic Works. Our**

137. SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL OCTOBER – DECEMBER 1975, ch. XII, at 9 (draft ed. 1975) [hereinafter SECOND SUPPLEMENTARY REPORT] (emphasis added).

138. *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. (1975), *reprinted in* 14 OMNIBUS, *supra* note 28.

139. *Id.* at ii, 119–23 (emphasis added).

	membership in the Berne Convention would facilitate and simplify international copyright protection for U.S. nationals. Therefore, we strongly support the term of copyright protection proposed in section 302. . . . Rep. Robert W. Kastenmeier [Chairman of House Subcommittee on Courts, Civil Liberties, and the Administration of Justice]: "I see. It is the policy of the State Department, notwithstanding the success of the Universal Copyright Convention and its membership, that we should be in a position to adhere to the Berne Convention nonetheless; is that correct?" Mr. Biller: "Yes." Mr. Kastenmeier: "In your view, does the passage of this bill, in its present form, qualify us for entry, for adherence to the Berne Convention?" Mr. Biller. W**hat it would do, Mr. Chairman, is remove one of the principal obstacles that now exists to our adherence, that being the term of protection, by extending the term of protection to the lifetime of the author plus 50 years. That would remove that obstacle because that is the term provided for in the Berne Convention. There are some other obstacles which would have to be overcome, but I think it would be quite possible to work them out."** Mr. Kastenmeier: "Are those obstacles outside of the perimeter of what the statutes provide for?" Mr. Biller: "Yes, sir." Mr. Kastenmeier: "You have discussed the term in that connection? I**s it not the fact that there are one or more countries moving away from life plus 50; is there not at least one major European country that has moved to a longer-term than that?"** Mr. Biller: **"I am not aware of it, Mr. Chairman."** Mr. Kastenmeier: "**As far as you are aware, all the Western European countries have life plus 50?"** Mr. Biller: **"I believe so."** Mr. Kastenmeier. **"Perhaps I ought to put it this way, what countries in the world other than ourselves have a term other than life plus 50?"** Mr. Biller: "I don't have a list of them with me. If you would like, I can submit such a list for the record." Mr. Kastenmeier: "Thank you. We would appreciate that."

	Testimony of Irwin Goldbloom [Deputy Assistant Attorney General, Civil Division, Department of Justice]:[140] Rep. Robert W. Kastenmeier [Chairman of House Subcommittee on Courts, Civil Liberties, and the Administration of Justice]: "Had you wondered or determined why the rest of the world had gone to a life plus 50 at some point during the codification of their copyright laws?" Mr. Goldbloom: "We know they have gone that way. They have, we believe, different considerations that they pursue in furnishing this type of protection." Mr. Kastenmeier: "How would theirs be different from our own? It is a very important point." Mr. Goldbloom: "**Well, we think that our own considerations flow from constitutional provisions of the concept of thereby protecting authors and to promote and advance science and useful arts for a limited time under the concept as expressed in the constitution.** **"In our view a term which extends for 56 years or the lifetime of the author, whichever is greater, would serve those constitutional goals of a limited time, which is a very clear constitutional concept. Certainly, 150 years in our view is an extended period of time considerably above the authority granted."** **Robert J. McCloskey [Assistant Secretary for Congressional Relations]:**[141] "Section 302 concerns the duration of copyright (i.e. term of protection) and is one of the most important provisions, if not the most important in the revision bill. Basically, Section 302(a) provides for a copyright term consisting of the life of the author and 50 years after his death. The importance of the provision is borne out by the fact that the Register of Copyrights regards a 'life-plus-50 term' as the 'foundation of the entire bill.' **Such a term of protection would be more consistent with the practice of a very large majority of other countries that are members of the international copyright community. This provision would also remove a major obstacle to the possible adherence to the Berne Convention for the Protection of Literary and Artistic Works by the United States, Article 7 of which requires states party to the convention to provide such a term of protection**. Such a change would facilitate and simplify international copyright protection for U.S. nationals. Therefore, the Department of State strongly supports the duration of copyright protection as proposed in Section 302."

140. *Id.* at 127, 141 (emphasis added).
141. *Id.* at 173–74 (emphasis added).

	Appendix 2.—18 briefing papers by the Copyright Office referred to in testimony of register of Copyrights on May 7, 1975[142] "Duration of Copyright . . . *International standards*.—**Nearly all countries in the world have copyright laws, and virtually all of them except the United States base their copyright term in the life of the author. A duration of the life of the author and fifty years after his death (sometimes referred to as 'fifty years post mortem auctoris' or '50 years p.m.a.') became the governing international copyright term in 1928, and the 1948 Brussels revision of the International (Berne) Convention for the Protection of Literary and Artistic Works made this term a mandatory minimum for all member countries. A large majority of the world's industrialized countries have accepted or augmented this international standard.** "As a practical matter it is to the advantage of American authors for the United States to adopt the same system." **Debates on S. 22; 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 2815–36 (February 6, 1976)**[143] **Sen. John L. McClellan**: "**The adoption of this term will bring U.S. law into conformity with the generally recognized international standard.** As life expectancy has increased, the existing 56-year term does not insure that an author and his dependents will receive reasonable monetary recognition throughout their life. More and more authors are seeing their works fall into the public domain during their lifetimes. However, e**ven with the revised copyright term, the treatment of authors under this legislation is less favorable than in the copyright legislation of most major nations of the western world**." **Debates on S. 22; 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 3143–52 (February 16, 1976)**[144] **Sen. John V. Tunney**: "Since American authors are frequently protected longer in foreign countries than in the United States, substantial resentment has arisen among American authors who have questioned the national interest in the support of the arts. The duration specified in the bill indicates that the United States recognizes that the present term of 56 years is too short and that the increase in longevity since 1909 as well as the adherence to the Berne Copyright Union mandate the necessity for the life-plus-50 term."

142. *Id.* at 2051, 2081–82 (emphasis added).
143. 122 CONG. REC. 2815, 2834 (1976) (emphasis added).
144. 122 CONG. REC. 3143–44 (1976).

	Debates on S. 22; 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 3821–41 (February 19, 1976)[145] **Sen. James Abourezk**: "It has been argued that since most European countries have adopted the copyright term of the author's life plus 50 years, we must follow suit. Conformity is supposedly necessary to provide certainty in international business dealings. This argument ignores a fundamental difference between the European system and ours. **The Europeans' principal purpose in copyright is to protect the property interest of the creator.** For example, in France, every time a book is borrowed from a library, a fee must be paid that goes to the book publisher. The American interest in copyright is eloquently stated in article I, section 8, of the Constitution: 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." **Sen. John L. McClellan**: "Mr. President, I yield myself 5 minutes. "Mr. President, again I do not suppose this is a life-and-death issue with respect to this bill, b**ut I want to point out what we are doing here, what we are undertaking to do here, conforms to what 80 other nations do today, principally, primarily, the industrial nations of the world**. . . . "**Mr. President, we simply are conforming to what is international practice today among the most enlightened industrial nations of the world. Seventy-four nations now have the same provision of law that is in this bill that is now challenged, and six other nations have longer terms.** "Mr. President, we are in line with international practices at least today. Actually, after all, Mr. President, we have 28 years now, 28 years of renewal, and only about 15 percent of the copyrights granted are renewed. It is only those important ones, those that have great value, that are renewed today, and I see no reason, Mr. President, why we should not go along with that which is established universal practice today. "Mr. President, this amendment strikes at the most fundamental section of the bill, the duration of copyright protection. "The term of copyright in the bill was not chosen by whim. The committee has examined the copyright statutes of other countries. According to the Department of State, 74 countries have adopted the term of life of the author plus 50 years after death. Several countries have longer terms, such as the Federal Republic of Germany and Spain. "During the consideration in the committee of his amendment, **the Senator from South Dakota said that the United States should not blindly imitate what is done in other nations. I agree. But it appears to me that the Senate might be better advised to be guided by the experience of some 80**

145. 122 CONG. REC. 3821, 3829–30, 3834 (1976) (emphasis added).

	countries rather than the somewhat theoretical concerns advanced by the Senator from South Dakota. If undesirable consequences result from the life plus 50 term, it would appear reasonable that other countries would have abandoned that term. "The administration is opposed to this amendment. The letter from the Department of State indicates that its adoption would prevent the United States from joining the principal international copyright agreement. "Mr. President, I ask unanimous consent that the letter from the Department of State and a list prepared by the Department of State be printed at this point in the RECORD." **Sen. James Abourezk**: "Mr. President, **to say that we have to conform to European nations, amongst which there really is no conformity because many of them are changing their terms to much longer terms,** all the existing provisions in S. 22 will do is to protect those people who buy copyrights from the original creator. It really does nothing to protect the creator himself nor to encourage people to produce material that is subject to copyright, produce artistic works." **Sen. Hugh Scott**: "Mr. President, the current provision for term in S. 22—life of the author plus 50 years—forms the cornerstone of the whole copyright revision effort. . . . "The United States has been, and will continue to be, in a very difficult position insofar as the international copyright field is concerned until we adopt the life-plus-50 term which is the norm, if not the minimum term for most developed countries. Some countries have expanded their term to life plus 70 or more and other nations are considering similar actions. "Since a large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death; since American authors are frequently protected longer in foreign countries than in the United States, the disparity in duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Publishing has always had a favorable balance-of-payments structure in the United States, and copyrighted works move across national borders faster and more easily than virtually any other economic commodity. However, in order to maintain the favorable economic status books, music, and other works of art have in the export arena, it has become increasingly clear that the United States must become a party to the Berne Copyright Union. However, the major stumbling block to our adherence to Berne is the requirement of a term of copyright of life of the author plus 50 years. Without the change in our copyright laws, the possibility of future U.S. adherence to the Berne Conventions would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike**.**

	"Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works and the only result is a commercial windfall to certain users at the author's expense. It should be remembered too, that copyright has the effect of assisting in dissemination, since publishers and other users cannot risk investing in a work unless assured of exclusive right. "**It is time for the United States to take the leadership in the world copyright community, and without the life-plus-50 term of copyright, this will prove to be an impossible task**." **Debates on S. 22, 94th Cong., 2d Sess. (1976): 122 Cong. Rec. 31977–32016 (September 22, 1976)[146]** **Rep. J. Edward Hutchinson**: "Lastly, the life-plus-50-year term which authors would have in works created after the effective date of this bill, w**ould conform our law to the copyright law of many foreign countries**. In these times of instant communication throughout the world, there is an increasing need for some uniformity in the field of copyright. A very large number of countries have already adopted a copyright term of the life of the author and 50 years after his death. "American authors are today frequently protected longer in some foreign countries than in the United States, and some resentment has occasionally been provoked because of this disparity in the duration of the term. Copyrighted materials move across national borders faster than virtually any other economic commodity, and with the techniques now in common use this movement has become instantaneous and effortless in many cases. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealing." **Editorial entitled "Copyright for 1976" appearing in the New York Times; requested to be printed in the Record by Sen. Hugh Scott, 122 Cong. Rec. 26234 (8/6/76)[147]**

146. 122 CONG. REC. 31977, 31982 (1976) (emphasis added).
147. 122 CONG. REC. 26234 (1976) (emphasis added).

	"Under the revised law, literary and dramatic works would be protected for the life of their creator plus 50 years. **This is the term already in effect in most Western nations. Bringing American copyright laws into closer alignment with the international scene would foster greater exchange of written and musical property between countries on a voluntary, negotiated basis, thereby encouraging international ideas to flow more freely."**

APPENDIX B:
FORMALITIES

Topic	**Issues**	**Register's Tentative Draft 5/61[148]**	**Preliminary Draft 1/16/1963[149]**	**S. 3008 7/20/64[150]** (note that H.R. 4347 language is mostly the same with updated section no. and "affixed" instead of "placed on" in subsection (c))[151]	**S. 22, 94th Cong. 2d Sess. 9/3/1976[152]**	**1976 Act Language[153]**
Notice of copyright § 401	Should proper notice be required for the subsistence of	Chapter VI. NOTICE OF COPYRIGHT D. Recommendations 1. A notice of	§ 24. Notice of Copyright: Visually-Perceptible Copies	§ 24. N*otice of copyright: v*isually-*p*erceptible *c*opies	§ 401. Notice of copyright: Visually perceptible copies	§ 401. Notice of copyright: Visually perceptible copies

148. 4 KAMINSTEIN, *supra* note 72, at 240.
149. *Id.* at 248.
150. *Id.* at 256–57.
151. *Id.* at 259.
152. *Id.* at 279–80.
153. *Id.* at 281.

	copyright protection?	copyright, consisting of either the word "copyright" or the symbol ©, accompanied by the name of the copyright owner and the year date of first publication, should be required in all published copies of copyrighted works. 5. The statute should not require that the notice be placed in a specified position. Instead, it should merely require that the notice be so placed that a reasonable inspection of the copy will reveal it.	(a) GENERAL REQUIREMENT. Whenever a work under this title is published by authority of the copyright owner in the United States or elsewhere, a notice of copyright as provided in this section shall be placed on all publicly-distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. Except as provided in section 25, no notice shall be required in connection with the performance, the exhibition of copies, or the distribution of records of a sound recording of the work. (b) FORM OF NOTICE. The notice appearing on the copies shall consist of the	(a) GENERAL REQUIREMENT.—Whenever a work *protected* under this title is published *in the United States or elsewhere by authority of the copyright owner*, a notice of copyright as provided *by* this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. (b) FORM OF NOTICE.—The notice appearing on the copies shall consist of the following three elements: (1) *the symbol © (the letter C in a circle), the word*	(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published *i*n the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device (b) FORM OF NOTICE.—The notice appearing on the copies shall consist of the following three elements: (1) the symbol © (the letter	(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. (b) FORM OF NOTICE.—The notice appearing on the copies shall consist of the following three elements: (1) the symbol © in a

			following three elements: (1) The word "Copyright," the abbreviation "Copr.," or the symbol © (the letter C in a circle). (2) The year of first publication; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work shall be sufficient. (3) The name of the owner of the copyright or of the exclusive right to distribute the visually-perceptible copies, an abbreviation by which the name can be recognized, or a generally	*"Copyright," or the abbreviation "Copr.";* (2) *t*he year of first publication *of the work;* in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work *is* sufficient*;* (3) *t*he name of the owner of copyright *in the work*, *or* an abbreviation by which the name can be recognized, or a generally known alternative designation of *the* owner. (c) POSITION OF NOTICE.—The notice shall be placed on the copies in such manner and location as to give	C in a circle), the word "Copyright," or the abbreviation "Copr."; *and* (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery,	circle), or the word "Copyright," or the abbreviation "Copr."; and (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards,

			known alternative designation of said owner. (c) POSITION OF NOTICE. The notice shall be placed on the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall, by regulation, prescribe examples of specific methods of affixation and positions on various types of works which shall be deemed to satisfy this requirement, but in no case shall his listing be considered exhaustive.	reasonable notice of the claim of copyright. *The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.*	jewelry, dolls, toys, or any useful articles; *and* (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. (c) POSITION OF NOTICE.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the	postcards, stationery, jewelry, dolls, toys, or any useful articles; and (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. (c) POSITION OF NOTICE.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation

					notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.	and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.
Evidence of Foreign Influence	**Copyright Office Study 7 Copyright Notice, 1960** [footnotes omitted][154] **"B. INTERNATIONAL COPYRIGHT "BERNE" CONVENTIONS . . .** **"[T]he revisions made by the Berlin Convention of 1908 brought about a fundamental change. The second paragraph of article 4 provided as follows:** **The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work.** **"This provision has been incorporated without appreciable change in the latest revisions of the 'Berne' Convention—the Rome Convention of 1928 and the Brussels Convention of 1948.** **"The original 1886 convention contained two provisions specifically requiring a 'notice' (that is, a statement of reservation) as a condition of certain rights. First, article VII permitted free reproduction of 'articles from newspapers or periodicals * * * unless the authors or publishers have expressly forbidden it,'** and provided that '[f] or [*sic*] periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical.' The principle of this provision has been incorporated in all later revisions of the convention, although in somewhat different and more limited form. The Paris revision of 1896 excluded from the provision's effect '[s]erial stories, including tales;' for other types of articles unauthorized use could be prevented only if 'the authors or editors shall have expressly declared in the newspaper or periodical itself in which they shall have been published						

154. Doyle et al., *supra* note 27, at 24–29, 37, 39–40, 42, 44–48 (emphasis added).

	that reproduction is forbidden. The provision was simplified in the Berlin revision of 1908, and appears as article 9 in the Rome Convention of 1928 and the Brussels Convention of 1948; in the latest revision it reads as follows: 2. Articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved; **"The other specific 'notice' provision of the 1886 convention referred to the right of musical performance, and read as follows:** **The stipulations of article II [the right of national treatment] shall apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title page or commencement of the work that he forbids the public performance thereof.** **"The Berlin Convention of 1908 specifically abrogated this requirement, and instituted a provision which has appeared in all of the later revisions:** 3. In order to enjoy the protection of this article [the right of public performance]. authors shall not be bound, when publishing their works, to forbid the public presentation or performance thereof. "The various 'Berne' Conventions also contains a few provisions which would permit contracting states to require a notice for certain purposes. For example, the latest revision (the Brussels Convention of 1948), in addition to permitting the requirement of a notice for articles of current interest, provides that it shall be a matter for domestic legislation to determine the conditions under which works of applied art may be protected, and the conditions under which lectures and similar works may be reproduced by the press." "C. THE UNIVERSAL COPYRIGHT CONVENTION "It is generally recognized that the Universal Copyright Convention, signed at Geneva in 1952, represents an effort to reconcile the fundamental differences between those countries which base copyright protection on the performance of certain formalities, and those which do not. The foundation stone on which the convention is built is that provision of article III which reads as follows: 1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and

	location as to give reasonable notice of claim of copyright. "**It is worth noting that the compromise embodied in this provision involves the use of a prescribed form of notice as a substitute for other types of formalities."** "V. THE COPYRIGHT NOTICE IN THE LAWS OF FOREIGN COUNTRIES "A. GENERAL NOTICE PROVISIONS "*1. Notice as a condition of copyright* **"As will be seen below, many countries require a notice with respect to particular classes or uses of copyrighted works. In addition there are five countries, other than the United States, which appear to require some sort of notice as a fundamental condition of copyright protection**. The statute of the Philippines, which is patterned after that of the United States, requires both publication with notice and registration as conditions of copyright in published works, and contains a comparatively simple notice provision: SEC. 16. The notice of copyright required by section eleven of this Act shall consist of the word 'Copyright' accompanied by the name of the copyright proprietor and the year in which the copyright was registered." . . . "*2. Notice mandatory but not a condition of copyright* **"The new Mexican copyright statute, which came into effect in January 1957, embodies an interesting approach to the notice problem. Article 23 provides as follows:** Published works protected by this law shall bear the expression 'derechos reservados' (rights reserved), or its abbreviation 'D.R.,' followed by the symbol © and the full name and address of the copyright owner and an indication of the year of first publication. These particulars shall be placed in such manner and location that they shall be readily visible and give clear notice of claim of copyright. *However, the indication of the reservation of copyright in this or any other form shall not be an essential condition for the protection of the work, but shall render any publisher who omits them liable to the sanctions prescribed by this law*. [Emphasis supplied.] . . .

	"The copyright laws of three countries (Republic of China, Liberia, and El Salvador) appear to require a notice for published works, but do not make clear what consequences follow from failure to use a notice. The Chinese copyright statute provides that no action against an infringer may be instituted until registration has been made, and the regulations issued under the statute in 1944 provide for a notice to appear on registered works, as follows: SECTION 6. Any literary or artistic work which has been registered shall bear the inscription 'Registered by the Ministry of lnterior on _____ (day) _____ (month) _____ (year)' and the certificate number, on the last page of the said work." . . . "B. SPECIAL NOTICE PROVISIONS" [omitted] . . . "VI. PROPOSALS SINCE 1909 FOR REVISION OF THE NOTICE REQUIREMENTS "A. THE DALLINGER BILL, 1924 "One of the earliest of the general revision bills designed to permit the United States to become a member of the Berne Copyright Union was H.R. 9137, which was introduced by Representative Dallinger on May 9, 1924. The bill provided that no notice was to be required as a condition of copyright, but permitted the use of a notice consisting of the word 'Copyright' or the abbreviation 'Copr.', accompanied by the name of the copyright proprietor." . . . "D. OTHER DEVELOPMENTS, 1928–32 "While the Vestal bills for general revision of the law were being considered, **other attempts were being made to modify the copyright law only to the extent necessary to permit the United States to become a member of the Berne Union**. Typical of the bills introduced for this purpose was H.R. 15086, which was submitted by Representative Vestal to the 2d session of the 70th Congress on December 10, 1928. **This bill provided for the elimination of formalities with respect to works of foreign authors in the following fashion:** SEC. 2. * * * foreign authors who first publish their works in any country which is a member of the Copyright Union, as well as all authors who are within the jurisdiction of one of the countries of the said union, shall enjoy for their works, whether unpublished or published for the first time in one of the countries of the said union, such rights as the laws of the United States now accord or shall hereafter accord to citizens of the United States, as well as the rights specially accorded by the said convention: * * * SEC. 3. The enjoyment and the exercise by such authors of the rights and remedies accorded by the copyright laws of the United States and the said

	convention shall not be subject to the performance of any formalities other than such as are authorized by the said convention, and such authors shall not be required to comply with the provisions of the copyright laws of the United States as to publication with notice of copyright, * * * "This and similar measures, which would have had no effect upon the notice requirements for domestic works, were never reported from committee." . . . "F. THE DUFFY BILL AND OTHER DEVELOPMENTS, 1933–36 "Senator Dill reintroduced his general revision bill in the 73d Congress on March 13, 1933 (S. 342), but no further action was taken on it. **On May 31, 1933, a short bill, H.R. 5853, was introduced by Representative Luce to permit the United States to become a member of the Berne Union by exempting works of foreign authors from compulsory formalities;** the bill was also introduced in the Senate by Senator Cutting as S. 1928 on June 10, 1933. "On February 16,1934, Secretary of State Cordell Hull recommended to President Roosevelt that the United States adhere to the Berne Convention. The President sent this recommendation to the Senate for advice and consent, and not long thereafter hearings were held on S. 1928 by the Senate Foreign Relations Committee. Opposition developed to the adherence of the United States to the Berne Convention, and near the close of the hearings, it was suggested that the Secretary of State confer with the various conflicting interests and report later to the Senate Committee. As a result, the Interdepartmental Committee on Copyright, headed by Dr. Wallace McClure of of [*sic*] the State Department, was organized. Representatives by the Copyright Office and the Department of Commerce were included on this committee, which formulated a bill, S. 2465, later introduced in the Senate on March 13, 1935, by Senator Duffy. A second draft of this bill was introduced by Senator Duffy on May 13, 1935. This bill was favorably reported by the committee and passed the Senate on August 7, 1935." . . . "G. THE SHOTWELL COMMITTEE BILL AND OTHER DEVELOPMENTS, 1937–41 "Various revisions of the Daly bill, which substantially incorporated the notice provisions of the Duffy bill, were introduced in both houses of Congress between 1937 and 1941; although they attracted some attention, no action was taken on any of them. The most significant development during this period actually took place outside of Congress. A Committee for the Study of Copyright, headed by **Professor James T. Shotwell of Columbia University, was organized within the framework of the National Committee of the United States of America on International Intellectual Cooperation, a group related to the League of Nations' Committee on Intellectual Cooperation: its purpose was essentially to draft a new general revision bill permitting the United States to join the Berne Union.**

	"The Shotwell Committee, which was composed of representatives of most of the major groups interested in copyright, held a number of meetings during 1938 and 1939. **The fullest discussion of the notice requirements occurred during one of the early sessions, at which representatives of the authors' groups urged the unfairness of a situation in which an author's rights can be irretrievably lost because of a technical error on the part of a publisher over which the author himself has no control.** The motion picture representatives, on the other hand, maintained that the notice is of great value to users; and they argued for a stricter system of recording transfers of rights under a copyright. On the notice question, the position of the motion picture interests was summarized as follows: When a man has common law rights, it is true he doesn't need any notice or registration of any sort, and can hold someone for infringement, but we must not forget he has only his common law rights so long as he withholds the work from publication, and then he has them perpetually, but once (excluding the fact that a performance is not publication) he puts it in print, he has no common law rights any longer, and people interested want to know whether or not the work is in the public domain. A proposal to permit publication without losing what would have been previously the common law rights, by not putting any notice on it, will make it extremely difficult to tell when works fall into the public domain. "At one point in the discussion, it was suggested for the authors that, since users almost invariably conduct their own investigations rather than relying solely on the notice for information concerning the copyright, the notice actually serves no real purpose. A representative of the broadcasters replied: That isn't invariably true. The convenience of notice to us is that it gives us the starting point * * *. It is a great convenience for us to have that starting point. I am not saying that the author should lose all of his writings if the publisher omits doing it. I say it is good for us to have it and we would like to have it encouraged if not made compulsory, by making it attractive to do it. "The 'Shotwell Committee' bill was introduced by Senator Thomas as S. 3043 on January 8, 1940. It provided that copyright was to be extended 'without compliance with any conditions or formalities,' and it would have restored (without prejudice to users who had already begun an undertaking) the copyright in works which had previously been published with defective notices. The bill contained indirect recognition that notices of copyright could be used voluntarily, but included no indication as to the preferred form and position of the permissive notice, and offered no incentives for the use of such a notice. Section 17(3) provided: The failure to register any claim to copyright, or to record a grant, or to publish any work with notice of copyright, shall not affect the validity of any copyright or right therein, nor impair the rights of the author or other owner thereof, except as in this act otherwise expressly provided. "There were no hearings or further action on the 'Shotwell Committee' bill. Nevertheless, it is of some historical importance, not only because of the thoroughness with which it was prepared, but also because it represents the last full-scale effort at reconsideration of the U.S. copyright notice requirements."

	. . . "VII. REVIEW OF BASIC PROBLEMS "A. THE ISSUES RAISED BY COPYRIGHT NOTICE "The opponents of notice as a fundamental condition of copyright have attacked the general principle on four major grounds: **"1. *Notice is anomalous*.—Everyone is entitled to the fruits of his labor; the notice requirement, which forces an author to make an affirmative claim or forfeit copyright protection, is in basic conflict with this principle.** **"2. *Notice is anachronistic*.—Most of the other countries of the world have no general notice formalities, and in clinging to the requirement the United States is hopelessly behind the times.** "3. *Notice is useless*.—Since anyone wishing to determine the ownership or expiration date of a copyright must necessarily go beyond the notice, it is in reality a meaningless technicality. "4. *Notice is unjust and oppressive*.—Many copyrights are lost because of technical defects in the notice over which the author had no control; an author is not a businessman and is not equipped to deal with complex formalities. "The leading arguments in support of a notice requirement may be summarized as follows: "1. *Notice is socially desirable*.—No one is interested in copyrighting the large majority of published works but, without formalities, they would be pointlessly kept in the private domain for many years; this would inevitably hamper scholarship and free cultural interchange. "2. *Notice fits the U.S. situation*.—Far from being an outmoded concept, notice is increasingly needed to meet the demands for copyright information created by technological developments and the growing number of 'secondary users.' "3. ***Notice accords with the U.S. theory of copyright*.—Copyright in the United States is a limited grant of a monopoly to provide an incentive to creation, rather than a natural right of the author. It is thus appropriate to require the author to fulfill certain conditions which are of benefit to the public**. "4. *Notice is effective in practice*.—Notice fulfills a vital function in informing the public that a claim exists, and in providing users with at least a starting point for determining ownership and duration. The burden of affixing a notice is generally very slight.

	"These opposing arguments can be elaborated almost endlessly, and much support can be found for both points of view. It is not the purpose of this paper to reach conclusions, but simply to frame the basic issues presented by notice in the general revision of the copyright law. In essence, the arguments for and against a notice requirement may be said to revolve around two opposing aims: "On the one hand, to assure to all authors the benefit of copyright protection for all of their works. "On the other, to facilitate the dissemination of works, by allowing free use of works in which no claim to copyright is asserted, and by giving prospective users a readily available starting point for determining the ownership and duration of copyright when a claim is asserted. "B. ABOLISHMENT OF THE NOTICE "Complete elimination of the notice requirements has been urged by the author-publisher groups, as simplifying the securing of copyright. If notice were eliminated, there would also be no necessity for dealing with the complicated details of the notice requirements in various kinds of works. On the other hand, it has been urged that a provision bringing all published works into the private domain would hamper the dissemination and scholarly use of copyright material. "C. INCENTIVES FOR VOLUNTARY USE OF NOTICE "**One of the principal arguments advanced by the opponents of compulsory notice is the injustice of having copyright forfeited irrevocably for failure to observe the technical requirements of notice**. On the other side, one of the principal arguments of those favoring notice is the importance of protecting innocent users, who had relied on the absence of notice, against liability for infringement. As noted above, some of the earlier revision bills have attempted to reconcile these opposing views by a system under which notice is a condition of certain remedies but not of the right itself. These bills would have permitted copyright to subsist without a notice, but would have limited the remedies against an infringer who relied on the absence of notice, either to an injunction against future infringement, or to a reasonable license fee." "D. THE SPECIFIC NOTICE REQUIREMENTS "There has been general agreement that the notice provisions of the present law leave much to be desired. Some of the requirements are ambiguous, others are incomplete, and still others are ill adapted to present-day media of expression. By requiring the notice to meet very limited and specific conditions as to form and position, the present statute has appeared to many as unduly restrictive and as resulting in a number of cases of technically faulty notices. **"Some of the objections to the present notice requirement might no doubt be minimized by a more liberal and flexible specification of the form and position of the notice. As to position, for example, consideration might be given to a provision along the lines of the Universal Copyright Convention,**

	which provides that the notice be 'placed in such manner and location as to give reasonable notice of claim of copyright.' And as to form, it might be provided that an error in the name or the year date would not invalidate the notice, and could be cured by the recording of corrective data in the Copyright Office. "If some form of notice is to be retained, consideration must also be given to the clarification of other details, including the notice on collections of copyrighted works, the requirement of a notice on works published abroad, the year date or dates in a revised edition, and the notice on a sheet reproducing a work repetitively. These questions, while of great practical importance, are subsidiary to the basic issues raised by the copyright notice. Analysis of detailed alternatives on these points is not within the scope of the present paper." **COMMENTS** Samuel Tannenbaum[155] "With respect to the position of the notice, the same language used in the above subd. 1, of the Universal Copyright Convention, should be a satisfactory amendment to the U.S. copyright law, to wit, that a notice be inserted 'in such manner and location as to give reasonable notice of claim of copyright'. "Aside from the advantages relating to the substantive copyright law, from the practical view point the advisability of continuing the use of the notice of copyright in one form or another, is evident by reason of the following: "1. In most cases, the statutory notice affords notice to the public as to whether or not the author has elected to claim the benefits of statutory copyright protection. "2. It facilitates the determination as to whether the copyright of the work has been renewed or not. It would also indicate whether the copyright had expired, if more than 56 years had elapsed. "3. It would expedite the time consumed in the search required for determining the existence, validity and ownership of the copyright, rights thereunder, and uses of the work involved."

155. *Id.* at 54.

	Ralph S. Brown, Jr.[156] "The careful marshaling in the Copyright Office study of the arguments for and against any requirement of notice as a condition for protection leaves me with a conviction that mandatory notice should be retained for *published works*. **Even if we are out of step with most of the rest of the world, the notice requirement does not preclude international cooperation, as exemplified by the UCC. The historic conception of copyright in this country as a legal monopoly seems to require that some assertion should be made by those who wish to have the advantage of the monopoly. Notice seems best adapted for this purpose, since it is easy for the author to accomplish, and directly warns the would-be copier that a claim of copyright is made with respect to the work.** "With respect to an infringer who is misled by the accidental omission of a notice from some copies, or by its unauthorized omission by a licensee or another infringer, there seems to be considerable merit in giving him immunity from all remedies except an injunction. In this connection, he should have some protection for an undertaking innocently begun. The language of section 8 of the proposed Designs of Useful Articles bill seems well adapted for this purpose. "Many of the objections to notice would be lessened if the technicalities could be diminished. **It seems clear that the present statute and the older cases have been quite unnecessarily rigorous.** So long as the essentials of a claim of copyright, by any appropriate word or symbol, the date, and some identification of the author are included, there should be no insistence on an exact formula. **As for the position of a notice, the provision of the UCC—'placed in such manner and location as to give reasonable notice'—should be a sufficient statutory guide. I suppose some explicit statutory provision for curing postdated notices would be necessary to overcome the decisions that invalidate copyrights the date of which is later than the actual date of publication.** **"I should have thought that a requirement of notice on the foreign editions of works first published abroad was burdensome (considering its inconsistence with foreign practice), and that the absence of such notice should not preclude the obtaining of an American copyright.** In other words, I am (though on very imperfect information) in sympathy with the majority position in *Heim v. Harris*. However, since the UCC apparently looks in a different direction it seems appropriate for our domestic law to accent its requirement of notice on works published abroad."

156. *Id.* at 55 (emphasis added).

	Walter J. Derenberg[157] "Since this admirable study gives the complete historical and legislative background of the present notice provisions and also offers an enlightening survey of the respective provisions in the laws of foreign countries, it will not be necessary here to do more than briefly indicate my personal views with regard to the issues summarized at page 48 of the study. **"It has always been my belief that the present notice provisions of the Act of 1909 are an anachronism and have resulted in innumerable instances in the loss of copyright on highly technical grounds. . . .** "This, in my opinion, has always been a most undesirable situation but has become almost intolerable since ratification by the United States of the Universal Copyright Convention. While the new Convention notice, © may now be used by U.S. authors and authors of works first published here on any type of work, as provided by Public Law 743, it still remains true that with regard to all other notice requirements concerning such works the notice provisions of the Act of 1909 continue to apply. In other words, a U.S. author may still not put the © at any place where it can be 'reasonably seen' as provided in article lII.l of the Universal Convention, but must continue to comply with the rigid requirements of sections 18 and 19 of the Act of 1909. "This result followed from our policy in seeking enactment of Public Law 743 not to go beyond the minimum changes which were required in our domestic law for the purpose of enabling the United States to ratify the Convention. "In my opinion, any complete revision of the Copyright Act of 1909 should certainly eliminate all existing notice requirements for works first published here which would go beyond the requirements of article III.1 of the Universal Convention. In other words, if any notice requirements at all were retained, it should suffice for any kind of copyrighted work if the symbol © accompanied by the name of the copyright proprietor and the year of first publication were placed 'in such manner and location as to give reasonable notice of claim of copyright.' **I, however, would readily endorse any legislative proposal which would not even go as far as the Universal Convention but which would approach the philosophy underlying the Berne Convention and the laws of the vast majority of foreign countries, to the effect that no copyright notice whatever should be required as a condition to the securing of copyright protection. In other words, I would favor a provision such as was included in the Shotwell bill of 1940, S. 3043, which provided that copyright was to be extended 'without compliance with any conditions or formalities**.'"

157. *Id.* at 56 (emphasis added).

	Register's 1961 Report (House Judiciary Committee Print (7/10/61 [Issued])[158]
	"B. ARGUMENTS FOR AND AGAINST THE NOTICE REQUIREMENT . . . "*c. Identifying the copyright owner* "The notice indicates who is the copyright owner at the time of publication. **In foreign countries where no notice is required, the laws commonly provide that if the author is identified in the copies of the work, he is presumed to own the copyright; otherwise the publisher named in the copies is presumed to be the copyright owner**. In a substantial number of instances, however, the notice required by our law shows that the copyright owner is someone other than the person to whom such a presumption would apply. . . . "2. OBJECTIONS TO THE NOTICE REQUIREMENT . . . **"The elimination of the notice requirement would mean that everything potentially copyrightable is under copyright protection. With some exceptions for particular kinds and uses of works, this is the state of the law in most foreign countries.** Advocates of eliminating our notice provision argue that, as a matter of principle, all authors are entitled to have copyright in all their works without any requirement that they assert their desire for copyright protection. They urge that it is unjust to deprive an author of copyright because of his failure to comply with a technical notice requirement." . . . **"(3) *Application of formal requirements to foreign works*.—The protection of foreign works by virtue of a proclamation, like the protection of domestic works, depends upon compliance with the general requirements of our statute for securing or maintaining copyright. These include the requirements of a copyright notice on published copies, the deposit of copies for registration of the copyright claim, and the manufacture of copies of certain works in the United States.** **"Aside from the copyright notice, these requirements impose a much greater practical burden on foreign authors than on domestic authors**. As noted below, these formal requirements are mainly eliminated for foreign works protected under the Universal Copyright Convention if they are published with a prescribed notice. And apparently the same result was contemplated under the Buenos Aires Convention." . . .

158. 1961 REGISTER'S REPORT, *supra* note 55, at 62–63, 115–18 (emphasis added).

	"(2) *The Universal Copyright Convention*.—The underlying principle of the Universal Copyright Convention is 'national treatment'—each country is to **protect the works originating in other member countries on the same basis as it protects the works of its own nationals**. In addition, the UCC specifies certain minimum standards of protection. Section 9(c) was added to our statute in 1954 (effective in 1955) to make it conform with the terms of the Convention. "Section 9(c) extends the statute to the works of authors who are citizens or subjects of a foreign country that is a party to the UCC, and also to the works of any foreign author first published in a Convention country. **It also provides that if the published copies of a foreign work eligible for protection under the UCC bear a prescribed copyright notice, the work is exempt from—** **(a) The general requirement of deposit and registration (except as a prerequisite to suit);** **(b) The requirement of domestic manufacture for certain works;** **(c) The importation limit of 1,500 copies for certain works; and** **(d) The requirement of a special proclamation for the extension of mechanical recording rights to foreign musical works.** "(3) *The Buenos Aires Convention*.—The Buenos Aires Convention provides for copyright protection among the adhering American Republics on the general basis of 'national treatment' in each country for the works of the citizens or domiciliaries of the other countries. Although it is not clear on this and other points, the Convention appears to apply only to works published in one of the member countries. "There are no provisions in our statute implementing or referring specifically to the Buenos Aires Convention. It was declared to be in effect, however, by a presidential proclamation. **The Convention appears to contemplate that, under certain conditions, a work of another member country would be entitled to protection in the United States without compliance with some of the formal requirements of our statute** "As of the date of this report, 7 of the 16 Latin American members of the Buenos Aires Convention have also adhered to the Universal Copyright Convention, and others will undoubtedly join. Until all 16 have done so, however, our copyright relations with some of the Latin American countries will continue to be governed by the Buenos Aires Convention. "There remain the countries that do not belong to either the Universal or Buenos Aires Conventions—15 'proclaimed' countries and 40 or more countries with which we have no copyright relations. It is here that we may find an opportunity to simplify the protection of foreign works and to improve our international copyright relations."

	Panel Discussion and Comments on 1961 Report (Part 2) (2/15/63 [Issued]) Mr. Karp:[159] "Mr. Kaminstein, I think that perhaps Mr. Tannenbaum's question relates more to the basic problem of just how useful a purpose the notice provision serves in the whole area of enabling the would-be copyist to decide whether it is now safe for him to copy the work (or the would-be 'user'—I don't mean the term derogatorily). And I think that there are so many instances in which notice serves no practical means of determining whether a work is or isn't in copyright that it might be wise to consider once again the thinking of some of us who, as Mr. Schulman mentioned, believe that notice should not be a requirement for copyright. "In addition to that circumstance that Mr. Tannenbaum mentions—where you have a work that may have actually been in copyright for 20 years, and is just published, and bears a publication date 20 years after the time that the term of copyright began to run, anyone who relied only on the notice would have been misinformed by 20 years—you have the circumstance of a book published in Europe. (And I assume that you're not going to require that works published abroad must bear U:S. copyright if they are circulated abroad. Am I right or wrong about that? I wasn't quite clear on that in the report.) What happens, if this proposal is enacted, in the case of a book published in Europe? As it is now, it would not require a copyright notice here, would it?" Mr. Kaminstein: "Yes, it would. **And the UCC does provide for requiring a notice now."** Mr. Karp.: **"If it's not circulated in the United States?"** **Mr. Kaminstein: "In other words, this was intended to overrule the *Hein* doctrine."** Mrs. Pilpel:[160] "Now I am aware that any simple-sounding proposal would, when submitted to any group—and particularly this group—pretty soon become at least as complicated as the Copyright Office report. But, bearing that in mind, I would nonetheless like to make the following suggestion. **I don't see why there could not be the simple copyright notice as stated in the UCC—both in terms of wording and in terms of location**." … Mr. Schulman:[161] "But not today. But let me point this out. What is there, in our own situation, which differentiates us from the whole world? Here we have a report in the Times last Sunday that in Great Britain there were published approximately twice the number of books that we've published in the United

159. DISCUSSION AND COMMENTS, *supra* note 30, at 114 (emphasis added).
160. *Id.* at 119 (emphasis added).
161. *Id.* at 126 (emphasis added).

	States last year. **Well, they are people who believe in copyright, and they have the same problems as we have in this country about the use of works by scholars and others. Yet there is no requirement in England, or any of the Commonwealth countries, for a notice, and there is no dedication of a work to the public for failure to inscribe a notice."** **"Here we have the whole Common Market area, of which we hear a great deal, comprising a population of about 270 million people, an area larger than ours—a flourishing motion picture industry, a flourishing publishing industry, in France, and Italy, and the Scandinavian countries. And yet they get along without notice, and nobody has ever yet failed to find an author or a publisher of a work."** **Mr. Dubin:**[162] **"**In the earlier part of the discussion, when we were discussing the question of notice, **John pointed out some of the situations that exist in some of the Central and South American countries. Now there they've combined a double standard both as to notice, deposit, and registration. Certain acts are required to be accomplished within a certain period of time. Then there's continued protection. In other words, neither deposit, nor notice, nor registration is a condition of obtaining protection in the first instance. It is a condition in order to maintain protection. And your judicial rights are suspended until such time as you do comply**. "They give you a certain period of time. In some of the countries you have a year within which to provide for deposit and registration. In other countries you have a notice, not as a prerequisite, but in order to maintain protection. Now if, within the period of 5**,** 10, 15, or 20 years—as the case may be, depending upon the laws of the particular jurisdiction—you fail to comply with the formalities, then you lose protection. But at least your rights are there; they are merely suspended until you do comply. I think that's what you had in mind this morning, did you not, John?" Mr. Schulman:[163] "We might under such circumstances relax the notice requirement only to the point of permitting a notice to be placed as provided in the Universal Copyright Convention."

162. *Id.* at 138 (emphasis added).
163. *Id.* at 117.

	Mr. Sargoy:[164] "One of the reasons strongly urged by you, as Barbara indicated, was to encourage adherences by these other nations to the UCC. **Now, UCC works are presently exempt, as you pointed out, from deposit and registration (save only as a condition precedent to suit), from the manufacturing requirements, from import limitations on works enjoying ad interim protection, and from the requirement of a special proclamation for extension of mechanical recordings to foreign musical works. But, under your proposals for a new act, most of these things would disappear, except only (this is for the nonnational getting protection in the United States) for the possibility of deposit being a condition of copyright—which, I think, is not too likely. There may be penalties for failing to make a deposit, but not as a condition of copyright."** Mr. Kaminstein: "Incidentally, I am not sure that you understood the purport of our recommendations in that case. **We don't propose to treat these other countries as though they had joined the UCC. They would still have to meet all the requirements of our own statute."** Mr. Sargoy: "That's right, but you are eliminating many of the U.S. requirements that now make it advantageous to join the UCC. Under your proposed law, there'd be really no incentives left for joining the UCC—under the new type of law that you are proposing. **I merely toss in for consideration that, to encourage countries getting into the UCC, some provisions might possibly be made as to these non-UCC nationals—as to whether their works should be protected only if they will, say, register them in the Copyright Office in the United States—and then only as to infringements committed after registration.**" Mr. Kaminstein: "I think this is a perfectly valid argument. And it is a question of judgment as to which carrot is going to be more attractive. Mr. Olsson, did you want to—" Mr. Olsson: "No, I didn't raise my hand, Kami. However, I have previously expressed myself in writing pretty much in accord with the views of those who have just spoken." Mr. Finkelstein: "I can see some merit in the Register's proposal that foreign authors not be deprived of copyright in the United States because of what their own Government is doing in their own country with respect to American works. I can see this advantage—that, if the time comes when we have a treaty with a foreign country, the treaty could be made effective as to some works that had been written or published in the past.

164. *Id.* at 191–92 (emphasis added).

	"I wonder if we could have some departure from the present provision and say, instead of copyright being denied to these authors that remedies be denied for the time being—so that, if we enter into a subsequent treaty with our respective countries, at that time there would be a larger body of works to be protected. But, in the meantime, those works would not be subject to any remedies in the United States. "It would seem to me that that might have some merit to it. Deny remedies in the meantime, but make the works available from now on for copyright protection and whatever remedies the subsequent treaty would provide." Mr. Kaminstein: "This sounds a little complicated, but I think some simplification would be worth considering here." . . . The Authors League of America:[165] "**At common law the author has the exclusive rights to publish, copy, perform, and otherwise present his work to the public, and to prevent anyone else from doing so—after, as well as before, it has been disseminated by performance, broadcast, or other means. Notice of copyright, registration, and other formalities are not required. And these common law rights are exclusively the author's—they are not subject to any limitations or exceptions (as they are under the statute)**; the author does not surrender rights to others so they can present his work publicly for their benefit (not his); he is not compelled to license rights at fixed rates. These rights are 'immune from limitations on the scope of statutory protection' . . . "(a) We believe that notice of copyright should not be required if the system of 'life plus 50 years' were adopted. I**t has never been required for copyright protection in most other countries.** It is not required at common law." Ralph S. Brown, Jr.:[166] "**The report also maintains the firm foundation of our system that statutory copyright is not automatic on creation or dissemination or publication. It is a privilege which the author may freely claim, but one which he must assert clearly enough so that the public will know what is in the public domain and what is not**. The most effective way of doing this is by a dated notice of copyright, but there are obvious

165. *Id.* at 247, 249–50, 257 (emphasis added).
166. *Id.* at 265–66 (emphasis added).

	difficulties about affixing such a notice to works, such as broadcasts, that are either heard and not seen, as in radio, or if they are visually perceptible, as in television, are ephemerally seen by the viewer. **The third leg of what turns out to be a rather shaky stool is the report's preference for continuing a term of years as the measure of duration, renewable for a longer term. Each leg of the stool—public dissemination as the basis for inception of copyright; an affirmative claim of copyright as essential to protection; a period of duration that releases most works to the public domain in a relatively short time—is solid enough; but the finished product is unstable.** **"This is so largely because it must rest on two awkward bumps in the Universal Copyright Convention—the third paragraph of article IV.2 and article VI. In the case of a state which, like the United States, does not compute duration by the life of the author plus a term of years, article IV requires a term of not less than 25 years from registration or publication; and article VI defines publication in classical terms—the distribution of tangible copies, readable or otherwise visually perceptible.** "All this is made clear enough in the report, as are the solutions which attempt to bring dissemination without publication into the statutory scheme, and, at the same time, t**o satisfy the UCC requirements as to duration, and our American ideas about notice. I will not comment in detail on the proposed solutions, because the restatement of the problem has been too lengthy already; but I have to observe that they seem to me complicated and awkward. I am also struck by the complexity of the proposals for transition to a lengthened second term of 48 years. This is to some extent a separate matter from the difficulties outlined above; I note only in passing that the period of transition, which in many cases will have the practical effect of dividing the total term into three parts, will continue for a long time.** "What is the way out of these difficulties, short of attempting to change the UCC? I suggest that, though I share the preferences of the report for a fixed term of years, it may have to be abandoned for human (as distinct from corporate) authors. The UCC requirement of a term not less than life plus 25 years (IV.2., first paragraph) was made attractive by a presumably deliberate omission of any definition of the mode of inception. It can, I take it, be easily assimilated to any conventional mode—dissemination, publication, registration. This bait may be too tempting to resist. **My other hasty suggestion is that we ought to think more about the question of requiring a claim of copyright—something akin to the printed notice—upon any kind of dissemination. If the public is entitled to be advised that a printed work is subject to copyright, there seems to be some merit in applying the same criterion to other works**."

	Walter Derenberg[167] **"3. Even in the light of the U.C.C., it would still be desirable to assimilate our copyright law to the laws prevailing in the great majority of other nations, so that ultimately perhaps a fusion of the U.C.C. and the Berne Convention may become a reality**. . . . *"(c)* **I do not believe there should be any difference whatever with regard to the notice requirements as between foreign and domestic works. In other words, I agree that the UCC. notice should be acceptable for domestic purposes. both with regard to form and position, but more than that I think we may want to consider further relaxation of the present notice requirements when it comes to articles such as earrings, artistic features of textiles, glassware, etc.** Under the trademark law we used to have a rigid requirement of affixation of the trademark to the article itself but now permit the trademark and the notice to appear on containers, receptacles, and 'displays associated with' the product. I believe that a similar relaxation of the notice requirements of the copyright law would be desirable in order to eliminate some of the technical defenses so frequently raised in this type of case, witness, for instance, the second circuit decision in *Ideal Toy Corp. v. J.-Cey Doll Co., Inc.*, 129 USPQ 241 (May 15, 1961)." **Preliminary Draft and Discussion (Part 3) (7/20/64 [Issued])[168]** Comment of Elliott H. Levitas[169] "You will recall that last week in Washington, following the Copyright Revision Panel Meeting, **we discussed an article which appeared in the October 16th issue of *Variety* ascribing to the Copyright Office the statement that the trend in Europe, Africa, and South America was towards the use of copyright notice and that any attempt to abandon copyright notice would be 'a step backward.' Although it is our understanding that no one in the Copyright Office actually made such a statement at the Copyright Revision Panel Meeting as ascribed to it by the *Variety* article, we want to go on record, nonetheless, as disagreeing with the substance of that statement.** "As you know, Article 4(2) of the 1948 (Brussels) text of the Berne Convention states that 'the enjoyment and the exercise of these rights shall not be subject to any formality . . .' Article 4(2) of the 1928 (Rome) text of the Berne Convention is substantially identical. There is no proposed change in the text of Article 4(2) for the 1967 Stockholm Revision Conference. . . .

167. *Id.* at 273–74 (emphasis added).
168. PRELIMINARY DRAFT, *supra* note 50.
169. *Id.* at 386–87 (emphasis added).

	"U.C.C. 'copyright notice' provisions were a compromise between the Berne Union and American systems and European support of Article III was based on the fact that American acceptance of the U.C.C. would result in a *decrease* in formalities under American law, and would not increase formalities for Berne Union Members, due to the 'safeguard clauses.' (cf. 'Records of the Intergovernmental Copyright Conference,' pp. 77, 123–124). **"It is equally clear that the date of publication becomes a less significant element of the 'copyright notice' when protection is based on the life of the author rather than the date of publication."** **Further Panel Discussion and Comments (Part 4) (12/1/64 [Issued])**[170] **Goldman:**[171] "Subsection (c) of section 24, dealing with position, adopts the rule in the Universal Copyright Convention, the first sentence saying: 'The notice shall be placed . . . in such manner and location as to give reasonable notice of the claim of copyright.' The second sentence authorizes the Register to specify in regulations examples of acceptable positions of the notice, but makes it clear that the Register's specification is not to be considered exhaustive." **Levitas:**[172] When we get to the question of notice, I assume that the notice will still relate to questions of publication. On the other hand, as I understand its purpose (and leaving aside its benefits or disadvantages), one of the arguments in favor of a notice provision is that it enables any user, or any person coming in contact with the work bearing copyright notice, to have some clear understanding as to when the copyright will expire. Now, if there's no requirement as to including the year of creation in the notice once a work is published (assuming it was published more than 25 years after its creation) a question might arise as to whether or not the notice provision is adequately serving its purpose—or at least one of the advantages which has been argued in its favor. Similarly, a U.C.C. question as to notice would be involved there. "But, addressing myself primarily to this question of term, I think the question raised by Spence Olin earlier is something which cannot he ignored by this group. I am addressing myself now to the political considerations involved. It seems that most of the discussions of copyright and copyright revision have

170. FURTHER DISCUSSIONS AND COMMENTS, *supra* note 47.
171. *Id.* at 66–67.
172. *Id.* at 32.

	been conducted—necessarily so—by a group of people who are intimately familiar with its background, with its operation, and with its effect. However, ultimately this question of term, and the question of copyright revision completely, will be resolved by Congressmen and Senators." **Waldheim:**[173] Sections 24 to 28 preserve, with some modifications, the requirement of a notice of copyright as a condition of copyright protection. As in the past, this bill builds a platform to sustain the author's copyright and then, by the requirement of a copyright notice, builds in a trapdoor through which the copyright can be lost. Why? "The first element in the copyright notice is a word or symbol to indicate that copyright is claimed. **Can we not assume, as nearly all the other countries of the world assume, that the creator of an original work does not intend to dedicate it to the public? If he does intend to dedicate it, the law could provide that this may be accomplished by inserting a notice reading 'Copyright disclaimed.'** Just because the author or his publisher may forget to insert a copyright notice, or because the notice is in the wrong place or in the wrong form, why should the author forfeit the results of his labor." **Karp:**[174] In the third line of section 24(a) we find what appears to me to be a departure from the present law: the requirement that. the notice appear on the work published either here or abroad. Now, an American author or an American publisher who has the publishing rights and licenses their publication abroad cannot control compliance by a foreign publisher with the United States copyright law. **And, unless I read the section incorrectly, if a foreign publisher who has got a right to publish a book in France or England or someplace else breaches his contract by failing to put the notice in his edition, this can forfeit the United States copyright.** "I had always thought that copyright was a matter of territorial law: that our copyright law shouldn't reach beyond our borders, and that nobody else's law should reach here. For that reason, and for the very practical reason that many occasions arise in which compliance with the law cannot be compelled from within our borders, I don't see the advantage or the fairness of staking the existence of a copyright on somebody else's failure to comply with the United States copyright law, whether it be in France, or Afghanistan, or anyplace else."

173. *Id.* at 68–69 (emphasis added).
174. *Id.* at 77, 79–80 (emphasis added).

	Comment of Sidney A. Diamond:[175] "My feelings are strongly against formalities, particularly the copyright notice. I see no reason why the general understanding of anyone dealing with literary or artistic property should not be that it probably belongs to somebody. That is the general approach with regard to tangible personal property; I see no reason for distinguishing intangible personal property. **Indeed, this is the standard approach in Berne Union countries, where, as you know, a copyright system has been in existence for many years without the requirement of any notice whatsoever**. The prospective user has the burden of determining for himself whether any literary or artistic material is in the public domain; the presumption under which he must operate as a practical matter is that it is not free for use unless and until he can determine the contrary. Particularly if we go to a life-plus-years system, the determinative event will be the death of the author and this is something which, with rare exceptions, is readily determinable from reference sources. The notice then would serve no useful purpose. "I am aware of the argument that notice requirements are becoming more familiar to the copyright industries throughout the world due to the influence of the notice provision in the Universal Copyright Convention, and that notice requirements are even beginning to appear in foreign legislation. With all respect, I consider this a boot-strap type of argument. The fact that the overly technical requirements of the United States statute should have influenced the UCC and eventually some other countries does not support the view that we ought to continue the same or a similar system in our proposed new legislation in this country." **Comment of Authors League of America Inc:**[176] "The requirement for notice in copies published abroad should be deleted. This is not in the present Act, it is unnecessary, and it would help defeat many copyrights. Authors and publishers cannot control the actions of foreign publishers. It is also poor practice to impose such conditions on foreign publication as a condition for American copyright protection. American authors and publishers could be subjected to many difficult requirements abroad, if other countries followed this example." **Kellman:**[177] "With all due respect to Mr. Kaye, whose opinions I have always found valuable and interesting, I should like to take issue with what I may call 'the scrap of paper philosophy'—the fear of having everything written become entitled to protection**. In Europe, where notice is not required except**

175. *Id.* at 338–39 (emphasis added).
176. *Id.* at 314, 317.
177. *Id.* at 90 (emphasis added).

	for the U.C.C. requirements, there apparently has been no trouble because of the fact that untold quantities of paper become entitled to copyright protection. If anything that is written is of no value, then no one wants to use it—except possibly those uses that could be made anyhow on the ground of fair use. If it is of value then it should be protected, and the author or the owner should have the right to decide. I would rather have too many writings protected in theory, even though no one gives a darn or wants to use them, than to create requirements that will inevitably create pitfalls." **1964 Revision Bill Discussion**[178] BOGSCH: "**Well, as you know, a notice requirement is generally not regarded very favorably in Europe in whatever form it is presented. On the other hand, my feeling is that Europeans have generally become accustomed to the notice requirement in connection with the Universal Copyright Convention. I hope that the Europeans will make a step towards America with respect to notice, as America is probably going to make a step towards Europe in connection with duration, and that they will also recognize the undeniable advantages of notice."** **Supplementary Report of Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, May 1965 (Part 6) (5/13/65)**[179] "(3) Both subsections require use of a notice whenever the work 'is published in the United States **or elsewhere** * * *.' Under section 10 of the present statute, as interpreted by the Copyright Office Regulations, a work first published abroad must generally bear a notice at the time of its first publication in order to secure copyright protection in the United States; however, there have been court decisions indicating that, once copyright has been secured, any copies later distributed outside the United States need not bear a notice. **Thus, in this one respect, the proposed requirement may be tighter than under the present law; it has been argued very strenuously that, since foreign publishers sometimes ignore the need to use a notice, the requirement could work a hardship on American authors and publishers. While this argument has validity, there are several factors to consider:** **"(a) In view of the valuable purposes served by the notice, it would be unwise to eliminate it for the vast body of works published abroad unless there were overwhelming reasons for doing so.**

178. STAFF OF H. COMM. OF THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 183 (Comm. Print 1965) (emphasis added), *reprinted in* 4 OMNIBUS, *supra* note 7.

179. SUPPLEMENTARY REPORT, *supra* note 32, at 100–02 (emphasis added).

	"(b) Many copies of works published abroad find their way into the United States where, if they bore no notice, they might induce innocent infringements. "(c) The consequences of failure to use a notice would be much less drastic under the bill than they are now: for the most part they pertain to limitations on remedies against innocent infringers rather than a forfeiture of rights. "(d) Under section 9(c) of the present law a notice must appear on all copies of a work distributed anywhere in the world in order to be entitled to the special benefits of the Universal Copyright Convention. **As a result, a great many foreign publishers have become accustomed to the use of the notice, and their numbers are increasing. With the breaking down of national barriers with respect to intellectual materials, and the free flow of copies and phonorecords across boundaries, the need for a notice on foreign works becomes more urgent than ever before. To throw away the gains that have been made in the use of the notice under the Universal Copyright Convention would seem unwise and shortsighted.** "(e) An American author or publisher can guard himself against a foreign grantee of publishing rights who carelessly omits the notice, by making the use of notice a condition of the grant. . . . "**It is true that, where the notice is left off of foreign copies, the copyright owner might occasionally suffer a loss under section 404 if one of those copies comes into the hands of someone who is misled by the omission and infringes innocently in the United States. Whatever the solution under section 404, however, we do not believe the risk of loss is so great as to justify abandoning the general requirement that copies published abroad bear the notice. . . .** "The provision on the position of the notice, as the *Report* proposed, adopts the flexible approach of the Universal Copyright Convention by providing simply that the notice 'shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright.' However, in order to offer guidance and avoid uncertainty as much as possible, the subsection provides: 'The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.' Under this provision a notice placed in one of the positions or affixed by one of the methods prescribed in the regulations would clearly meet the requirements, but a notice in some other location or affixed in some other way might also meet the requirements if it were found to 'give reasonable notice of the claim of copyright.'" **Hearings before Subcommittee on Patents, Trademarks and Copyrights of Committee on Judiciary (Senate), 89th Cong., 1st Sess. (1965) (8/18–20/1965); 2nd Sess. (8/2-4, 25/1966) on S. 1006**

	Kaminstein:[180] "The present law contains a number of highly technical requirements concerning copyright notice, registration, and deposit, and the recording of assignments which are not only burdensome and difficult to understand but which, in too many cases, result in a complete loss of copyright protection. The bill would abolish some of the unnecessary features of these requirements. With respect to those it retains, it would reduce the drastic consequences of a mistake, and would make the requirements as simple and flexible as possible. . . . The bill would retain a manufacturing requirement, but with substantial changes that would make its results less drastic." Letter of Franklin Waldheim on behalf of Walt Disney Productions[181] "Since 1802 our law has required some form of copyright notice. **The public has been accustomed to seeing it and, while other countries get along very well without it, it does not seem in order to dispense with this tradition. However, failure to affix the copyright notice results, under our present law, in forfeiture of the copyright. This has seemed to be a cruel punishment to inflict for such a trifling offense**. "The Register of Copyrights, in his Supplementary Report on the General Revision of the Copyright Law, states that Sections 401 through 405 of the pending bill 'represent an effort to preserve the values of the copyright notice by inducing its use; while substantially ameliorating the effects of accidental or even deliberate errors or omissions.' These sections do, indeed, offer some escape from the harsh severity of the present law but leniency is afforded only under conditions with which it may sometimes be impossible to comply. "Section 404 provides that omission of the notice does not invalidate the copyright—but *only if* the notice has been omitted from no more than a relatively small number of copies *or if* registration has been made within five years after publication (and a reasonable effort is made to add the notice after the omission has been discovered). Suppose, then, that a work is published and distributed to the public in *large* numbers with no adequate copyright notice affixed. The only way to avoid forfeiture would be to register the work within five years. **But the author and the publisher may never notice the omission until an infringement action arises more than five years after the publication. It would then be too late to correct the error by registration.** **"Thus copyright is still condemned to death because of the failure to comply with a formality. The pending bill offers a chance of survival only if favorable conditions prevail. Common sense would dictate life for the copyright in all circumstances."**

180. *S. 1006 Hearing*, *supra* note 82, at 64, 68 (emphasis added).
181. *Id.* at 223–24 (emphasis added).

	Hearings before Subcommittee No. 3 of the Committee on the Judiciary (House), 89th Cong., 1st Sess. (5/26–28; 6/2–4, 9, 10, 16, 17, 23, 24, 30; 8/4, 5, 11, 12, 18, 19, 26; 9/1, 2/65) (37, 44)\ (Part 1) Mr. Karp:[182] **Lastly, as to the formalities that are required to secure copyright, the revision bill makes significant improvements both in terms of the type of placement and wording of notice that are required to preserve copyright in this country, a provision by the way which is not required in other countries of the Western World.** It also makes new provisions for curing defects in the copyright. On this again we have made certain proposals for changes to the Copyright Office and to the committee, and I will leave the statement of these to our memorandum." Statement of Harry N. Rosenfield, Esq. (on behalf of Ad Hoc Committee of Educational Institutions and Organizations):[183] "Furthermore, the present law (of a fixed 28-year initial term beginning with in objectively ascertainable date of publication) is simple and readily enables anyone to know when a copyrighted work is in the public domain;. On tile other hand, H.R. 4347 (based on an uncertain life term arising from a subjective date of creation) creates a highly complex system of variable and multiple durations. "*Conformity to foreign laws*.—One of the principal reasons advanced for H.R. 4347's radical departure from established American copyright renewal and duration practice is to have the term in the United States correspond with that in most foreign countries. There are many answers to this enforced conformity of our law to foreign law: . . . **"*Third*, adoption of conformity to foreign law as a principal basis for copyright law revision is a dangerous precedent. For example, most foreign countries have no copyright notice requirement except for special kinds of works. Also, major foreign countries have no system of copyright registration and deposit of copyright material. By adopting the conformity-with-foreign-laws rationale, do we say that henceforth copyright notice and copyright registration and deposit will also be eliminated although notice has been part of our copyright law since 1802 and registration since 1790?"**

182. *Hearings*, *supra* note 28, at 107–08 (emphasis added).
183. *Id.* at 338, 348 (emphasis added).

	INFORMATORY DOCUMENT: COMMENTS FROM THE INTERNATIONAL PUBLISHERS' ASSOCIATION[184] "'The 17th Congress of the International Publishers' Association (IPA), which met at Washington, D.C. (U.S.A.) from May 30 to June 5, 1965, adopted the following resolutions: "'BERNE CONVENTION—UNIVERSAL COPYRIGHT CONVENTION—U.S. COPYRIGHT ACT "'The 17th Congress of the International Publishers' Association, whose members are the national publishers organizations from 28 nations in 4 continents, has studied in detail the problem of a future international adaptation of the existing copyright laws, especially with regard to the Revised Berne Convention, the Universal Copyright Convention and the U.S. Copyright Act. The Congress welcomes the efforts that will be made for another revision of the Berne Convention during the forthcoming Stockholm Conference of 1967, as well as the propositions formulated in the reform bill of 1965 concerning the U.S. Copyright Act; it therefore pleads for a reform of adaptation of the Universal Copyright Convention. **With the aim at reaching protection of the copyright laws which would as far as possible be internationally uniform, the Congress considers the following reforms as indispensable: . . . "** **Hayword Cirker:**[185] "I said we had a copyright notice. That isn't altogether true. We have in the copyright page of every one of our books what we call a bibliographical statement: "'This work is an unabridged reprint of a work first published in 1883, to which has been added a new introduction especially written for this edition.' "I would much prefer to see written into this law the requirement that some statement appear on the copyright page which clarifies what copyright is being claimed. In the absence of such a statement, then the next best thing is to make it mandatory that all copyright works be registered, because without the registration, nobody ever knows what is copyright. **If you think that England has a wonderful law, try to find out what is copyright in an English book. It is the most confusing element that one can imagine. There are no dates. There is nothing in the book to indicate copyright. You have to be a scholar to find out what is and what is not copyright. Now, our American law, although it didn't conform with Berne Convention, was a far more sensible law. The men who framed this early, the 1909 law, were brilliant in many ways.**"

184. *Id.* at 1907 (emphasis added).
185. *Id.* at 1213 (emphasis added).

	H. R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) [Submitted with H. R. 4347] (10/12/66) (53)[186] "SECTION 401. NOTICE ON VISUALLY PERCEPTIBLE COPIES . . . "Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work 'is published in the United States or elsewhere by authority of the copyright owner.' The phrase 'or elsewhere,' which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. T**his provision was opposed by various organizations of authors, publishers, and motion picture producers, who argued that it would impose a hardship on American copyright owners since foreign publishers are unfamiliar with U.S. notice requirements and their activities are difficult to control.** "The committee has decided to retain the requirement that a notice appear on all copies and phonorecords published abroad on the strength of the factors set out at page 101 of the Register's Supplementary Report. **The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out.** The consequences of omission or mistakes with respect to the notice are far less serious under the bill than under the present law, and the committee had inserted a new clause in section 404(a) to make doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of notice an express condition of his publishing licenses. "Subsection (b) of section 401, which sets out the form of notice to appear on visually perceptible copies, retains the basic elements of the notice under the present law: the word 'Copyright,' the abbreviation 'Copr.,' or the symbol '©'; the year of first publication; and the name of the copyright owner. The year of publication, which is still significant in computing the term and determining the status of a work, is required for all categories of copyrightable work, but clause (2) of subsection (b) makes clear that, in the case of a derivative work or compilation, it is not necessary to list the dates of publication of all preexisting material incorporated in the work. Clause (3) establishes that a recognizable abbreviation or a generally known alternative designation may be used instead of the full name of the copyright owner. **"By providing simply that the notice 'shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright,' subsection (c) follows the flexible approach of the Universal Copyright Convention. Some concern was expressed that this general prescription might lead to subterfuge and confusion. The committee believes, however, that the further provision empowering the Register of Copyrights to set forth in his regulations a list of examples of 'specific methods of affixation and positions of the notice on various types of works that will satisfy this**

186. H.R. REP. NO. 89-2237, at 139–41 (1966) (emphasis added).

	requirement' will offer substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to 'be considered exhaustive,' a notice placed or affixed in some other way might also comply with the law if it were found to 'give reasonable notice' of the copyright claim." **H.R. Rep. No. 83, 90th Cong., 1st Sess (1967) [Submitted with H.R. 2512] (3/8/67)[187]** "SECTION 401: NOTICE ON VISUALLY PERCEPTIBLE COPIES . . . "By providing simply that the notice 'shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright,' subsection (c) follows the flexible approach of the Universal Copyright Convention. Some concern was expressed that this general prescription might lead to subterfuge and confusion. The committee believes, however, that the further provision empowering the Register of Copyrights to set forth in his regulations a list of examples of 'specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement' will offer substantial guidance and avoid a good deal of uncertainty." **Review of copyright law to date by Stanley Rothenberg. Appeared in Encyclopedia Americana for 1968, and introduced into Record by Mr. Kupferman. 114 Cong. Rec. 10345-10347. (4/23/68) (72)[188]** "INTERNATIONAL COPYRIGHT "England, today, and all European countries maintain a single copyright system, as distinguished from the common-law-statutory dualism of the United States. Under the Bern Convention, to which virtually all European countries belong, the members accord protection to the unpublished works of the members' nationals and to works first (or simultaneously) published in one of the convention countries whether or not the author is a national of a convention country {for example, a U.S. citizen). No other formality need be observed as a condition of obtaining such copyrights. Frequent practical problems have arisen because first or simultaneous publication abroad by Americans is not always feasible. The eventual response was the Universal Copyright Convention (UCC) in 1955, to which the United States and the other major countries of the world (excluding Russia and China) belong. The UCC requires each signatory to protect the unpublished works of other signatories' nationals (without formalities), their published works whether first published within or without a UCC

187. H.R. REP. NO. 90-83, at 110–12 (1967).
188. 114 CONG. REC. 10345–47 (1968).

	country, and any work first (or simultaneously) published in a UCC country irrespective of the author's nationality and residence (as, for example, Boris Pasternak's *Dr. Zhivago*, published in Italy). "Each UCC member country is allowed to impose formalities (conditions for obtaining and maintaining copyright such as notice, deposit of copies, registration, fees, local manufacture and publication) for works first published in its territory or created by one of its nationals. However, each member country must comply with the following rule as to works first published in another UCC country, the author of which is not one of the first country's nationals. It must regard all such formalities as satisfied *if* beginning with first publication all published copies bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication, placed in such manner and location as to give reasonable notice of claim of copyright. "Strict U.S. Requirements. The UCC form of notice satisfies the notice requirement of the U.S. Copyright Act, so that an American proprietor need insert only a single notice, such as '© 1968 John Author.' The United States, however, has strict requirements as to the location of the notice: in the case of a book or other printed publication, on its title page or the page immediately following; if a periodical, on the title page or on the first page of text of each separate issue or under the title heading; or if a musical work on its title page or the first page of music. Under the U.S. act the words 'Copyright' or 'Copr.' may be used in place of the symbol C [*sic*]. Also, the year date is not required if the work is not a printed literary, musical, or dramatic work. Furthermore, the symbol C [*sic*] accompanied by the initials or symbol of the proprietor is permitted in the case of works of an artistic nature (such as maps, art reproductions, drawings and plastic works, photographs, prints and illustrations), provided that, on some accessible portion of such copies, the proprietor's name appears. However, the use of the term 'Copyright' or 'Copr.' or of the other shorter notices for works of an artistic nature will not satisfy the UCC requirements for the notice privilege**."** **Register's Second Supplementary Report, 1975**[189] "By far the strongest criticism of present formalities was leveled at the requirement of a copyright notice as a condition of copyright protection. As the 1965 Supplementary Report summarized the situation: "Unintentional omission of the notice and comparatively trivial errors in its form and position have caused complete forfeiture in a number of cases, and it has been argued that, because of this injustice, the notice requirements should be eliminated entirely. **It has also been urged that, as a matter**

189. SECOND SUPPLEMENTARY REPORT, *supra* note 137, ch. XIII, at 3 (emphasis added).

	of principle, an author should be entitled to protection without the need of giving public notice of his claim. "The **1961 Report** weighed these objections against the four principal values of a copyright notice: (1) placing published material which no one is interested in protecting in the public domain; (2) showing whether a work is under copyright; (3) identifying the copyright owner; and (4) showing the year of publication. It concluded that these are real and important purposes which should be preserved, and it proposed to '**continue to require a copyright notice in published copies, but with certain changes in the present law to avoid the forfeiture of copyright through inadvertent omission of or errors in the notice." The broad outlines of the Report's recommendations for carrying out this proposal have been retained in the 1965 bill, but with some additional changes aimed at making the notice simpler and minimizing still further the effect of omissions and errors."** **S. Rep. No. 473, 94th Cong., 1st Sess. (1975) [Submitted with S. 22]. (11/20 [Legislative Day, II/18]/75]) (134).**[190] "SECTION 401. NOTICE ON PERCEPTIBLE COPIES . . . "Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work 'is published in the United States or elsewhere by authority of the copyright owner.' **The phrase 'or elsewhere,' which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out. The consequences of omissions or mistakes with respect to the notice are far less serious under the bill than under the present law, and section 405(a) makes doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of the prescribed notice an express condition of his publishing licenses. . . .** "By providing simply that the notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright, subsection (c) **follows the flexible approach of the Universal Copyright Convention**. The further provision empowering the Register of Copyrights to set forth in his regulations a list of examples of 'specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement 'will offer substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly

190. S. REP. NO. 94-473, at 126–28 (1975) (emphasis added).

	meet the requirements but, since the Register's specifications are not to 'be considered exhaustive,' a notice placed or affixed in some other way might also comply with the law if it were found to 'give reasonable notice' of the copyright claim. "SECTION 402. NOTICE ON PHONORECORDS OF SOUND RECORDINGS . . . "There are at least three reasons for prescribing use of the symbol '(P)' rather than © in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol '(P)' has also been adopted as the international symbol for the protection of sound recordings by the 'Convention for the Protection of Producers of Phonograms' (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971). The United States ratified the convention on November 9, 1973."