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Copyright Legislation and Technological Change

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OREGON LAW REVIEW

JESSICA LITMAN*

Copyright Legislation and Technological Change

Mr. Huddleston. The gentleman realizes that this is a highly technical subject and one that the ordinary Member is not qualified to deal with?

Mr. Bankhead. I understand that.

Mr. Huddleston. And that it is impossible to write a bill on this subject on the floor of the House. It is impossible to do it with any satisfaction.

Mr. Bankhead. In reply to that, permit me to state it is apparent to me that it is impossible to write a bill in the committee.

Mr. Huddleston. Let us dismiss the subject, then.¹

THIS is a story about private parties, vested interests, and the inexorable pace of technological change. As of this writing, there are nineteen copyright bills pending before Congress. The number is typical. Throughout this century, members of Congress have introduced innumerable copyright bills, held hearings on many, reported some, and enacted few. In the past few years, Con-

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¹ 75 CONG. REC. 11,072 (1932).

gress has been inundated with proposals to revise copyright law in light of new technology.² That, too, is typical.

Recent commentary reflects a dispute over whether the copyright statute can adjust to the current climate of rapid technological change. One camp argues that current technology differs profoundly from prior development and calls into question the assumptions on which our copyright laws are based.³ Another camp insists that copyright law has always faced the problem of technological change and accommodated it with remarkable success. The current challenge, the argument continues, is not qualitatively different from previous challenges, and the copyright statute is equal to the task.⁴ Both camps rely heavily on received wisdom about the his-

² See, e.g., *Copyright Issues Presented by Digital Audio Tape: Joint Hearing before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *Copyright and New Technologies: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1987); *Home Video Recording: Hearings Before the Senate Judiciary Comm.*, 99th Cong., 2d Sess. (1987); *Home Audio Recording Act: Hearings on S. 1739 before the Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1986); *OTA Report on Intellectual Property Rights in an Age of Electronics and Information: Joint Hearing before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986); *Copyright and Technological Change: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1985). See also Kastenmeier & Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?* 70 MINN. L. REV. 417, 424-30 (1985) (describing proposed copyright amendments preceding the enactment of sui generis protection for semiconductor chips); Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y 109, 110-11, 125-30 (1989) (summarizing proposed legislation).

³ See Kost, *The End of Copyright*, in *INTELLECTUAL PROPERTY RIGHTS IN AN ELECTRONIC AGE: PROCEEDINGS OF THE LIBRARY OF CONGRESS NETWORK ADVISORY COMM. MEETING, APRIL 22-24, 1987*, at 19 (Network Planning Paper No. 16, 1987) [hereinafter *Network Planning Paper No. 16*]; Fleischmann, *The Impact of Digital Technology on Copyright Law*, J. PAT. & TRADEMARK OFF. SOC'Y 5 (1988). See generally OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* (1986) [hereinafter *OTA REPORT*].

⁴ See, e.g., Baumgarten & Meyer, *Program Copyright and the Office of Technology Assessment* (pts. 1 & 2), 4 THE COMPUTER LAW. 8 (Oct. 1987), 1 (Nov. 1987); Marsh, *Fair Use and New Technology: The Appropriate Standards to Apply*, 5 CARDOZO L. REV. 635 (1984); Oman, *The Copyright Law: Can it Wrap Itself Around the New Technologies?* in *Network Planning Paper No. 16*, *supra* note 3, at 27; see also Davidson, *The Black Box Approach to Software Copyright Infringement*, 3 THE COMPUTER LAW. 25, 27-28 (March 1986) (suggesting that copyright protection be extended to recombinant DNA).

tory of the interaction between copyright and technology.⁵ Both, therefore, proceed on the assumption that copyright law has been effective, until now, in assimilating technological development; in fact, it has not.

Throughout its history, copyright law has had difficulty accommodating technological change. Although the substance of copyright legislation in this century has evolved from meetings among industry representatives whose avowed purpose was to draft legislation that provided for the future,⁶ the resulting statutes have done so poorly. The language of copyright statutes has been phrased in fact-specific language that has grown obsolete as new modes and mediums of copyrightable expression have developed. Whatever copyright statute has been on the books has been routinely, and justifiably, criticized as outmoded.⁷ In this Article, I suggest that the nature of the legislative process we have relied on for copyright revision is largely to blame for those laws' deficiencies.⁸

⁵ See, e.g., Baumgarten & Meyer (pt. 2), *supra* note 4, at 2-7; Marsh, *supra* note 4, at 647.

⁶ See, e.g., HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 29-32 (Comm. Print 1963) [hereinafter CLR PART 2] (colloquy); *id.* at 273-77 (written remarks of Walter J. Derenberg, U.S. Copyright Soc'y); STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE LIBRARIAN'S CONFERENCE ON COPYRIGHT, 1ST SESSION, IN NEW YORK CITY, MAY 31-JUNE 2, 1905, at 45-48, *reprinted in* 1 E.F. BRYLAWSKI & A. GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at pt. C (1976) [hereinafter COPYRIGHT CONFERENCE, 1ST SESS.] (colloquy).

⁷ See, e.g., Ebenstein, *Introduction to S. ROTHENBERG, COPYRIGHT LAW: BASIC AND RELATED MATERIALS*, at xv-xx (1956); Solberg, *Introduction to R.C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW* at xix-xxiv (1925); Ashby, *Legal Aspects of Radio Broadcasting*, 1 AIR L. REV. 331, 342 (1930); Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 503 (1945); Cramer, *Some Observations on the Copyright Law of 1976: Not Everything is Beautiful*, 1 COMM./ENT. 157, 164-66 (1977); Fleischmann, *supra* note 3, at 24-26; Kupferman, *Rights in New Media*, 19 LAW & CONTEMP. PROBS. 172, 172 (1954); MacDonald, *Technological Advances and Copyright*, 8 BULL. COPYRIGHT SOC'Y 3 (1960); Oman, *Software as Seen by the U.S. Copyright Office*, 28 IDEA 29 (1987); Stern, *Reflections on Copyright Law*, 21 N.Y.U. L.Q. 506, 512 (1947); Toohey, *The Only Copyright Law We Need*, WILSON LIB. BULL., Sept., 1984, at 27. See generally *OTA Report*, *supra* note 2.

⁸ There has been a bumper crop of recent literature propounding theoretical models of the legislative process. See, e.g., Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Macey, *Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982);

To solve the dilemma of updating and simplifying a body of law too complicated for legislative revision,⁹ Congress and the Copyright Office have settled on a scheme for statutory drafting that features meetings and negotiations among representatives of industries with interests in copyright. That scheme dominated copyright revision during the legislative process that led to the enactment of the 1909 Copyright Act.¹⁰ Congress and the Copyright Office continued to rely on meetings and negotiations among interested parties

Mikva, *Foreward to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

Because this literature has focused on explicating the birth of a hypothetically *typical* statute, it has paid little attention to the myriad processes accompanying the enactment of actual statutes. Thus, while the models provide useful pedagogical tools for abstract discussions of separation of powers, they tell us remarkably little about the legislative process because they do not take as their task the examination of any actual legislative processes. Rather, they replace the traditional fictions of legislative intent with alternative fictions that may challenge the mind but are no more descriptive of any actual process culminating in legislation than the fictions they seek to displace. Until recently, the debate omitted any empirical examination of how particular statutes came to be the law. For an articulate critique of the empirical bases of the public choice literature, see Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

In my examination of the legislative process that has yielded copyright statutes, I shunt most of these models aside. Instead of addressing the theoretical legislative process literature directly, I describe an actual legislative process that does not fit neatly into any of the propounded models.

⁹ It has been a commonplace among representatives of interests affected by copyright that the subject is so complicated most members of Congress cannot understand it. See, e.g., COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at 145 (remarks of Herbert Putnam, Librarian of Congress); CLR PART 2, *supra* note 6, at 5 (remarks of Abraham Kaminstein, Register of Copyrights).

There seems to be no reason why copyright law should necessarily be too complicated for members of Congress to draft. Congress has, after all, frequently addressed its attention to matters, such as the tax code, that are at least as complex. Copyright legislation, however, has never been accorded the congressional staff or resources available for legislation on politically sensitive issues like tax or military appropriations. It may be that the impression that members of Congress cannot or will not spare copyright sufficient time to gain a thorough understanding has been a self-fulfilling one.

¹⁰ Copyright Act of March 4, 1909, ch. 320, 35 Stat. 1075 [hereinafter 1909 Act], repealed by Pub. L. No. 94-553, 90 Stat. 2541 (1976). See, e.g., *Revision of Copyright Laws: Hearings Before the Joint Comm. on Patents*, 60th Cong., 1st Sess. 365-69 (1908), reprinted in 5 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. K [hereinafter 1908 Hearings]; *Copyright Hearings: Arguments on S. 6330 and H.R. 19853 Before the Joint Comm. on Patents*, 59th Cong., 1st Sess. 26-29, 31-33, 58-60, 68-70, 77-78, 88-90, 97, 154-67 (1906), reprinted in 4 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. J [hereinafter Dec. 1906 Hearings]; *Arguments on S. 6330 and H.R. 19853 Before the Joint Comm. on Patents*, 59th Cong., 1st Sess. 3-7, 20-21, 33-39, 77, 151-52 (1906), reprinted in 4 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. H [hereinafter June 1906 Hearings].

for subsequent efforts at copyright revision.¹¹ The efforts during the 1920s and 1930s to amend the copyright law to permit adherence to the *Berne Convention for the Protection of Literary and Artistic Works*¹² rested upon inter-industry negotiations and collapsed when those negotiations collapsed.¹³ The twenty-one year effort that culminated in the enactment of the 1976 Copyright Act¹⁴ again depended upon officially sponsored meetings among those with vested interests in copyright.¹⁵ Recent efforts to amend our law to conform to the requirements of the *Berne Convention* involved a similar process.¹⁶ The ongoing endeavor to write copyright amendments that make specific provision for new communications media relies heavily on inter-industry negotiations and stalls whenever those negotiations stall.¹⁷ Indeed, the informal understanding

¹¹ See generally Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, reprinted in SUBCOMM. ON PATENTS, COPYRIGHTS AND TRADEMARKS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960). A single, notable exception is the process that led to the enactment of Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980) (codified at 17 U.S.C. §§ 101, 117), amending the copyright statute to make explicit provision for computer software. The text of the 1980 amendment was suggested by the National Commission on New Technological Uses of Copyrighted Works (CONTU), a learned commission charged with divining a solution to the problems posed by computers and photocopy machines. See *infra* note 399.

¹² The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 CTS 185, originated in 1886 and has been revised six times since then. See generally Black & Dworkin, *Foreward to Opening Speech of Arpad Bagsch at the Conference Celebrating the Centenary of the Berne Convention*, 11 COLUM.-VLA J. L. & ARTS 1 (1986). *Berne* is a multilateral copyright treaty that mandates copyright protection without formalities for works created by authors of *Berne* nations and works first published in *Berne* nations. Until 1988, the United States remained one of the few developed countries that had not yet acceded to *Berne*. The Senate finally ratified the *Berne Convention* in the final hours of the 100th Congress. See *Legislation: Bill Making Copyright Act Compatible With Berne Convention Passes House*, 36 Pat. Trademark & Copyright J. (BNA) 699 (Oct. 20, 1988); see also Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

¹³ See Goldman, *supra* note 11, at 4-11.

¹⁴ General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (1982 & Supp. IV)).

¹⁵ See Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

¹⁶ Olson, *supra* note 2, at 121. See FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION 1-4, reprinted in 10 COLUM.-VLA J.L. & ARTS 513, 513-16 (1986). See generally U.S. Adherence to the Berne Convention: Hearings before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. 47 (1987).

¹⁷ Proposed legislation for satellite broadcasting and the use of home satellite dishes has been pending in Congress for several years. Congressional efforts to encourage inter-industry negotiations finally culminated in the enactment of compromise legislation last autumn. See Satellite Home Viewer Act of 1988, Pub. L. 100-667, 102 Stat. 3985

among copyright scholars and practitioners is that copyright revision is, as a practical matter, impossible except through such a process.¹⁸

The process Congress has relied on for copyright revision, however, has shaped the law in disturbing ways. The inter-industry negotiations that resulted in the 1909 Copyright Act sought to revise a body of law based on an old model in order to enable it to embrace a variety of new media. Industries for whom the old law worked well sought to retain their advantages;¹⁹ industries that found the old law inadequate sought profound changes in the way the copyright statute treated them.²⁰ Affected interests compromised their disputes by treating different industries in disparate ways. The draft bill that emerged from the conferences among industry representatives defined particular copyright rights with reference to the type of work in which copyright was claimed,²¹ and the statute enacted in 1909 retained the draft bill's essential strategy. Authors of particular classes of works were granted specific, enumerated rights; rights differed among the classes of copyrightable works.²² Thus, the 1909 Act gave the proprietor of the copyright in a dramatic work the exclusive right to present the work publicly,²³ the proprietor of the copyright in a lecture the exclusive right to deliver the

(1988); Olson, *supra* note 2, at 121-22. The bill introduced in 1987, H.R. 2848, 100th Cong., 1st Sess. (1987), reprinted in 34 Pat. Trademark & Copyright J. (BNA) 279-85 (July 16, 1987), included provisions endorsed by the satellite industry and the Copyright Office but not by the major television networks. The staff of the House subcommittee encouraged ongoing negotiations over the bill and scheduled H.R. 2848 for mark-up repeatedly during the spring of 1988. Agreement proved elusive, and each mark-up session was canceled abruptly. Finally, in July of 1988, the networks and satellite carriers reached a compromise; only then did the House subcommittee move on the bill, incorporating the compromise into the legislation. See *Legislation: House Passes Legislation on Satellite Retransmission*, 36 Pat. Trademark & Copyright J. (BNA) 636 (Oct. 13, 1988); *Legislation: House Committee OKs Animal Patenting, Satellite Retransmission Legislation*, 36 Pat. Trademark & Copyright J. (BNA) 346, 347 (Aug. 4, 1988).

¹⁸ See, e.g., Kaminstein, *Introduction to Viewpoints on the General Revision of the Copyright Law — The American Bar Association Copyright Symposium at Chicago, August 1963*, 11 BULL. COPYRIGHT SOC'Y 3, 4 (1963); Olson, *supra* note 2, at 111; cf. *Home Video Recording*, *supra* note 2, at 77 (remarks of Sen. Thurmond).

¹⁹ See, e.g., COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at 15-17 (remarks of Charles Scribner, American Publishers' Copyright League).

²⁰ See, e.g., *id.* at 21-23 (remarks of Don C. Seitz, American Newspaper Publishers' Ass'n).

²¹ See S. 6330, 59th Cong., 1st Sess. §§ 1, 4, 18 (1906), reprinted in 1 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. B; *infra* notes 142-46 and accompanying text.

²² See 1909 Act, *supra* note 10, §§ 1, 4, 5; *infra* notes 144-48 and accompanying text.

²³ 1909 Act, *supra* note 10, § 1(d).

work in public for profit,²⁴ the proprietor of the copyright in a musical composition the exclusive right to perform the work publicly for profit except on coin operated machines,²⁵ and the proprietor of the copyright in a book no performance or delivery right whatsoever.

The drafters of the 1976 Act pursued similar goals to different conclusions. Congress and the Copyright Office again depended on negotiations among representatives of an assortment of interests affected by copyright to draft a copyright bill.²⁶ During twenty-one years of inter-industry squabbling, the private parties to the ongoing negotiations settled on a strategy for the future that all of them could support. Copyright owners were to be granted broad, expansive rights, including future as well as currently feasible uses of copyrighted works. Each of the copyright users represented in the negotiations, meanwhile, received the benefit of a privilege or exemption specifically tailored to its requirements, but very narrowly defined.²⁷ The 1976 Act solved the problem of accommodating future technology by reserving to the copyright owner control over uses of copyrighted works made possible by that technology. Broad, expansive rights were balanced by narrow, stingy exceptions.²⁸

A comparison of the immediate futures of the 1909 and the 1976 Acts reveals that they failed the future in similar ways. Narrow provisions became inapplicable or irrelevant as technology developed, while those interests absent from the meetings of industry representatives encountered significant legal barriers to their activities. The inflexibility of specific provisions distorted the balance that the statute's drafters envisioned when it was enacted, and interested groups came running to Congress to plead for quick fixes. This history illustrates that broad rights and broad exceptions swal-

²⁴ *Id.* § 1(c).

²⁵ *Id.* § 1(e).

²⁶ I have described the legislative process that produced the 1976 Copyright Act in an earlier article. See Litman, *supra* note 15.

²⁷ See *id.* at 883-88; *infra* notes 234-312 and accompanying text.

²⁸ Cases interpreting the 1976 Act have not described it this way; the interpretation is my own. See Litman, *supra* note 15, at 882-96. Courts have, for the most part, perceived the statute as striking some balance between rights and exceptions, but they have not characterized that balance in general terms. See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429-33 (1984). The disparity between the breadth of the rights granted in 17 U.S.C. § 106 and the narrow specificity of the exceptions and limitations detailed in 17 U.S.C. §§ 107-118, however, is patent. The 1976 Act's legislative history suggests a rationale behind that disparity. See *infra* notes 229-312 and accompanying text.

low up their specific counterparts. Because technological development will change the world that a copyright law seeks to order, the law needs flexible provisions of general application.²⁹

In this Article, I explore how the process of drafting copyright statutes through negotiations among industry representatives became entrenched, and what that process has cost us in our efforts to deal rationally with technology.³⁰ Part I traces the birth of the conference process and its shaping of the 1909 Act. Part II describes how the conference process became a fixture of copyright revision during later efforts to amend the statute. Part III examines the strengths and weaknesses of a legislative process predicated on negotiations among interested parties. Part IV explores the distortions that the process imposed upon the massive revision effort that produced the 1976 Copyright Act. Part V focuses on the problems posed by new communications media and private use as illustrations of the 1976 Act's weaknesses. Part VI surveys recent legislative activity and suggests that the conference process disserves both affected industries and members of Congress. I nonetheless conclude that no meaningful reform of the process is likely.³¹

I

THE FIRST CONFERENCES

Until the copyright revision that culminated in the 1909 Act, the legislative process accompanying copyright enactments differed little from the process yielding most statutes: interested parties sent

²⁹ See *infra* notes 313-72 and accompanying text.

³⁰ I will proceed more or less chronologically, because the stresses posed by new technology and the disputes among industries affected by copyright were more straightforward when the number of technological innovations and industries in the game were fewer than they have since become. The turn of the century dispute between music publishers and the manufacturers of player pianos shares many similarities with the current brawl among motion picture producers, television broadcasters, cable systems, and the operators of communications satellites, but the parallels are easier to see if the simpler disputes are explored before tackling the more complicated ones.

³¹ Because the focus of my Article is the process that yields copyright legislation, I will not address, except in passing, see *infra* note 396, the strategies that courts might employ to interpret or reinterpret copyright statutes in ways that would circumvent statutory weaknesses. That topic is a fascinating and complex one in its own right, and raises significant separation of powers concerns. See generally Davidson, *Common Law, Uncommon Software*, 47 U. PITT. L. REV. 1037, 1067-70 (1986); Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769 (1984); Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process* (Book Review), 66 TEX. L. REV. 1071 (1988).

petitions to Congress.³² The majority of bills were drafted by representatives of affected interests, who then requested members of Congress to introduce the bills,³³ wrote petitions to Congress in their support, and testified in their favor during Patent Committee hearings.³⁴ By 1900, the body of copyright law was a pastiche of inconsistent amendments grafted on a basic structure that conflated (and sometimes confused) copyrights, patents, and trademarks.³⁵ Efforts toward general statutory revision foundered as a “result of difficulties in obtaining a quorum of the Patents Committee to give attention to this subject.”³⁶

³² *E.g.*, MEMORIAL OF PETER S. DU PONCEAU AND OTHERS, PRAYING CONGRESS TO APPOINT COMMITTEES OF INQUIRY ON THE SUBJECT OF COPYRIGHT, AND TO AWAIT THEIR REPORT BEFORE ACTING ON THE SUBJECT, S. DOC. NO. 309, 25th Cong., 2d Sess. (1838). *See* H. REP. NO. 16, 40th Cong., 2d Sess. (1868); S. REP. NO. 494, 25th Cong., 2d Sess. (1838); *see generally* LIBRARY OF CONGRESS, COPYRIGHT IN CONGRESS, 1789-1904. (1976 Reprint of 1905 ed.) [hereinafter COPYRIGHT IN CONGRESS].

³³ *See, e.g.*, *International Copyright: Statements on S. 191 and S. 1178 Made before the Sen. Comm. on Patents*, 49th Cong., 1st Sess. 4 (1886) (remarks of Sen. Hawley) (S. 191 drafted by authors' association and introduced by Hawley at its request).

³⁴ *See* COPYRIGHT IN CONGRESS, *supra* note 32, at 96-377.

³⁵ Throughout the nineteenth century, Congress responded to new developments by enacting discrete amendments to meet particular exigencies. *See, e.g.*, Act of Aug. 1, 1882, ch. 366, 22 Stat. 181 (amending Rev. Stat. § 4962 to permit manufacturers of molded decorative articles to affix copyright notice on the bottom of the articles). By the turn of the century, United States copyright law had become arcane and complex. *See generally* LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1903, S. DOC. NO. 10, 58th Cong., 2d Sess. 68-69 (1903) [hereinafter REGISTER'S 1903 REPORT] (“Our present copyright system is a highly technical one, largely due to its uneven development by means of many separate enactments dealing with particular matters, or framed to meet special exigencies.”); *id.* at 443-45 (detailing examples). The law was riddled with internal contradictions and discrepancies and lacked the flexibility to adjust to the growth of new works and media. *Id.* at 443-68. Copyright owners complained of technicalities. *See* COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at 15-16 (remarks of Charles Scribner, Periodical Publishers' Ass'n of America); *id.* at 18-19 (remarks of W.A. Livingstone, Print Publishers' Ass'n of America); *id.* at 20 (remarks of John W. Alexander, Soc'y of American Artists); *id.* at 137-38 (colloquy). Judicial opinions were inconsistent and confused. *See generally* R.R. BOWKER, COPYRIGHT: ITS LAW AND LITERATURE 8-20 (1886); E.S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 43-53, 434-67 (1879).

³⁶ *Copyright Legislation*, 49 PUBLISHERS' WEEKLY 856 (May 23, 1896). Although the Register of Copyrights, in his 1903 Report to the Librarian of Congress, characterized two nineteenth century statutes as general revisions of the copyright laws, *see* REGISTER'S 1903 REPORT, *supra* note 35, at 443-68, neither statute represented a comprehensive overhaul. By general revision, Register Solberg appears to have meant only that the two statutes re-enacted the copyright laws rather than merely amending them. The first, enacted in 1831 after lobbying by Dr. Noah Webster, extended the initial copyright term to 28 years and added musical compositions to the subject matter of copyright. *See* Solberg, *Copyright Law Reform*, 35 YALE L.J. 48, 49-50 (1925). The

Beginning in 1901, the recently appointed Register of Copyrights pleaded repeatedly with Congress to appoint a special commission to revise the copyright law.³⁷ Members of the Senate Patent Committee, however, were hostile to the idea of a commission.³⁸ The Librarian of Congress suggested that Congress instead pass a resolution authorizing the Library of Congress to convene a conference of experts and interested parties to consider a codification of the copyright laws. The members of the Senate Patent Committee concluded that it would be improper for Congress to authorize such a conference, but suggested that they would be delighted if the Librarian were to call an unauthorized conference on his own motion.³⁹

The Librarian of Congress followed the Patent Committee's suggestion and invited representatives of authors, dramatists, painters, sculptors, architects, composers,⁴⁰ photographers, publishers of various sorts of works, libraries, and printers' unions to a series of meetings in New York City.⁴¹ The invitees represented the beneficiaries of the rights granted by existing copyright statutes.⁴² The

second, in 1870, consolidated the copyright, patent, and trademark laws in connection with the general effort of transforming the extant federal laws into the *Revised Statutes*; it made few substantive changes but did introduce language into the copyright law that invited confusion with the patent laws. See REGISTER'S 1903 REPORT, *supra* note 35, at 444-45; Solberg, *supra*, at 50. Six statutes enacted between 1831 and 1870, and 10 statutes enacted between 1870 and 1900, accomplished more substantive amendment. See LIBRARY OF CONGRESS, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 31-59 (1963).

³⁷ See LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1902, S. DOC. NO. 6, 57th Cong., 2d Sess. 63-65 (1902); LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1901, S. DOC. NO. 35, 57th Cong., 1st Sess. 60-61 (1901); REGISTER'S 1903 REPORT, *supra* note 35, at 68-69, 467-68.

³⁸ See Solberg, *supra* note 36, at 62.

³⁹ Letter from Sen. A.B. Kittredge, Chairman of Senate Comm. on Patents, to Hon. Herbert Putnam, Librarian of Congress (January 27, 1905), *reprinted in* 5 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. M, at 5.

⁴⁰ Although composers' representatives were invited to attend, their presence was nominal. See *Dec. 1906 Hearings*, *supra* note 10, at 385 (colloquy).

⁴¹ See COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at vii-xv; Solberg, *supra* note 36, at 62-63.

⁴² The extant copyright statutes extended copyright to the works of the creators and publishers, privileges to the libraries, and job protection to the printers' unions.

The Librarian also invited representatives from the National Educational Association as surrogates for the public interest. They attended some of the sessions but did not actively participate. See *June 1906 Hearings*, *supra* note 10, at 57-58 (remarks of Mr. Putnam, Librarian of Congress). Bar Association representatives, in contrast, participated enthusiastically and assisted the Copyright Office in the actual drafting of the bill. See AMERICAN BAR ASSOCIATION, REPORT OF THE 29TH ANNUAL MEETING 35-37 (1906).

Librarian did not invite representatives from interests that had not yet received statutory recognition; the motion picture industry,⁴³ the piano roll industry, and the “talking machine” (phonograph) industry received no invitations.⁴⁴ No invitee commented on their absence.

A year later, the conferences yielded a bill, and joint hearings in Congress commenced. It quickly became clear that the doubts of Senate Committee members about the propriety of a conference of private interests had been well-founded.⁴⁵ Witnesses who had not been invited to the conferences found the whole procedure scandalous.⁴⁶ Indeed, some went so far as to suggest that Congress was being hoodwinked by a monopolistic conspiracy.⁴⁷ The Librarian

⁴³ Motion pictures were then in their infancy. Thomas Edison had invented the kinetoscope in 1889. By the turn of the century, short, plotless motion pictures were being exploited commercially. Under the copyright law then in force, creators of motion pictures could register their films for copyright only as “photographs.” See *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903); *American Mutoscope & Biograph v. Edison Mfg.*, 137 F. 262, 266-67 (D.N.J. 1905).

⁴⁴ One representative of the talking machine industry became aware of the conferences and politely crashed one of its sessions. See *June 1906 Hearings, supra* note 10, at 151 (remarks of Mr. Putnam, Librarian of Congress).

⁴⁵ Some of the remarks made during the hearings by members of the committees support an inference that their nervousness about the drafting process figured in their decision to delay reporting the bill. See, e.g., *June 1906 Hearings, supra* note 10, at 153 (colloquy); see also *Arguments on H.R. 11, 943 Before the House Comm. on Patents*, 59th Cong., 1st Sess. 12 (1906) (colloquy).

⁴⁶ See *Dec. 1906 Hearings, supra* note 10, at 26-29 (testimony of F.W. Hedgeland, Kimball Co.); *id.* at 170 (written statement of Herbert Fromme, attorney for band directors); *June 1906 Hearings, supra* note 10, at 53 (testimony of George W. Oglivie, publisher); *id.* at 77 (testimony of Paul H. Cromelin, Columbia Phonograph Co.); *id.* at 97 (testimony of G. Howlett Davis, inventor of talking machine devices); *id.* at 110 (testimony of John O’Connell, representing player piano and piano roll companies); *id.* at 145-46 (testimony of S.T. Cameron, American Gramophone Co.); *id.* at 190 (written brief submitted by F.W. Hedgeland, Kimball Co.).

⁴⁷ See *Dec. 1906 Hearings, supra* note 10, at 73-77 (testimony of William P. Cutter, Forbes Library); *id.* at 277-83 (testimony of Albert H. Walker, attorney); *id.* at 298-313 (testimony of George W. Pound, DeKleist Musical Instrument Co.); *id.* at 337-44 (testimony of Paul H. Cromelin, Columbia Phonograph Co.); *June 1906 Hearings, supra* note 10, at 98 (testimony of G. Howlett Davis, inventor of talking machine devices); *id.* at 127 (testimony of H.N. Low, piano roll industry); *id.* at 166-70 (testimony of Albert H. Walker, attorney). Witnesses representing talking machine and piano roll manufacturers charged that an illegal combination of music publishers and the Aeolian Company, a manufacturer of player pianos and piano rolls, had conspired to draft a provision of the copyright bill that would enable Aeolian to secure a monopoly on piano rolls of popular songs in return for Aeolian’s promise to pay royalties to the music publishers. Charges of monopoly, trust, and other restraints of trade remained popular among witnesses in many subsequent copyright revision hearings. See, e.g., sources cited *infra* notes 77 & 93.

of Congress became increasingly defensive.⁴⁸

The copyright bill produced by the conferences conferred significant advantages upon composers and music publishers, who had participated, at the expense of the piano roll and talking machine industries, which had not. Extant case law held that the manufacture of piano rolls did not infringe the copyright in the underlying musical composition.⁴⁹ The bill, however, gave copyright owners the exclusive right to make or sell any mechanical device that reproduced the work in sounds, thus making the unlicensed manufacture of piano rolls and phonograph records illegal.⁵⁰ The opposition from piano roll and talking machine companies to the bill derived significant weight from their complaints about the process and dominated the 1906 hearings. At the request of the House and Senate Committees, the bill's original authors drafted a substitute bill limiting the mechanical reproduction provisions that the piano roll and talking machine interests opposed.⁵¹ Nonetheless, a majority of the House Committee voted to delete the mechanical reproduction subsection completely.⁵² A minority of the House Committee filed a dissenting report supporting a third version of the disputed subsection.⁵³ The majority of the Senate Committee reported favorably on a bill incorporating yet a fourth version,⁵⁴ while the Senate minority

⁴⁸ See *Dec. 1906 Hearings*, *supra* note 10, at 31-33 (remarks of Herbert Putnam, Librarian of Congress); *June 1906 Hearings*, *supra* note 10, at 17-18, 109, 148, 151-52 (remarks of Herbert Putnam, Librarian of Congress).

⁴⁹ See *Kennedy v. McTammany*, 33 F. 584 (C.C. Mass. 1888).

⁵⁰ See S. 6330, 59th Cong., 1st Sess. § 1(g) (1906). Two years later, the Supreme Court settled the issue, agreeing with prior case law and ruling that manufacture of piano rolls (and, by analogy, phonograph records) did not infringe the copyright in the underlying musical composition. *White-Smith Music Publishing v. Apollo Co.*, 209 U.S. 1 (1908). That ruling remained good law only until it was superseded by the 1909 Act.

⁵¹ See H. REP. NO. 7083, 59th Cong., 2d Sess. 9 (1907), *reprinted in* 6 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. N.

⁵² See *id.* In revising the bill, the House Committee also limited the conference bill's definition of copyrightable subject matter, restricted the performance rights in musical compositions to public performance for profit, reduced the duration of the copyright term, and introduced a procedure in lieu of renewal. Compare H.R. 25,133, 59th Cong., 2d Sess. §§ 1, 4, 18 (1907), *reprinted in* 6 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. N, with S. 6330, 59th Cong., 1st Sess. §§ 1, 4, 18 (1906) *reprinted in* 1 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. B.

⁵³ See H. REP. NO. 7083, pt. 2, 59th Cong., 2d Sess. 7 (1907), *reprinted in* 6 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. P.

⁵⁴ See S. REP. NO. 6187, 59th Cong., 2d Sess. 3-4 (1907), *reprinted in* 6 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. Q.

report supported the House Committee majority's position.⁵⁵

None of the bills reached a vote, and, in the following year, a proponent of each of the four camps introduced a bill reflecting its position.⁵⁶ At the joint hearings held on the four bills, testimony was as divisive as it had been two years earlier.⁵⁷ At the end of the hearings, a representative of popular song writers suggested that the song writers might sit down with the piano roll and talking machine manufacturers and the music publishers' association in order to agree on a compromise solution.⁵⁸ Representative Currier, the chairman of the House Committee, urged the parties to adopt such a plan, and a spokesman for the piano roll industry disclosed that he had, in fact, begun to explore negotiations with his opponents earlier in the day. Representative Currier assured the witnesses that, if they could reach agreement, the bill would pass. The Senate Committee Chairman echoed his enthusiasm for the plan and adjourned the hearings.⁵⁹

The copyright bill introduced in February of 1909 included a solution that apparently embodied the agreement of the affected parties.⁶⁰ The relevant provision differed from prior proposals; it established a compulsory license⁶¹ for mechanical reproductions of music and entirely exempted the performance of musical compositions on coin operated devices.⁶² The bill also incorporated a side agreement or two that the private parties had reached along the

⁵⁵ See S. REP. NO. 6187, pt. 2, 59th Cong., 2d Sess. 3-4 (1907), reprinted in 6 E.F. BRYLAWSKI & A. GOLDMAN, *supra* note 6, at pt. R.

⁵⁶ See LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1908, 60th Cong., 1st Sess. 90-93 (1908).

⁵⁷ See 1908 Hearings, *supra* note 10, at 188-93 (testimony of Victor Herbert, Authors' and Composers' Copyright League of America); *id.* at 194-218 (testimony of Nathan Burkan, attorney); *id.* at 353 (testimony of George W. Pound, DeKleist Musical Instrument Co.). One witness submitted his own substitute bill. See *id.* at 293-97 (testimony of Frank L. Dyer, Nat'l Phonograph Co.). The major players insisted that a compromise solution would be impossible. See, e.g., *id.* at 361 (testimony of Robert Underwood Johnson, American (Authors') Copyright League).

⁵⁸ See *id.* at 365 (remarks of William Kendall Evans, Words and Music Club).

⁵⁹ See *id.* at 368-69 (colloquy).

⁶⁰ See 43 CONG. REC. 3765-67 (colloquy).

⁶¹ A compulsory license limits the copyright owner's exclusive rights by prohibiting her from refusing to license a particular use. Users are entitled to use the copyrighted work on statutory terms for a statutory fee. The compulsory license included in the 1909 bill provided that once a copyright owner had authorized a mechanical reproduction (a piano roll or phonograph record) of a musical composition, other concerns were entitled to produce their own mechanical reproductions of the work at the statutory royalty of two cents per record or roll manufactured. See S. REP. NO. 9440, 60th Cong, 2d Sess. § 1(e) (1909).

⁶² See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7-9 (1909). The exemption for coin

way.⁶³ It was enacted within the month.

II

THE 1909 ACT IN A CHANGING WORLD

A. *The Conferences Reprised*

At the same time the Committees were struggling with the revision bill, the Kalem Company hired a writer to read the novel *Ben Hur* and write a scenario for a motion picture, which it proceeded to produce. The motion picture industry had been operating without concern for the copyright laws. A few motion pictures had been registered for copyright as "photographs,"⁶⁴ but the industry was paying no more attention to the copyrights in works it used for its raw material than had the piano roll and talking machine industries before it.⁶⁵ The copyright in the novel *Ben Hur* belonged to Harper Brothers Publishers, and Harper Brothers slapped the Kalem Company with a copyright infringement suit. In 1911, the United States Supreme Court held that the exhibition of the movie infringed the copyright in the novel.⁶⁶ The Kalem Company settled the suit for \$25,000, and the motion picture industry woke up and got in touch

operated machines was intended to shield the promotional playing of songs in penny arcades, which were thought to increase the sales of sheet music. *See id.*

⁶³ Negotiations between a representative of the American (Authors') Copyright League and representatives of the International Typographical Union, for example, produced a provision exempting foreign books written in foreign languages from the bill's manufacturing clause, which required all copyrighted books to be printed from type set in the United States. *See Solberg, supra* note 36, at 64-65. In addition, the bill revived the renewal term.

⁶⁴ *See supra* note 43.

⁶⁵ Lawyers for the motion picture industry, often the same lawyers that represented the talking machine industry, contended that the production of motion pictures based on copyrighted works did not violate the current copyright laws, and may well have so advised their clients. *See Townsend Copyright Amendment: Complete File of Arguments On H.R. 15,263 and H.R. 20,596 Before the House Comm. on Patents, 62d Cong., 2d Sess. 17-18, 22, 41 (1912) [hereinafter 1912 Hearings]* (remarks of John O'Connell, Motion Pictures Patent Co.).

⁶⁶ *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). The lower court held that the motion picture itself did not infringe the novel, relying on an analogy to piano rolls, which the Supreme Court held did not infringe the copyright in underlying musical compositions. *See supra* note 49 and accompanying text. The court, nevertheless, concluded that *showing* the motion picture violated the copyright owner's exclusive right, under Rev. Stat. 4952, to dramatize the novel. *Harper & Bros. v. Kalem Co.*, 169 F. 61 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911). The Supreme Court agreed that exhibition of the film infringed plaintiff's dramatization rights. *Kalem*, 222 U.S. at 61. Defendant did not itself exhibit the film but sold or leased copies of the film for others to exhibit. The Supreme Court concluded that defendant's distribution of copies to others for public exhibition was contributory infringement. *Id.* at 62-63.

with its Congressmen.⁶⁷

Motion pictures had barely been mentioned in the hearings on the 1909 Act;⁶⁸ the motion picture industry had not bothered to attend.⁶⁹ After *Kalem Co. v. Harper Brothers*, however, the motion picture industry faced the prospect of liability under a statute that had been drafted without its interests in mind.⁷⁰ It prepared a bill to amend the copyright statute to limit the motion picture industry's exposure in copyright infringement actions and asked Representative Edward Townsend of New Jersey to introduce the bill in Congress.⁷¹

Townsend introduced the movie industry bill in January of 1912; the House Patent Committee scheduled it for hearings that same month.⁷² The Committee made no initial effort to notify interested parties of the pending bill.⁷³ A representative of the live theatre industry, however, learned of the hearings and showed up at them without invitation.⁷⁴ The hearings that followed threatened to become a replay of the talking machine dispute. Most of the witnesses who testified before the Committee were the same people who testified in 1906 and 1908.⁷⁵ Although some of them represented differ-

⁶⁷ See 1912 Hearings, *supra* note 65, at 8-9, 65-73 (remarks of Frank L. Dyer, Edison Electric Co.). During the early 1910s, the motion picture industry was concentrated in New Jersey, Philadelphia, and New York City. Congressmen representing districts in which motion picture producers were located spearheaded the industry's efforts to amend the copyright statute in the House of Representatives.

⁶⁸ See 1908 Hearings, *supra* note 10, at 24, 31, 175-78 (testimony of Ligon Johnson, Nat'l Ass'n of Theatrical Managers); *id.* at 180-98 (various witnesses).

⁶⁹ Two of the representatives of talking machine companies said a word or two on the motion picture industry's behalf. See *id.* at 281-82 (testimony of Frank L. Dyer, Nat'l Phonograph Co., on behalf of the Edison Mfg. Co.); *id.* at 309-11 (testimony of Paul H. Cromelin, American Musical Copyright League, on behalf of Mr. Whitman of the Cameraphone Co.).

⁷⁰ See 1912 Hearings, *supra* note 65, at 17-22 (remarks of John O'Connell, Motion Pictures Patent Co.).

⁷¹ See *id.* at 7 (testimony of Rep. Townsend). Among Townsend's New Jersey constituents were Thomas Edison and his Edison Electric Company. Mr. Edison invented an early motion picture camera; Edison Electric produced motion pictures.

⁷² See *id.* at 3.

⁷³ See *id.* at 3 (remarks of Ligon Johnson, Nat'l Ass'n of Theatrical Producing Managers).

⁷⁴ See *id.*

⁷⁵ For example, Frank Dyer testified in 1906 on behalf of the Edison Phonograph Works and the National Phonograph Company. He returned in 1912 to speak for Edison Electric Company, a motion picture company. William Brady testified as a theatrical producer in 1908 and as the President of the National Association of Producing Managers in 1912. John O'Connell represented the National Piano Manufacturers Association of America in 1906 and 1908 and returned in 1912 as the representative of the Motion Pictures Patent Co.

ent interests this time around, their arguments and counter arguments had a familiar ring.⁷⁶ As was the case in the earlier hearings, opponents of the legislation testified that its supporters were conspirators in thrall to a dastardly trust.⁷⁷

To head off a full-scale re-enactment, Representative Alexander suggested that the parties negotiate privately to reach a compromise solution, and twice asked the Committee to adjourn its hearings to permit the private negotiations to continue.⁷⁸ The parties reached an agreement in March of 1912 and turned their draft of a bill over to Representative Townsend for introduction.⁷⁹ The agreement resolved the theatre industry's objections to the bill, but disadvantaged authors of nondramatic works, who had not been involved in the controversy.⁸⁰ The Copyright Office questioned the wisdom of aspects of the compromise,⁸¹ but the Committee reported the bill with only minor changes.⁸² Enactment followed swiftly.

B. *New Players Join the Game*

The lesson an industry observer might have expected to learn from the preceding saga of copyright legislation was that interested parties were well advised to work out their differences before involving Congress. And, indeed, that was precisely what affected industries attempted to do with all subsequent efforts at copyright

⁷⁶ See, e.g., 1912 Hearings, *supra* note 65, at 34, 74 (testimony of Ligon Johnson, Nat'l Ass'n of Theatrical Managers); *id.* at 41 (testimony of John O'Connell, Motion Pictures Patent Co.).

⁷⁷ See *id.* at 29-30 (testimony of Augustus Thomas, Soc'y of American Dramatists and Composers); *id.* at 31-32, 60-61 (testimony of William Brady, Nat'l Ass'n of Producing Managers); *id.* at 64, 74-78 (testimony of Ligon Johnson, Nat'l Ass'n of Theatrical Managers).

⁷⁸ See *id.* at 44-45; *id.* at 94. Initial efforts to reach agreement broke down after three weeks, and motion picture industry representatives gave Rep. Townsend their own version of a compromise proposal. See *id.* at 50-51 (remarks of Augustus Thomas, Soc'y of American Dramatists and Composers); *id.* at 79 (remarks of John O'Connell, Motion Pictures Patent Co.). The proposal was unacceptable to the bills' opponents. See *id.* at 60-78 (various witnesses). Rep. Alexander asked the parties to try again. *Id.* at 94.

⁷⁹ See *id.* at 95-96.

⁸⁰ The bill sharply reduced the statutory damages available for infringement of a non-dramatic work by a motion picture. It did not, however, significantly reduce the statutory damages available for infringement of dramatic works. See H.R. 24,224, 62d Cong., 2d Sess. (1912). A provision of the bill that the committee later deleted would have limited the copyrightability of scenarios. See sources cited *infra* note 81.

⁸¹ See 1912 Hearings, *supra* note 65, at 106-09 (testimony of Thorvald Solberg, Register of Copyrights); see also *Townsend Copyright Amendment: Hearing on H.R. 22,350 Before the House Comm. on Patents*, 62d Cong., 2d Sess. 1-9 (1912) (testimony of J.J. O'Connell, motion picture industry).

⁸² See H.R. REP. NO. 756, 62d Cong., 2d Sess. (1912).

revision. Seeking inter-industry consensus, however, became significantly more complicated in the years that followed.

Shortly after the enactment of the Townsend amendment in 1912, the structure of industries affected by copyright changed dramatically. In 1914, representatives of music publishers and composers formed the American Society of Composers, Authors and Publishers (ASCAP) to enforce collectively the members' rights to perform their musical compositions publicly for profit. ASCAP began a campaign to make the nominal performance right remunerative.⁸³ On November 2, 1920, the first commercial radio broadcasting station opened with a broadcast of the Harding election returns.⁸⁴ Radio receiving set manufacturers pioneered radio broadcasting as a promotional device; other concerns soon recognized the potential of radio advertising.⁸⁵ Within a few years, there were radio stations throughout the nation. During the 1920s, the motion picture industry grew more powerful. U.S. companies produced "talkies" and began exporting their movies to Europe.

Despite the enactment of the Townsend amendment, motion picture producers grew increasingly uncomfortable with the formalities of a copyright statute written without attention to their needs.⁸⁶

⁸³ Composers and music publishers found it impossible to enforce the public performance right in individual compositions. ASCAP members pooled their compositions into a repertory and offered blanket licenses that permitted establishments to perform any composition in the repertory during the license term. ASCAP set the single, up-front blanket license fee for an establishment on the basis of the size of the business. Motion picture theatres, for example, paid an annual fee equal to ten cents per seat. ASCAP's sales tactics drew great ire from affected businesses. An ASCAP representative would first offer to sell a blanket license. When the business refused to purchase one, ASCAP's representatives would monitor the business, document its performance of ASCAP songs, and then sue for infringement. Many businesses chose to purchase licenses to settle the litigation. Others went to court, where ASCAP routinely prevailed. *See, e.g., Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931). *See generally* Oman, *Source Licensing: The Latest Skirmish in an Old Battle*, 11 COLUM.-VLA J. L. & ARTS 251, 252-53 (1987).

⁸⁴ *See* Ashby, *supra* note 7, at 331.

⁸⁵ *Id.* at 332.

⁸⁶ The 1909 Act imposed formalities prerequisite to the securing of copyright, which were based on assumptions appropriate to works exploited by publishing printed copies. A story could not be registered for copyright, for example, until it had been published with correctly placed and worded notice identifying the owner of the copyright. The courts interpreted these requirements rigidly. *See generally* W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 138-57 (6th ed. 1986). Although the Townsend amendment addressed problems surrounding registration of motion pictures, it had not altered the formal requirements for copyright in other works. Motion picture producers found that these provisions posed significant obstacles to their efforts to secure clear title to works they wished to use in their films. *See Copyrights: Hearings on H.R. 6250 and H.R. 9137 Before the House Comm. on Patents*, 68th Cong., 1st Sess. 312-13 (1924) [hereinafter

Representatives of the motion picture industry met with authors' representatives in New York and agreed to convene private copyright conferences, along the model of those that produced the 1909 Act, to work out a consensus on copyright revision.⁸⁷ Representatives of authors, book and periodical publishers, printers, labor unions, librarians, and motion picture producers met in conferences over a number of years and hammered out the details of a copyright revision bill.⁸⁸ Motion picture counsel completed a draft of the bill, and Representative Frederick William Dallinger introduced it in 1924.⁸⁹ Participants in the conferences, however, had not sought the advice of broadcasters or the talking machine industry and had sought, but not received, the advice of composers and music publishers.⁹⁰ Nor had the representatives of motion picture producers consulted the theatre owners who exhibited their films. When the supporters of the Dallinger bill arrived in front of the House Patent Committee, they discovered that the industries they failed to invite to their conferences were pursuing their own agenda.

Both motion picture theaters and radio stations used popular music in their programs. Apparently, theatre and station owners gave copyright infringement little thought until ASCAP showed up on their doorsteps demanding royalties.⁹¹ When ASCAP went to

1924 House Hearings] (testimony of Louis E. Swarts, Motion Picture Producers and Distributors of America).

⁸⁷ See *1924 House Hearings*, *supra* note 86, at 311-27 (testimony of Louis E. Swarts, Motion Picture Producers and Distributors of America).

⁸⁸ See *Copyrights: Hearings on H.R. 11,258 Before the House Comm. on Patents*, 68th Cong., 2d Sess. 475-79 (1925) [hereinafter *1925 House Hearings*] (testimony of Louis E. Swarts, Motion Picture Producers and Distributors of America); see also *id.* at 34-45 (testimony of Matthew Woll, Nat'l Allied Printing Ass'n); *id.* at 436-39 (testimony of Arthur W. Weil, Motion Picture Producers and Distributors of America).

⁸⁹ H.R. 8177, 68th Cong., 1st Sess. (1924). See *A Bill to Amend the Copyright Act and Secure International Copyright* (H.R. 8177), 105 PUBLISHERS' WEEKLY 1113 (Mar. 29, 1924). The Dallinger bill, modeled on the British Copyright Statute of 1911, provided for automatic copyright and adherence to the Berne Convention, see *supra* note 12. The bill contained provisions that would have greatly clarified the motion picture producers' title to the copyright in motion pictures and in the underlying works used for motion pictures, and would have simplified producers' acquisition of rights. See H.R. 8177, *supra*, §§ 45(c), 45(d), 46.

⁹⁰ See *1925 House Hearings*, *supra* note 88, at 437-38 (testimony of Arthur W. Weil, Motion Picture Producers and Distributors of America); *id.* at 475-79 (testimony of Louis E. Swarts, Motion Picture Producers and Distributors of America). During the same period of time, ASCAP initiated its own, ultimately unsuccessful, conferences with representatives of radio broadcasters. See *To Amend The Copyright Act: Hearings on S. 2328 and H.R. 10,353 before the Joint Comm. on Patents*, 69th Cong., 1st Sess. 236-39 (1926) [hereinafter *1926 Joint Hearings*] (testimony of E.C. Mills, ASCAP).

⁹¹ See, e.g., *1926 Joint Hearings*, *supra* note 90, at 5 (testimony of Paul B. Klugh,

court and got injunctions,⁹² radio stations and motion picture theatre owners went to Congress to seek ASCAP's abolition.⁹³ Members of Congress introduced various bills to restrict ASCAP's activities, exempt radio stations and theatre owners from liability for infringement, or narrow the right to perform musical compositions publicly for profit.⁹⁴ The Patent Committee scheduled hearings on pending legislation, and the two legislative agendas collided in the House Committee hearing room.⁹⁵

In hearings before the House Patent Committee, numerous witnesses testified that the copyright law was inadequate and needed revision. They disagreed sharply, however, on the form that revi-

Nat'l Ass'n of Broadcasters); *1924 House Hearings*, *supra* note 86, at 75 (testimony of Paul B. Klugh, Nat'l Ass'n of Broadcasters).

⁹² See, e.g., *Jerome H. Remick & Co. v. American Auto. Accessories*, 5 F.2d 411 (6th Cir. 1925); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

⁹³ See *1924 House Hearings*, *supra* note 86, at 1-255 (various witnesses); *Broadcasting and Copyright*, 105 PUBLISHERS' WEEKLY 1802 (May 31, 1924). The feud between the broadcasting industry and ASCAP grew increasingly hostile over the years. See, e.g., *1926 Joint Hearings*, *supra* note 90, at 242-63, 276 (testimony of E.C. Mills, ASCAP); *id.* at 372-72, 383-91 (testimony of Nathan Burkan, ASCAP); *id.* at 419-23 (testimony of Paul E. Klugh, Nat'l Ass'n of Broadcasters); see *infra* note 103 and accompanying text.

⁹⁴ See, e.g., S. 2600, 68th Cong., 1st Sess. (1924).

⁹⁵ *1924 House Hearings*, *supra* note 86. The story is, in fact, more complicated than the discussion in text would indicate. Many copyright bills were introduced in the 68th Congress and referred to the Patent Committees. In addition to the bills drafted by the motion picture industry and by the broadcasters, the House Committee had on its plate two bills written by the Copyright Office. Introduction of the Dallinger bill was spurred by opposition to the Lampert bill, H.R. 2704, 68th Cong, 1st Sess. (1924). The Lampert bill had been drafted by Register Solberg to permit the United States to adhere to the *Berne Convention* with minimal change in extant domestic copyright law. Motion picture counsel sought Register Solberg's advice on the Dallinger bill. Solberg voiced his opposition and suggested that conference participants endorse the Lampert bill as the best that they could get in the current political climate.

Perhaps because of its discomfort with supporting a bill opposed by the Register of Copyrights, the Authors' League then approached Register Solberg and asked him to draft an alternative comprehensive revision bill. Solberg had been involved with the *Berne Convention* since its inception and had long admired the more author-oriented copyright laws in force on the European continent. Solberg drafted a bill based on the *Berne Convention* and the copyright laws of European nations. See Solberg, *supra* note 36, at 66-75. Rep. Perkins introduced Solberg's draft as the Perkins bill in 1925. The Authors' League and ASCAP endorsed the Perkins bill over the Dallinger bill. Printers and labor unions, enraged by the Authors' League's defection, announced they would reconsider the concessions they had made in the compromises reflected in the Dallinger bill. This galvanized most of the other conference participants to oppose the Perkins bill. See generally *1925 House Hearings*, *supra* note 88. Ironically, the National Association of Broadcasters objected to the Perkins bill on the ground that the Register, in drafting it, had *not* followed the conference procedure that yielded the 1909 Act. See *id.* at 198 (testimony of Paul Klugh, Nat'l Ass'n of Broadcasters).

sion should take. Most of the witnesses endorsed one of a half dozen bills pending before the committee and testified solemnly that adoption of any of the other bills would bring the progress of science and the useful arts to a screeching halt.⁹⁶ Representatives Sol Bloom and Fritz Lanham expressed their frustration with the testimony, and Representative Bloom inquired whether any solution to the various disputes would be feasible.⁹⁷ An author of the Dallinger bill suggested that the lawyers for the interests affected by copyright have another try at the conference approach over the summer.⁹⁸ House Committee members endorsed the suggestion, with the proviso that the list of invitees be broader than before. Representative Randolph Perkins pointedly suggested the importance of including broadcasters, while Representative Bloom proposed that members of the House Committee also attend.⁹⁹ After some bickering among witnesses about starting points for discussion, Perkins persuaded them to give the idea of further conferences serious consideration. Bloom successfully moved the appointment of a subcommittee to oversee the effort.¹⁰⁰

The Committee appointed Bloom to head a five-person subcommittee. The meetings began the following April¹⁰¹ and continued for nearly a year. The list of invitees was initially expansive.¹⁰² In an early meeting, however, representatives of ASCAP had a rancorous exchange with representatives of the National Association of Broadcasters, and the broadcasters withdrew in a huff.¹⁰³

⁹⁶ See, e.g., *1925 House Hearings, supra* note 88, at 34-35 (testimony of Matthew Woll, Int'l Allied Printing Ass'n); *id.* at 136-37 (testimony of John Paine, Victor Talking Machine Co.); *id.* at 227-31 (testimony of Alfred Smith, Music Indus. Chamber of Commerce); *id.* at 426-27 (testimony of Gabriel Hess, Motion Picture Producers and Distributors of America); *1924 House Hearings, supra* note 86, at 169-71 (testimony of E.C. Mills, ASCAP); *id.* at 249-50 (testimony of Charles H. Tuttle, Nat'l Ass'n of Broadcasters); *id.* at 253-55 (testimony of George P. Ahrens, Motion Picture Owners Ass'n).

⁹⁷ See *1925 House Hearings, supra* note 88, at 367 (remarks of Rep. Lanham); *id.* at 483 (remarks of Rep. Bloom).

⁹⁸ *Id.* at 483-84 (colloquy).

⁹⁹ *Id.* at 484 (colloquy).

¹⁰⁰ *Id.* at 485-86 (colloquy).

¹⁰¹ See *Copyright Conferences Resumed*, 107 PUBLISHERS' WEEKLY 1432 (April 25, 1925).

¹⁰² See *Copyright: Hearings on H.R. 10,434 Before the House Comm. on Patents*, 69th Cong., 1st Sess. 15-17 (1926) [hereinafter *1926 House Hearings*] (testimony of F.A. Silcox, United Typothetae of America). Initially, the conference met as a large group. Later, members met in roughly 150 small meetings to work out bilateral or trilateral agreements on specific issues.

¹⁰³ See *1926 House Hearings, supra* note 102, at 193-96 (testimony of L.S. Baker, Nat'l Ass'n of Broadcasters).

After numerous meetings, representatives of almost all of the participating industries agreed on the text of a bill. The centerpiece of the bill would have enabled the United States to adhere to the *Berne Convention*,¹⁰⁴ an international copyright treaty mandating copyright protection without formalities. The language and structure of the bill reflected its compromise nature. Individual clauses had been created through several series of bilateral negotiations and fit together awkwardly.¹⁰⁵ It also lacked any accommodation for the absent broadcasters' concerns. Nonetheless, the bill, introduced as the Vestal bill in the 69th Congress, had a long list of endorsements. The broadcasting industry, of course, opposed the bill bitterly and allied with the talking machine industry and the theatre owners to block it.¹⁰⁶ Simultaneously, they pursued legislation to privilege public performance and broadcast of music.¹⁰⁷

The Vestal bill languished in Congress for several years, accumulating opposition from libraries, periodical publishers, academics, and a splinter group of theatrical producers,¹⁰⁸ as well as broadcasters, motion picture producers, and the talking machine industry. In 1930, supporters of the Vestal bill intensified their efforts toward enactment.¹⁰⁹ During the 71st Congress, the House Patent Com-

¹⁰⁴ See *supra* note 12.

¹⁰⁵ The Register of Copyrights gave this reason for preferring his own Perkins bill over the draft that emerged from the conferences. See *1926 House Hearings, supra* note 102, at 227-39.

¹⁰⁶ See, e.g., *id.* at 193-98 (testimony of L.S. Baker, Nat'l Ass'n of Broadcasters); *id.* at 199-206 (testimony of Fulton Brylawski, Motion Picture Theatre Owners of America). Although representatives of the talking machine industry and of the theatre owners had participated in the conferences throughout, they were unable to reach agreements with ASCAP. See *id.* at 302-03 (testimony of Alfred L. Smith, Music Industries Chamber of Commerce).

¹⁰⁷ See generally *1926 Joint Hearings, supra* note 90.

¹⁰⁸ See *General Revision of the Copyright Law: Hearings on H.R. 6990 Before the House Comm. on Patents*, 71st Cong., 2d Sess. 100 (1930) [hereinafter *1930 House Hearings*] (testimony of Carl Cannon, American Library Ass'n.); *id.* at 144 (testimony of George C. Lucas, Nat'l Publishers' Ass'n); *id.* at 161-69 (testimony of William Klein, Shubert Theatre Group).

¹⁰⁹ The catalyst for this activity was the approaching deadline for accession to the Berlin text of the *Berne Convention*. See *id.* at 59-61 (testimony of Rep. Sol Bloom). See generally Solberg, *The International Copyright Union*, 36 *YALE L.J.* 68, 85-102 (1926). The Berlin text permitted a nation to adhere to *Berne* while specifying reservations to provisions of the Convention. A 1928 revision of the convention in Rome, scheduled to come in to force in 1931, removed the privilege of adhering with reservations. See generally Goldman, *supra* note 11, at 7. Thus, if the United States wished to adhere to *Berne* subject to reservations, it was necessary to do so by August of 1931. At no time during the many efforts to accede to *Berne* over the past 100 years, including the drive that culminated in the *Berne Convention Implementation Act* of 1988, have industry representatives agreed on anything resembling wholehearted compliance with

mittee held further hearings on the Vestal bill.¹¹⁰ Authors' representatives met with representatives of organizations opposed to the bill throughout the night during the hearings and reached further compromises on disputed provisions.¹¹¹ Witnesses thus explained to the House Committee that they had opposed the bill during the previous day's testimony, but were now willing to endorse it.¹¹² Members of the Committee urged that further negotiations proceed with dispatch.¹¹³ Representative Lanham suggested that one dispute be settled on the spot, in the hearing room and during the testimony.¹¹⁴ As a result of the hasty negotiations, the House Committee reported the Vestal bill favorably, observing that "practically all the industries and all the authors have united in support of this revision."¹¹⁵

"Practically all the industries," of course, was not quite the same as all of the industries. Industries that had gotten little satisfaction from the conferences persuaded members of Congress to press their proposals on the floor of the House. The House of Representatives voted in favor of the Vestal bill only after adopting floor amendments restricting ASCAP's activities and privileging for-profit public performances of phonograph records and receptions of radio broadcasts.¹¹⁶

Berne's provisions. See, e.g., 134 CONG. REC. H10,094-98 (daily ed. Oct. 12, 1988); 134 CONG. REC. S14,551-S14,566 (daily ed. Oct. 5, 1988); *see also* Olson, *supra* note 2, at 121 ("To make . . . consensus possible, the Berne bill was stripped of those provisions that threatened major interest groups."). *See generally* U.S. *Adherence to the Berne Convention*, *supra* note 16.

¹¹⁰ 1930 *House Hearings*, *supra* note 108.

¹¹¹ *See id.* at 140-41 (testimony of William Hamilton Osborne, Authors' League of America).

¹¹² *See, e.g., id.* at 100-02 (testimony of Carl Cannon, American Library Ass'n).

¹¹³ *See, e.g.,* 1930 *House Hearings*, *supra* note 108, at 264 (testimony of William A. Brady: "Throughout your different hearings, many of your members have suggested to the publishers and authors 'Why not get together? Why not go out in the hall and have a little talk and settle this matter?' "); *see also* 72 CONG. REC. 12,000 (1930) (remarks of Rep. Busby).

¹¹⁴ 1930 *House Hearings*, *supra* note 108, at 155. When William Warner, of the National Publishers' Association, alluded to a disagreement between authors and periodical publishers over the ownership and scope of serialization rights, Rep. Lanham suggested that Warner interrupt his testimony in order to permit authors to express their views and then negotiate an immediate resolution. *Id.*

¹¹⁵ H.R. REP. NO. 1893, 71st Cong., 2d Sess. 8 (1930).

¹¹⁶ 74 CONG. REC. 2006-37 (1931); 72 CONG. REC. 12,007-15, 12,473-75 (1930); *see* Solberg, *The Present Copyright Situation*, 40 YALE L.J. 184, 201-02 (1930). The House debated, but ultimately defeated an amendment that would have made ASCAP's activities illegal and a complete defense to an infringement suit brought by one of its members. *See* 74 CONG. REC. 2031 (1931).

The amendments, however, failed to mollify the bill's opponents. When the House referred the bill to the Senate, representatives of broadcasters, radio and phonograph manufacturers, and motion picture theatre owners demanded that the Senate hold hearings to receive testimony in opposition to the bill.¹¹⁷ After listening to the testimony, the Committee settled on a series of amendments and reported a by now complex, and internally inconsistent, Vestal bill to the Senate floor, where it got caught in a filibuster on another matter.¹¹⁸

In the following Congress, the House Committee started over. The new Committee Chairman scheduled extended hearings and met privately with industry representatives.¹¹⁹ He then introduced a bill that embodied his notion of a fair compromise. In the face of opposition from the motion picture theatre owners, map publishers, and broadcasters, he revised the bill to incorporate their suggestions.¹²⁰ Motion picture producers and distributors and ASCAP denounced the changes.¹²¹ Chairman Sirovich rushed the bill to the House floor under a special rule,¹²² but the opposition of other members of the House Patent Committee killed the bill before it could be put to a vote.¹²³

Meanwhile, private negotiations began to collapse in the face of the Depression economy. Organizations that made concessions in the spirit of compromise in 1926, 1928, or 1930 were no longer satisfied with their bargains.¹²⁴ At the suggestion of a representative of

¹¹⁷ See *General Revision of The Copyright Law: Hearings on H.R. 12,549 Before the Senate Comm. on Patents*, 71st Cong., 3d Sess. 1-2 (1931) (remarks of Chairman Waterman).

¹¹⁸ See Goldman, *supra* note 11, at 6-7.

¹¹⁹ Private industry representatives continued to meet among themselves in the now familiar conferences.

¹²⁰ See *General Revision of the Copyright Law: Hearings on H.R. 11,948 Before the House Comm. on Patents*, 72d Cong., 1st Sess. 1 (1932) (remarks of Chairman Sirovich). ASCAP also insisted on amendments, but Chairman Sirovich declined to adopt them. See *id.*

¹²¹ See *id.* at 45-70 (testimony of Gabriel L. Hess, Nat'l Distributors of Motion Pictures); *id.* at 83-160 (testimony of Nathan Burkan, ASCAP). Among the changes was an amendment sharply reducing the remedies available for the unauthorized exhibition of motion pictures. See *id.* at 28-29 (testimony of Abram F. Meyers, Allied States Ass'n of Motion Picture Exhibitors).

¹²² 75 CONG. REC. 11,059 (1932).

¹²³ Goldman, *supra* note 11, at 7. See 75 CONG. REC. 11,065-72 (1932).

¹²⁴ See, e.g., *International Copyright Union: Hearings on S. 1928 Before the Senate Comm. on Foreign Relations*, 73d Cong., 2d Sess. 89-90 (1934) [hereinafter *1934 Senate Hearings*] (testimony of M.J. Flynn, American Fed'n of Labor) (printing unions currently oppose adherence to *Berne* unless publishers agree to raise wages).

organized labor, the Senate Committee on Foreign Relations asked the State Department to organize an informal committee of State Department, Copyright Office, and Commerce Department representatives to oversee further private negotiations.¹²⁵ The interdepartmental committee held a series of conferences with representatives of affected interests. They drafted a bill that proved to be acceptable to broadcasters and to the other interests that had opposed the Vestal bill.¹²⁶ Authors, composers, publishers, motion picture producers, and organized labor, however, found the bill completely unacceptable and promptly got off of the bandwagon.¹²⁷ Strong support from the administration enabled the bill to pass the Senate, but strong opposition from interested parties caused it to perish in the House.¹²⁸

With copyright revision stalled in Congress, a private foundation attempted to restart it. The National Committee of the United States of America on International Intellectual Cooperation called its own copyright conferences.¹²⁹ After sixteen months of meetings, it was unable to arrive at a bill that everyone would support. The Committee drafted a bill nonetheless.¹³⁰ The bill went nowhere.

¹²⁵ See *Revision of the Copyright Laws: Hearings before the House Comm. on Patents, 74th Cong., 2d Sess. 221-60 (1936)* [hereinafter *1936 House Hearings*] (testimony of Sen. F. Ryan Duffy). A representative of the printing and typographic unions requested that the State Department be enlisted to mediate between publishers and organized labor. Publishers favored adherence to *Berne*. Labor unions facing Depression wages demanded higher pay or statutory provisions to protect American printing jobs in return for labor's support of the treaty. See *1934 Senate Hearings, supra* note 124, at 90-91 (colloquy).

¹²⁶ See *1936 House Hearings, supra* note 125, at 260-89 (testimony of Wallace McClure, Dep't of State); *id.* at 337-40 (letter from Wallace McClure to Phillip Loucks, Nat'l Ass'n of Broadcasters); *id.* at 1068-74 (prepared statement submitted by Wallace McClure, Dep't of State).

¹²⁷ *1936 House Hearings, supra* note 125, at 279-80 (remarks of Chairman Sirovich); see *Hearing on S. 2465 Before the Senate Comm. on Patents, 74th Cong., 1st Sess 3-15 (1935)* (testimony of Louise Silcox, Authors' League of America); *id.* at 15-26 (testimony of Gene Buck, ASCAP); *id.* at 47-49 (testimony of John G. Payne, Music Publishers' Protective Ass'n); *id.* at 53-56 (testimony of Gabriel Hess, Motion Picture Producers and Distributors of America); *id.* at 739-43 (testimony of Thorvald Solberg, former Register of Copyrights).

¹²⁸ See Duffy, *International Copyright*, 8 AIR L. REV. 213, 220 (1937).

¹²⁹ See *Copyright Group Making Progress*, 135 PUBLISHERS' WEEKLY 1281 (April 1, 1939).

¹³⁰ S. 3043, 76th Cong., 2d Sess. (1940). See 86 CONG. REC. 63-78 (1940); Goldman, *supra* note 11, at 10-11; see also Chafee, *supra* note 7 (comparing major provisions of the Shotwell bill with then-current law). See generally Note, *Copyright-Adherence to the International Copyright Union and Proposed Copyright Reform (Shotwell bill)*, 12 AIR L. REV. 49 (1941).

After twenty years of private negotiations, the second world war intervened, and efforts to revise the copyright statute died.

III

SHORTCHANGING THE FUTURE

The history of copyright revision efforts during the first half of this century demonstrates how a process of private negotiations, initially adopted as an expedient alternative to a government commission,¹³¹ came to dominate copyright revision. A closer look at the substance of some of the negotiations reveals insights about the strengths and weaknesses of that process as a method of drafting statutes.

Throughout the various conferences, interests that were absent from the bargaining table were shortchanged in the compromises that emerged. The Librarian of Congress's conferences in 1905 and 1906 excluded the piano roll and talking machine interests; the bill that emerged disadvantaged them.¹³² The motion picture industry attended none of the negotiations that resulted in the 1909 Act and found the statute a significant hindrance.¹³³ The 1912 negotiations between motion picture and theatre industries to frame the Townsend Amendment yielded a compromise that handicapped authors and publishers of nondramatic works, who did not participate.¹³⁴ The conferences in the 1920s that led to the Dallinger bill included no representatives of the broadcasting industry; the Dallinger bill gave publishers and composers rights at the broadcasters' expense.¹³⁵ The broadcasters walked out of the conferences that produced the Vestal bill; the Vestal bill addressed none of the broadcasters' concerns.¹³⁶

At first glance, this observation seems intuitively obvious. Parties who are negotiating would seem to have no incentive to safeguard the interests of their absent competitors. On further consideration, however, the persistent shortchanging of absent interests seems more startling. The battles that preceded the enactment of the 1909 Act should have demonstrated to the participants that interests excluded from negotiations could effectively block legislation. Many

¹³¹ See *supra* notes 37-40 and accompanying text.

¹³² See *supra* notes 44-50 and accompanying text.

¹³³ See *supra* notes 67-70 and accompanying text; *supra* note 86.

¹³⁴ See *supra* note 80 and accompanying text.

¹³⁵ See *supra* notes 87-99 and accompanying text.

¹³⁶ See *supra* notes 102-07 and accompanying text.

of the participants in the later conferences had been privy to the 1906 and 1908 hearings. Even had the threat been dismissed or forgotten, the controversy that surrounded the Dallinger bill¹³⁷ should surely have persuaded conference participants to make some accommodation for absent parties in connection with the Vestal bill. Yet, the compromises that were made emerged only after face-to-face bargaining, either within the conferences or at the last minute in response to congressional pressure.¹³⁸

If the parties' desire to draft enactable legislation would seem to engender consideration for those excluded, other forces made that accommodation difficult. The division of rights among competing interests became increasingly complex and interdependent. The compromises that emerged from the conference approach were rarely bilateral. Authors conditioned concessions to motion picture producers on their receipt of concessions from organized labor who in turn demanded something from publishers.¹³⁹ In the ensuing complex web of interrelated concessions, the hypothetical demands of absent parties got lost.

The understandable tendency of stakeholders to view representatives of the upstart future as poachers on previously settled territory also influenced the course of negotiations.¹⁴⁰ Composers, sheet music publishers, and musicians divided up the world in a satisfactory manner before the producers of piano rolls and talking machines entered their markets. Novelists, dramatists, photographers, book publishers, and theatrical producers had comfortable niches before motion picture theatres came on the scene. Excluding newcomers from the benefits conferred by copyright legislation may have seemed like a necessary corollary to protecting one's turf.

Indeed, the interests that had not yet come into being when the negotiations took place were the quintessential excluded parties. They threatened competition with all current stakeholders and posed no apparent threat of lobbying against legislation. As one might expect, then, they were the parties most likely to find that the negotiated compromises operated to their disadvantage. The industries that chafed most under the provisions of the 1909 Act, for example, were the motion picture and broadcast industries: the for-

¹³⁷ See *supra* notes 87-96 and accompanying text.

¹³⁸ See *supra* notes 108-14 and accompanying text.

¹³⁹ See, e.g., sources cited *supra* notes 95-97.

¹⁴⁰ See, e.g., *1924 House Hearings*, *supra* note 86, at 105-11 (testimony of Gene Buck, ASCAP); *1908 Hearings*, *supra* note 10, at 173-79 (testimony of Ligon Johnson, Nat'l Ass'n of Theatrical Producing Managers).

mer barely begun and the latter not yet imagined at the time the Librarian of Congress called his conferences in 1906.¹⁴¹

The motion picture and broadcast industries found the 1909 Act particularly inhospitable because it required emergent industries to adapt themselves to conform to ill-fitting molds. A statute could pose difficulties for a new technology simply because its general provisions seem not to anticipate the specific circumstances of a new invention. That, however, is a problem shared by most legislation. The problems inherent in the 1909 Act were more pernicious, because its drafters crafted the language to settle particular, specific inter-industry disputes.

The 1909 Act's strategy for reconciling competing demands among industry representatives was to specify rights and remedies within subject matter categories. The conferences began in 1905 with each organization's articulation of its wish list.¹⁴² Each of the affected interests sought to retain the advantages it enjoyed under current law, while eliminating features that worked to its detriment. Where wishes appeared irreconcilable, the parties suggested differentiation of provisions along subject matter lines.¹⁴³ The solutions to many disputes were provisions detailing the particular rights attaching to particular categories of works, the particular actions that constituted infringement of those rights, and the particular remedies available for those infringements.¹⁴⁴ The bill introduced in the 59th Congress followed this strategy.¹⁴⁵ For example, the original bill varied the term of copyright among different classes of works, from twenty-eight years for prints and labels, to life of the author plus fifty years after death for musical compositions. In addition, it placed a ten year limit on the exercise of the exclusive dramatization right in a book.¹⁴⁶ In tinkering with the bill, the House and

¹⁴¹ See, e.g., *General Revision of the Copyright Law: Hearings Before the House Comm. on Patents*, 72d Cong., 1st Sess. 168 (1932) (remarks of Louis G. Caldwell, Nat'l Ass'n of Broadcasters).

¹⁴² COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at 7-26; see also STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE LIBRARIAN'S CONFERENCE ON COPYRIGHT, 2D SESSION, IN NEW YORK CITY, NOV. 1-4, 1905, at 7-29, 33-35, reprinted in 2 E.F. BRYLAWSKI AND A. GOLDMAN, *supra* note 6, at pt. D [hereinafter COPYRIGHT CONFERENCE, 2D SESS.]

¹⁴³ See COPYRIGHT CONFERENCE, 1ST SESS., *supra* note 6, at 45-48, 51-53, 77-84.

¹⁴⁴ See STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE LIBRARIAN'S CONFERENCE ON COPYRIGHT, 3D SESSION, AT LIBRARY OF CONGRESS, WASHINGTON, D.C., MARCH 13-16, 1906, at xxix-lxiv, xcv-c, reprinted in 3 E.F. BRYLAWSKI AND A. GOLDMAN, *supra* note 6, at pt. E.

¹⁴⁵ See S. 6330, 59th Cong., 1st Sess. (1906).

¹⁴⁶ See S. 6330, 59th Cong., 1st Sess. §§ 18, 20 (1906).

Senate committees removed some of the distinctions but added others. Thus, Congress replaced the variable copyright terms with a uniform renewable term of twenty-eight years.¹⁴⁷ On the other hand, the 1906 bill treated the performance rights in musical compositions and dramatic compositions similarly. The bill that Congress enacted gave the rights different scope and established different remedies for their infringement.¹⁴⁸

The extent to which the 1909 Act's category-specific language encompassed new technology was difficult to predict. Although the specificity of terms initially provided security to the affected industries, the growth of new forms and methods made the language seem increasingly ambiguous. The development of the mimeograph machine, for example, created doubts about the reach of a provision requiring all books to "be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein."¹⁴⁹ When the word roll, a piano roll with lyrics printed alongside the perforations that produced the music, superseded the simple piano roll, it was unclear whether the compulsory license for mechanical reproductions of music permitted the addition of printed lyrics.¹⁵⁰

The statutory language posed more radical problems for the new media. The infant industries found the 1909 Act ambiguous and its application to their activities uncertain until the courts issued an authoritative ruling.¹⁵¹ Courts, in turn, struggled to apply the 1909 Act's language to fact patterns that its drafters never envisioned. As case law developed, the application of copyright law to new technology depended more on linguistic fortuity than anything

¹⁴⁷ See 17 U.S.C. § 24 (1909).

¹⁴⁸ Compare S. 6330, 59th Cong., 1st Sess. §§ 1(d), 1(f), 23(b)(3) with 1909 Act, *supra* note 10, §§ 1(d), 1(e), 25(b). See *supra* notes 15-20 and accompanying text.

¹⁴⁹ 17 U.S.C. § 15 (1909). Congress amended the section in 1926 to preserve the copyrights in mimeographed books from forfeiture. See Act of July 3, 1926, 44 Stat. 818.

¹⁵⁰ See, e.g., 1926 *Joint Hearings, supra* note 90, at 86-87 (testimony of Alfred Smith, Music Industries Chamber of Commerce). The courts held that the statutory mechanical license did not permit the reproduction or distribution of printed lyrics. See *Standard Music Roll v. F.A. Mills*, 241 F. 360 (3d Cir. 1917).

¹⁵¹ See, e.g., *General Revision of the Copyright Law: Hearings Before the House Comm. on Patents*, 72d Cong., 1st Sess. 174-75 (1932) (testimony of Louis G. Caldwell, Nat'l Ass'n of Broadcasters); *id.* at 405-06 (testimony of George P. Aarons, Motion Picture Theatre Owners); *General Revision of the Copyright Law: Hearings on H.R. 10,976 Before the House Comm. on Patents*, 72d Cong., 1st Sess. 206-07 (1932) (testimony of Frank A.K. Boland, American Hotel Ass'n).

else.¹⁵²

Determining the scope of copyright protection for motion pictures, for example, required courts to decide such questions as whether the exhibition of a motion picture constituted "publication" within the meaning of the 1909 Act.¹⁵³ Was a motion picture, specifically enumerated in subsections (l) and (m) of section 5, also a "dramatic or dramatico-musical composition" as specified in subsection 5(d), or, if not, could it still be deemed a "drama" for the purposes of subsection 1(d)?¹⁵⁴ If so, was exhibiting the film a "performance"? Should projecting the frames of a motion picture be characterized as making a "copy" of the motion picture¹⁵⁵ or as "dramatizing" it?¹⁵⁶ Radio broadcasting posed similar problems. Was the broadcast of music to receiving sets in individuals' homes a public performance?¹⁵⁷ Was broadcasting at no charge to listeners a performance for profit?¹⁵⁸ Was it a public performance for profit to install a radio receiving set and loud speakers in hotel guest rooms?¹⁵⁹

¹⁵² See 75 CONG. REC. 11,062 (1932) (remarks of Rep. Sirovich):

At the time of the passage of the 1909 Act, radio broadcasting was an unknown quantity. Because of certain general provisions of that act, such as "public performance" and "mechanical reproduction" it turned out that dramatic and musical compositions were protected over the radio, but the act nowhere provided for protection over the radio in any other respect. The author of literary works is not protected under the present law.

See also Varmer, LIMITATIONS ON PERFORMING RIGHTS 104-07, reprinted in SUB-COMM. ON PATENTS, TRADEMARKS AND PATENTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960).

¹⁵³ See, e.g., *Patterson v. Century Prod.*, 93 F.2d 489 (2d Cir. 1937); *Tiffany Prods. v. Dewing*, 50 F.2d 911 (D. Md. 1931). The majority of courts held that exhibition was not publication.

¹⁵⁴ See, e.g., *Metro Goldwyn Mayer Distrib. v. Bijou Theatre*, 3 F. Supp. 66 (D. Ma. 1933); *Tiffany Prods.*, 50 F.2d at 914-15.

¹⁵⁵ See *Patterson*, 93 F.2d at 493-94; *Metro Goldwyn Mayer*, 3 F. Supp at 73-74. A few courts concluded that the projection was indeed a copy. See Varmer, *supra* note 152, at 104-07.

¹⁵⁶ See *Metro Goldwyn Mayer*, 3 F. Supp. at 73; cf. *Kalem Co. v. Harper Bro.*, 222 U.S. 55 (1911) (applying prior law). *Kalem* held that projecting a motion picture dramatized the book on which it was based, even if the motion picture was not itself a copy of the book. Some courts extended that rationale. See Varmer, *supra* note 152, at 105-06.

¹⁵⁷ See, e.g., *Jerome H. Remick & Co. v. American Auto. Accessories*, 5 F.2d 411 (6th Cir. 1925). Most courts held that it was. *But see Jerome H. Remick & Co. v. General Elec.*, 4 F.2d 160 (S.D.N.Y. 1924).

¹⁵⁸ See, e.g., *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F.2d 776 (D.N.J. 1923). The majority of courts said yes.

¹⁵⁹ See *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931). The court held that it was. *But see Twentieth Century Music v. Aiken*, 422 U.S. 151 (1975) (holding that installing a radio receiving set and loud speakers in a delicatessen was not a performance). Under the case law that developed, both radio broadcasting and the playing of

The nature of the legislation that emerged from the conference and compromise process increased the problems of applying a narrowly worded statute to industries transformed by technological change. Multilateral bargaining produces statutes ill-suited to traditional interpretation. It is problematic to discuss a statute's "overall purpose" in connection with a web of negotiated deals.¹⁶⁰ Where specific provisions are predicated on the peculiarities of individual industries, and new industries develop their own very different peculiarities, it is difficult to formulate a basis for drawing the appropriate analogies.

Industries, however, adjust in time to even the most inhospitable law.¹⁶¹ Where the copyright statute failed to accommodate the realities faced by affected industries, the industries devised expedients, exploited loopholes, and negotiated agreements that superseded statutory provisions. The broadcast industry formed its own performing rights society to compete with ASCAP.¹⁶² The recording industry developed a form license that incorporated the basic concept of a compulsory license for mechanical reproduction, but at more favorable terms, and used it instead of the license conferred by the statute.¹⁶³ The motion picture industry established an ASCAP-like operation to deal with unauthorized exhibition of films.¹⁶⁴ An enterprising group of talking machine manufacturers used the copyright exemption for the performance of musical compositions on coin operated devices¹⁶⁵ to launch the jukebox industry, and marketed jukeboxes to establishments that wished to play music but not

radio broadcasts in large commercial establishments infringed the copyrights in the music that was played, but radio broadcasts were not themselves copyrightable.

¹⁶⁰ See Easterbrook, *supra* note 8, at 540-44; Posner, *supra* note 8, at 273; *infra* notes 203-27 and accompanying text; see also Litman, *supra* note 15, at 879-82.

¹⁶¹ See, e.g., *General Revision of the Copyright Law: Hearings Before the House Comm. on Patents*, 72d Cong., 1st Sess. (1932) (testimony of Will Irwin, Authors' League of America).

¹⁶² See Oman, *supra* note 83, at 252. The broadcasters' performing rights association, Broadcast Music, Inc., was established in 1939 as a performing rights society owned entirely by broadcasters. Like ASCAP, it licensed its entire repertory of compositions for a flat fee. See generally *Columbia Broadcasting Sys. v. American Soc'y of Composers*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

¹⁶³ See *1926 Joint Hearings*, *supra* note 90, at 314-15 (testimony of Nathan Burkan, ASCAP); *id.* at 86 (testimony of Alfred L. Smith, Music Indus. Chamber of Commerce).

¹⁶⁴ See *1936 House Hearings*, *supra* note 125, at 1026-37 (testimony of Gabriel L. Hess, Nat'l Distributors of Copyrighted Motion Pictures).

¹⁶⁵ See *supra* note 62 and accompanying text.

to pay royalties.¹⁶⁶

IV

THE POST-WAR REVISION EFFORT

A. *Returning to Conference*

By the end of the second world war, industries had been operating within the confines of the 1909 Act for a third of a century. Everybody criticized the law as outmoded;¹⁶⁷ it had, after all, been drawn to accommodate the requirements of particular media before the advent of radio, jukeboxes, sound motion pictures, Muzak®, and now television.¹⁶⁸ The affected industries accommodated the arcane law through combinations of trade practice,¹⁶⁹ collectively bargained form contracts,¹⁷⁰ and practical contortions.¹⁷¹ The re-

¹⁶⁶ See *General Revision of the Copyright Law: Hearings Before the House Comm. on Patents*, 72d Cong., 1st Sess. 199-208 (1932) (testimony of Erwin M. Treusch, Automatic Music Indus.).

¹⁶⁷ See, e.g., Chafee, *supra* note 7, at 503, 516-22; Ebenstein, *supra* note 7, at xv-xx; Stern, *supra* note 7, at 512. Even the industries that had opposed all prior proposals for change came to view the outmoded 1909 Act as unsatisfactory.

¹⁶⁸ Television was invented in the 1920s, but the first commercial television broadcast station began operation in 1942.

¹⁶⁹ See, e.g., *Recording and Performing Rights in Certain Literary Works: Hearings on H.R. 3589 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 82d Cong., 1st Sess. 7-8 (1951) [hereinafter *1951 House Hearings*] (testimony of John Schulman, Authors' League of America); Kaminstein, DIVISIBILITY OF COPYRIGHTS 18-25, reprinted in SUBCOMM. ON PATENTS, TRADEMARKS AND PATENTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960). The trade practice in periodical publishing, for example, involved a complicated series of conveyances of the copyright in contributions to the periodical in order to achieve the publisher's acquisition of the rights it needed and the author's reservation of other rights without forfeiting the copyright. See *id.* at 18-22. In the music industry, prevailing practice gave the music publisher legal title to the copyright, but the publisher behaved as if it held certain portions of the copyright in trust for the composer. Although composers did not have legal title to their copyrights, they routinely granted some rights to ASCAP and similar organizations without the publishers' formal participation. See *id.* at 23-24. These practices made little legal sense because the courts treated copyright in a work as an indivisible whole. See generally *id.* at 1-17.

¹⁷⁰ See, e.g., Blaisdell, THE ECONOMIC ASPECTS OF THE COMPULSORY LICENSE 92-100, reprinted in SUBCOMM. ON PATENTS, TRADEMARKS AND PATENTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960); Henn, THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW 44-53, reprinted in SUBCOMM. ON PATENTS, TRADEMARKS AND PATENTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960). Composers, music publishers, and dramatists, for example, belonged to associations that acted as bargaining agents and negotiated complicated form contracts for the transfer or licensing of rights. These associations behaved like labor unions but were not labor unions because composers and dramatists were not employees for the purposes of the National Labor Relations Act.

sulting distortions in industry structure and clout produced new vested interests and hardened bargaining positions.¹⁷²

Industry representatives, having learned the difficulty of comprehensive statutory reform, declined to press for complete revision. Instead, they focused their legislative efforts on obtaining narrow amendments to redress specific grievances. Some of the bills introduced at the behest of particular industries succeeded;¹⁷³ others became perennial visitors in successive congressional sessions.¹⁷⁴

The most imperative problem after the war was the United States' isolation from international copyright relations.¹⁷⁵ Prior efforts to amend the copyright law to permit adherence to the *Berne Convention* had ended in failure.¹⁷⁶ The government directed its attention to devising a way to establish international copyright rela-

See Blaisdell, *supra*, at 91-92; Note, *Copyright in the Stage Direction of A Broadway Musical*, 8 COLUM.-VLA J.L. & ARTS 309, 323 n.94 (1983).

¹⁷¹ See, e.g., Kaminstein, *supra* note 169, at 18-22; Henn, *supra* note 170, at 44-47. Securing copyright protection abroad for a work published in the U.S. required particularly convoluted procedures. Securing copyright protection in the U.S. for a work published abroad was, in some cases, even more troublesome. See Stern, *supra* note 7, at 508-11.

¹⁷² See, e.g., Chafee, *supra* note 7, at 517-18; Ebenstein, *supra* note 7, at xix. Proposals to eliminate the compulsory license for mechanical reproductions of music or to increase the statutory royalty rate, for example, drew increasingly strident objections. The dispute between jukebox owners and operators, who insisted on retaining the jukebox exemption, and composers and music publishers, who demanded its repeal, became a pitched war. Suggestions that the United States eliminate the labor protection provisions contained in its copyright statute inspired fierce opposition.

¹⁷³ See Act of July 17, 1952, Pub. L. No. 82-575, 66 Stat. 752 (extending public performance for profit and recording rights to nondramatic literary works, lectures, and sermons); Act of June 3, 1949, Pub. L. No. 81-84 (extending *ad interim* protection for foreign books and periodicals).

¹⁷⁴ Bills to repeal or restrict the jukebox exemption, see, e.g., H.R. 5473, 82d Cong., 1st Sess. (1951); H.R. 1269, 80th Cong., 1st Sess. (1947); H.R. 3190, 79th Cong., 1st Sess. (1945), to extend limited copyright protection to recordings, see, e.g., S. 1206, 79th Cong., 1st Sess. (1945), and to provide copyright for textile designs, see e.g., H.R. 2860, 80th Cong., 1st Sess. (1947), showed up again and again.

¹⁷⁵ Most of the world's developed nations had joined the *Berne Convention* and modified their copyright laws to accord with its terms. See *supra* note 12. This left the United States with a copyright statute distinctly out of step with the international community, and dependent upon bilateral arrangements or simultaneous publication in *Berne* nations for protection of its copyrights abroad. See *Removal of Domestic Manufacturing Requirements for the Acquisition of Copyright by Certain Foreign Nationals: Hearings on H.R. 4059 before Subcomm. No. 3 of the House Comm. on the Judiciary*, 82d Cong., 2d Sess. 207-09 (1952) [hereinafter *1952 House Hearings*] (testimony of Arthur Fisher, Register of Copyrights); *id.* at 3-4 (testimony of Luther E. Evans, Librarian of Congress); American Bar Association Section of Patent, Trademark and Copyright Law, *Report of Committee No. 15: Program for Revision of the Copyright Law*, 1957 COMMITTEE REPORTS 51, 60-61; Stern, *supra* note 7, at 508-12.

¹⁷⁶ See *supra* notes 101-30 and accompanying text.

tions without undertaking the politically-charged endeavor of overhauling the copyright statute to comply with *Berne's* requirements.¹⁷⁷ The outcome was the *Universal Copyright Convention*.¹⁷⁸ The Copyright Office asked industries affected by copyright to delay requests for statutory revision until the international effort could be completed.¹⁷⁹ The strategy proved successful, but the clock continued to tick. The 1909 Act passed its fortieth birthday, and the need for copyright revision failed to evaporate.

Meanwhile, the subject matter of copyright remained frozen in the form it had taken in 1912. More recently developed works were copyrightable only to the extent they could be analogized to the statutory list of works subject to copyright and received rights whose scope was limited by the category in which they best fit. Decorative lamp bases and children's toys, for example, could be registered as "works of art" or "reproductions of a work of art."¹⁸⁰ Motion pictures and television programs recorded on film could be copyrighted as unpublished motion picture photoplays.¹⁸¹ Live or taped television programs, radio programs, and phonograph records were deemed uncopyrightable. Neither the copyright statute nor case law recognized that the multiplicity of copyright rights could

¹⁷⁷ The United States, working through UNESCO, used its new world power status to craft a second worldwide copyright treaty designed to accommodate the quirks of United States law without affecting copyright relations among *Berne* nations. See 1952 *House Hearings*, *supra* note 175, at 4 (testimony of Luther E. Evans, Librarian of Congress); *id.* at 209 (testimony of Arthur Fisher, Register of Copyrights). See generally Henn, *The Quest for International Copyright Protection*, 39 *CORNELL L. REV.* 43 (1953). The government created a commission of interest group representatives and government agency employees to facilitate domestic compromises. See Fisher, *Introduction*, 2 *BULL. COPYRIGHT SOC'Y* 83 (1955).

¹⁷⁸ Seven years of negotiations among United States and foreign industries under UNESCO's auspices produced substantial concessions to American demands and near unanimity in favor of the treaty among United States industry representatives. See *Universal Copyright Convention and Implementing Legislation, Hearings on The Universal Copyright Convention and S. 2559 Before a Subcomm. of the Sen. Comm. on Foreign Relations and a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. 177-79 (1954) (testimony of Arthur Fisher, Register of Copyrights). The Senate ratified the treaty and Congress passed the modest implementing legislation the treaty required. Act of Aug. 31, 1954, Pub. L. No. 83-743, 61 Stat. 655.

¹⁷⁹ See *Legislative Appropriations for 1956: Hearings Before the Subcomm. on Legislative Appropriations of the House Comm. on Appropriations*, 84th Cong., 1st Sess. 115-16 (1955) (testimony of Arthur Fisher, Register of Copyrights).

¹⁸⁰ See Derenberg, *Copyright Law*, in 1955 *ANNUAL SURVEY OF AMERICAN LAW* 278, 280-81 (1956); Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 *MINN. L. REV.* 707, 715-17 (1983).

¹⁸¹ See Cohn, *Old Licenses and New Uses: Motion Picture and Television Rights*, 19 *LAW AND CONTEMP. PROBS.* 184 (1954); Kupferman, *supra* note 7.

be separately owned and exploited.¹⁸² Because the law viewed copyright as unitary, the industries relied on form contracts negotiated by industry groups to divide up control of subsidiary uses and the revenues they produced.¹⁸³ New technological uses waited in the wings; how the copyright statute would affect them seemed unclear.

To revive the process of comprehensive copyright revision, Congress returned to a suggestion that it had rejected summarily fifty years before.¹⁸⁴ In 1956, it appropriated funds for the appointment of a special committee of copyright experts.¹⁸⁵

The Register of Copyrights, Arthur Fisher, initially conceived a three year revision process that would depart significantly from the familiar conferences.¹⁸⁶ Fisher envisioned a committee of copyright experts acting in a purely advisory capacity, while the Copyright Office's research division performed comprehensive studies of prior revision efforts, copyright laws of other nations, and each of the major substantive issues involved in copyright revision. The com-

¹⁸² See generally Kaminstein, *supra* note 169. Notwithstanding the courts' reluctance to recognize the divisibility of copyright, most industries had long relied on the separate licensing and exploitation of particular copyright rights. See sources cited *supra* note 169.

¹⁸³ See sources cited *supra* note 170.

¹⁸⁴ See *supra* note 38 and accompanying text.

¹⁸⁵ Legislative Appropriation Act of 1956, Pub. L. No. 242, 69 Stat. 499; see H.R. REP. NO. 1036, 84th Cong., 1st Sess. 6 (1956). Three members of Congress introduced bills in the 84th Congress calling for the appointment of a special Presidential Commission to revise the copyright law. See H.R. 2677, 84th Cong., 1st Sess. (1955); H.R. 5366, 84th Cong., 1st Sess. (1955); S. 1254, 84th Cong., 1st Sess. (1955). Two of the bills would have set up a commission comprising three Senators, three Representatives, and seven members appointed by the President, and charged them to return a report within one year. See 101 CONG. REC. A1652-53 (1955) (extension of remarks of Rep. Thompson, sponsor of H.R. 2677). The proposal alarmed members of the copyright bar, who suggested that a more appropriate committee might be appointed by the Librarian of Congress, supervised by the Register of Copyrights (the Copyright Office and the ABA enjoyed particularly cozy relations during those years), and composed exclusively of copyright experts. See *id.* at A1652 (reprinted letter from Prof. Walter Derenberg to Rep. Thompson); American Bar Association Section of Patent, Trademark and Copyright Law, 1955 SUMMARY OF PROCEEDINGS 38. The Librarian of Congress included the copyright bar's alternate plan in his annual appropriations request. See *Legislative Appropriations for 1956*, *supra* note 179, at 114-23 (testimony of Luther E. Evans, Librarian of Congress, and Arthur Fisher, Register of Copyrights). The ABA adopted a resolution disapproving the Presidential Commission bills, and Congress did not pursue them further.

¹⁸⁶ See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1959, H. DOC. NO. 245, 86th Cong., 2d Sess. 72-73 (1959) [hereinafter REGISTER'S 1959 REPORT]. Ultimately, the revision process lasted 21 years.

mittee's job would be to offer comments and suggestions, but not to make policy.¹⁸⁷ Fisher hoped to keep the policy making process insulated within the Copyright Office to avoid the partisan wrangling that infected prior legislation.¹⁸⁸

The Librarian of Congress appointed a panel of twenty-nine copyright experts, the majority of whom were active in the American Bar Association.¹⁸⁹ The panelists' ideas about their appropriate role differed from the Register's, and they soon began requesting that they convene in a forum that would permit the thrashing out of policy.¹⁹⁰ The Copyright Office acceded to requests to convene meetings of the panelists for substantive discussions¹⁹¹ but insisted upon its prerogative to formulate recommendations for legislation without further consultation.¹⁹²

The ABA established a shadow committee, including many of the panelists in its membership. The committee embarked on an effort to formulate substantive proposals at the same time as it monitored the Copyright Office's revision efforts.¹⁹³ While the Copyright Office struggled to digest the studies and the panelists' suggestions and to write a report in relative seclusion, the panelists themselves were meeting with interested parties in ad hoc groups and symposia to

¹⁸⁷ See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1956, H. DOC. NO. 5, 85th Cong., 1st Sess. 60 (1956) [hereinafter REGISTER'S 1956 REPORT]; American Bar Association Section of Patent, Trademark and Copyright Law, 1957 COMMITTEE REPORTS 53 [hereinafter 1957 ABA SEC. REP.].

¹⁸⁸ See sources cited *supra* note 187; see also REGISTER'S 1959 REPORT, *supra* note 186, at 72:

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.

¹⁸⁹ See 1957 ABA SEC. REP., *supra* note 187, at 55.

¹⁹⁰ See *id.* at 55-67; American Bar Association Section of Patent, Trademark and Copyright Law, 1959 COMMITTEE REPORTS 132-35; American Bar Association Section of Patent, Trademark and Copyright Law, 1958 COMMITTEE REPORTS 92-93, 99-100; American Bar Association Section of Patent, Trademark and Copyright Law, 1958 SUMMARY OF PROCEEDINGS 40.

¹⁹¹ See REGISTER'S 1959 REPORT, *supra* note 186, at 77.

¹⁹² See *Extending the Duration of Copyright Protection in Certain Cases: Hearing on H.R.J. Res. 627 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 87th Cong., 2d Sess. 8 (1962) (prepared statement of John Schulman, American Patent Law Ass'n).

¹⁹³ See 1957 ABA SEC. REP., *supra* note 187.

articulate substantive consensus.¹⁹⁴

Shortly before the Copyright Office completed the Register's Report to Congress, outlining recommendations for a revision bill, Register Fisher died. His successor, Register Abraham Kaminstein, abruptly shifted gears. While Fisher appeared to have viewed the history of inter-industry compromise as a weakness of prior revision efforts, Kaminstein seemed to read the record differently. He argued that such compromise was the keystone of achieving copyright revision and that the goal of enacting a modern copyright statute was worth herculean efforts to encourage compromise among interested parties.¹⁹⁵

Register Kaminstein began working toward conciliation¹⁹⁶ and narrowly averted a crisis that threatened to derail the revision program.¹⁹⁷ The substance of the Register's Report was poorly received by the Bar,¹⁹⁸ a number of whose members insisted that they

¹⁹⁴ The core of the consensus appears to have been the provisions that the Dallinger, Vestal and Shotwell bills had in common. See 1957 ABA SEC. REP., *supra* note 187, at 57-58; Schulman, *The Road to Progress in Revising the Copyright Law*, 9 BULL. COPYRIGHT SOC'Y 433, 436-39 (1962).

¹⁹⁵ See, e.g., LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1962, H. DOC. NO. 5, 88th Cong., 1st Sess. 70-71 (1962) [hereinafter REGISTER'S 1962 REPORT].

¹⁹⁶ The Register's Report was written without participation by the panel of experts. Preliminary rumblings indicated that the panelists would resist its conclusions. Before filing the Report, Kaminstein circulated it to the panel's members and solicited their comments. See HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW xi (Comm. Print 1961) [hereinafter CLR PART 1]. He added a conciliatory preface characterizing the Report's conclusions as tentative, and insisting that the Copyright Office's "purpose in issuing this report is to pinpoint the issues and to stimulate public discussion, so that the widest possible agreement can be reached on the principles to be incorporated in a revised statute." *Id.* at ix. See also American Bar Association, Section of Patent, Trademark and Copyright Law, 1961 SUMMARY OF PROCEEDINGS 122-23 (address by Register Kaminstein inviting members of the bar to participate in the drafting process). Kaminstein announced plans for a series of meetings with interested groups to discuss the report, and promised that the Copyright Office would consider all views expressed before drafting a bill. See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1961, H. DOC. NO. 255, 87th Cong., 2d Sess. 65-66 (1961) [hereinafter REGISTER'S 1961 REPORT].

¹⁹⁷ Industry representatives and members of the copyright bar disliked the Register's proposals for reform, which differed significantly from the consensus that they had reached in their ad hoc meetings. The intensity of their opposition threatened to overwhelm the revision effort. See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1963, H. DOC. NO. 255, 88th Cong., 2d Sess. 71-72 (1963) [hereinafter REGISTER'S 1963 REPORT]; sources cited *infra* notes 198-200.

¹⁹⁸ See, e.g., REGISTER'S 1963 REPORT, *supra* note 197, at 71; Schulman, *supra* note

would prefer the current outmoded statute to one following the Register's recommendations.¹⁹⁹ Kaminstein announced that the Copyright Office was willing to abandon unpopular proposals.²⁰⁰ He expanded the membership of the panel of experts and arranged meetings with interested parties to encourage them to compromise with one another.²⁰¹ The result was, in essence, a return to the conference process. Six years of study had produced the Register's Report. Another five years of conferences produced a bill that reflected the consensus of the conference participants and bore little resemblance to the Register's recommendations. It took an additional eleven years in Congress for the interested parties to compromise on extraneous issues and late-breaking problems. When the parties finally compromised on nearly every provision in the bill, Congress enacted the 1976 Copyright Act.²⁰²

B. Private Parties and Vested Interests

The stormy history of past revision efforts led the Copyright Office to conclude that the only copyright bill that would pass was one built on a network of negotiated compromises. The Copyright Office concentrated much of its energy on identifying affected interests and including their representatives in the negotiations. But, of course, it wasn't possible to invite every affected interest. Some interests lacked organization and had no identifiable representatives. In the 1905 conferences, the Library of Congress had tried unsuccessfully to recruit representatives of composers to participate. Music publishers purported to speak for composers and were the only representatives available. In the conferences convened in the 1960s, painters and sculptors did not attend²⁰³ and the Copyright Office's

194, at 434-38; see also Ringer, *Viewpoint of the Copyright Office on General Revision of the Copyright Law*, 11 BULL. COPYRIGHT SOC'Y 37, 37 (1963) ("Practically all of [the proposals] were criticized by somebody, and some of them were criticized by practically everybody.").

¹⁹⁹ See, e.g., CLR PART 2, *supra* note 6, at 321-24 (written comments of Irwin Karp); *id.* at 387-94 (written remarks of John Schulman).

²⁰⁰ See REGISTER'S 1963 REPORT, *supra* note 197, at 71-72; Kaminstein, *The General Revision Program*, 10 BULL. COPYRIGHT SOC'Y 81 (1962).

²⁰¹ See, e.g., REGISTER'S 1963 REPORT, *supra* note 197, at 72; REGISTER'S 1962 REPORT, *supra* note 195, at 70, 74.

²⁰² See Litman, *supra* note 15, at 873-79.

²⁰³ See HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 269 (Comm. Print 1963) [hereinafter CLR PART 3] (remarks of Irwin Karp, Authors' League of America).

efforts to seek them out proved unavailing.²⁰⁴ Choreographers, theatrical directors, and computer programmers sent no representatives because they had no representatives to send. Other interests that would have profound effect on copyright did not yet exist at the time of the conferences. Just as there had been no commercial broadcasters to invite to the conferences in 1905, there were no video cassette manufacturers, direct satellite broadcasters, digital audio technicians, motion picture colorizers, or on-line database users to invite in 1960.

Nor could the rest of us be there. The amorphous "public" comprises members whose relation to copyright and copyrighted works varies with the circumstances. Many of us are consumers of copyrighted songs and also consumers of parodies of copyrighted songs, watchers of broadcast television and subscribers to cable television, patrons of motion picture theatres and owners of videotape recorders, purchasers and renters and tapers of copyrighted sound recordings. Although a few organizations showed up at the conferences purporting to represent the "public" with respect to narrow issues,²⁰⁵ the citizenry's interest in copyright and copyrighted works was too varied and complex to be amenable to interest group championship. Moreover, the public's interests were not somehow approximated by the push and shove among opposing industry representatives. To say that the affected industries represented diverse and opposing interests is not to say that all relevant interests were represented.²⁰⁶

The conference participants began as the members of the Library of Congress's panel of experts and were all established members of

²⁰⁴ See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 1844 (1975) [hereinafter *1975 House Hearings*] (testimony of Barbara Ringer, Register of Copyrights).

²⁰⁵ See, e.g., HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5 76-77 (Comm. Print 1965) [hereinafter CLR PART 5] (remarks of John Schulman, Chairman of American Bar Association Committee 304); *id.* at 64 (remarks of Charles F. Gosnell, American Library Ass'n); *id.* at 70 (remarks of Nicholas E. Allen, Music Operators of America); CLR PART 3, *supra* note 203, at 425-27 (written comments of George Schiffer, on behalf of community television antenna systems).

²⁰⁶ A participant in the process observed after reading a transcript of several of the meetings that the public interest had received only passing attention, little effort had been made to inform the public of the progress of the effort, and that the majority of conference participants were, unsurprisingly, copyright lawyers. See Goldberg, *Copyright Law Revision Part 2—A Review of the Record*, 10 BULL. COPYRIGHT SOC'Y 214, 216-17 (1962).

the copyright bar. Other representatives joined the conferences as particular conflicts arose. Register Kaminstein invited representatives of current beneficiaries of the statute to participate in discussions of cutbacks in their statutory benefits.²⁰⁷ Lawyers on the panel solicited participation from their other clients.²⁰⁸ As with the conferences on earlier legislation, however, participants were almost exclusively those who already had a sizable economic investment in copyright matters under current law. Although these participants undoubtedly interacted with copyrighted works outside of their professional capacity, they failed to bring that perspective to bear on the conference negotiations.

Perhaps the most patent example of the partisan perspective that dominated the negotiations is illustrated in the treatment of the issue of private use, an issue that has become increasingly vexing in the years since the 1976 Act took effect. Presumably, all industry representatives made private use of copyrighted works in their individual capacities. Yet, the issue of the appropriate scope of permissible private use of copyrighted works received little explicit attention during the revision process. Representatives were too busy wrangling over commercial and institutional uses to talk about the behavior of individuals in their homes.²⁰⁹ The aggregate agendas developed in the conferences of private parties reflected systematic, if unintentional, bias against absent interests.²¹⁰ The fact that

²⁰⁷ The Register was not always successful in causing such interests to attend. Kaminstein speculated that his failure to turn up librarians or scientists to serve on the panel was partly due to the fact that few librarians or scientists were members of the bar, and partly due to the fact that their representatives were too busy to attend. See CLR PART 5, *supra* note 205, at 81 (remarks of Abraham Kaminstein, Register of Copyrights).

²⁰⁸ See, e.g., CLR PART 3, *supra* note 203, at 184-85 (remarks of Harriet Pilpel).

²⁰⁹ There were fleeting proposals during the conferences, for example, to extend the copyright owner's exclusive performance right to cover private as well as public performances, or give the copyright owner control of individual book borrowing, but they received little attention.

²¹⁰ I explore the systematic nature of that bias more fully below. An illustrative example is the treatment of charitable benefit performances. The revision bill that emerged from the conferences included a privilege for charitable benefit performances so long as performers, promoters and organizers received no compensation. See H.R. 4347, 89th Cong., 1st Sess. § 109(4) (1965). In 1967, sponsors of agricultural fairs got involved in copyright revision and managed to secure a privilege for performance of musical works during agricultural fairs, without regard to any fees paid performers or promoters. See S. 543, 91st Cong., 1st Sess. § 110(6) (1969); see, e.g., *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 621-23 (1967) [hereinafter *1967 Senate Hearings*] (testimony of Rep. Kenneth Gray); *id.* at 625-27 (testimony of William Hartsfield, Southeastern Fair Ass'n). In ensuing sessions of Con-

private use had no defenders and received no explicit treatment in the revision conferences, therefore, had substantive results on the legality of private use under the revision bill.

The public, of course, does have a designated representative; acting as that representative is Congress' job description. A few Congressional committee staff members did attend some of the copyright conferences as observers, but stayed above the fray.²¹¹ The unspoken premise of the conference process was that Congress would enact any bill that everyone else could agree on. Ultimately, that is what Congress did.²¹²

Much legislation advances the agendas of private interest groups. Indeed, contemporary interest group theory holds that many, if not most, statutes are purchased by special interests from legislators in return for political support.²¹³ Copyright legislation produced through industry conferences nonetheless has some unusual features. Under the typical model, interest groups submit self-serving proposals, and members of Congress evaluate whether the value of supporting the proposals outweighs the political costs, necessarily passing judgment on the substantive content of the proposed legislation.²¹⁴ The bargain between members of Congress and industry representatives in connection with copyright legislation was of a different sort: Congress in effect agreed that if the industry representatives would invest the time and energy to develop a bill that all of

gress, the privilege became narrower and more qualified. See S. 22, 94th Cong., 2d Sess. § 110(6) (1976), reprinted in H.R. 1476, 94th Cong., 2d Sess. 8 (1976); S. 22, 94th Cong., 1st Sess. § 110(6) (1975). Veterans' and fraternal organizations did not, for the most part, involve themselves in this dispute. *But see 1967 Senate Hearings, supra*, at 1361 (written comments from Troy Shrine Club supporting agricultural fair exemption). Shortly after the 1976 Act took effect, veterans' and fraternal organizations were dismayed to learn that the new Act made them liable for copyright infringement unless they negotiated licenses or ceased paying the bands that they hired to play at their charitable benefits. See generally *To Amend The Copyright Act, S. 2082: Hearings on S. 2082 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 6-43 (1981) (various witnesses). Veterans' and fraternal organizations mounted a successful effort before Congress for the enactment of an exemption for charitable benefit performances by nonprofit veterans' or fraternal organizations. See Pub. L. No. 97-366, 96 Stat. 1759 (codified at 17 U.S.C. § 110(10) (1982 & Supp. IV 1986)).

²¹¹ See, e.g., CLR PART 2, *supra* note 6, at 44 (remarks of Cyril F. Brickfield, House Judiciary Committee).

²¹² See Litman, *supra* note 15, at 876-79 and sources cited therein.

²¹³ See, e.g., Easterbrook, *The Supreme Court 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18 (1984); Landes & Posner, *supra* note 8, at 877; Macey, *supra* note 8, at 227-33; Posner, *supra* note 8, at 265-68.

²¹⁴ See, e.g., Macey, *supra* note 8, at 232-33.

them endorsed, Congress would refrain from exercising independent judgment on the substance of the legislation.²¹⁵

The nature of this bargain introduces particular difficulties into the enterprise of statutory interpretation. As I have argued elsewhere, this type of drafting process makes it exceedingly difficult to speak of legislative intent if by legislative intent one means the substantive intent of members of Congress.²¹⁶ But, even if one avoids that dilemma by ascribing to Congress an intent to enact the substance of the deals forged in conferences, one nonetheless may encounter difficulty in identifying any overall purpose pervading the text of the statute.²¹⁷ The compromises that evolve through the conference process can be multilateral and interrelated, but may not incorporate any common vision or strategy.²¹⁸ Courts must apply this legislation to parties, works, and situations that never arose during the conference process, and to industries that could not be present.²¹⁹

In the 1976 Act's first decade, for example, courts struggled with cases involving videocassette recorders,²²⁰ communications satellites,²²¹ and on-line databases.²²² The courts' efforts to apply the

²¹⁵ See Litman, *supra* note 15, at 870-80; Olson, *supra* note 2, at 120.

²¹⁶ See Litman, *supra* note 15, at 863-70.

²¹⁷ See, e.g., Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819-20 (1983).

²¹⁸ It would be exceedingly difficult, for example, to identify a coherent strategy animating the assorted provisions of the 1909 Act, see *supra* notes 141-59 and accompanying text, or any of the versions of the Vestal bill reported out of committee, see *supra* notes 116-18 and accompanying text. It is easier to discern a scheme underlying the provisions of the 1976 Act, see *infra* notes 230-60 and accompanying text, but the scheme that emerges seems to me to be neither workable nor wise. See *infra* notes 313-15, 449-58 and accompanying text.

²¹⁹ Courts have not, for the most part, attempted to detect an overarching strategy in the provisions of the 1976 Act. Many courts have relied on the plain meaning of the statutory language of whatever provisions are in dispute. See, e.g., *Mills Music v. Snyder*, 469 U.S. 153 (1985); *Pacific & Southern Co. v. Satellite Broadcast Networks*, 694 F. Supp. 1565 (N.D. Ga. 1988). Courts' use of the plain meaning rule arguably increases the influence of linguistic fortuity on the results. See *infra* notes 373-96 and accompanying text. Other courts have relied heavily on case law interpreting the 1909 Act. See cases cited in Litman, *supra* note 15, at 859-61, 896-901. Reversion to early case law has introduced additional randomness into courts' interpretations of the statute. See *id.* at 903. If courts were to interpret the statute with an eye to enforcing its underlying strategy, however, it seems likely that courts would hold many more activities than they have to be infringing. See *infra* notes 406-18 and accompanying text. As a result, the 1976 Act would age even more rapidly than it has thus far.

²²⁰ *Universal City Studios v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); see *infra* notes 406-16 and accompanying text.

²²¹ See *Hubbard Broadcasting v. Southern Satellite Systems*, 777 F.2d 393 (8th Cir.

statute in these cases have been widely criticized.²²³ The statutory language, however, gives courts little guidance. The fact-specific provisions of the statute do not contemplate such exotic creatures;²²⁴ the paucity of provisions articulating more general principles has relegated courts to ad hoc decisionmaking.²²⁵

Moreover, the complexity and specificity of multiparty compromises exacerbates the problem. If a compromise is negotiated between monolithic interests, between, for example, all artists and all art users, we can find roughly defined privies in the negotiating process for the interests that develop in the future. Applying a compromise negotiated among encyclopedia publishers, popular music composers, motion picture producers, novelists, and dramatists, however, to a situation involving the importers of unicorn figurines²²⁶ can be substantially more troublesome. This reveals the difficulty of jettisoning any effort to find coherence in such a statute and attempting to interpret it as if it were a contract.²²⁷ If the industry to which a court is trying to apply the statute was neither represented in negotiations nor in privity with someone who was there, it is difficult to assess how the metaphorical contract allocates the risks of ambiguity.

As it happens, however, the conferences that led to the 1976 Act did finally settle on a common strategy and did allocate the risks of

1985), *cert. denied*, 479 U.S. 1005 (1986); *Eastern Microwave v. Doubleday Sports*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *infra* notes 376-96 and accompanying text.

²²² See, e.g., *West Publishing v. Mead Data Cent.*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

²²³ See, e.g., Adelstein & Perez, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L REV. OF L. & ECON. 209 (1985); Kost, *supra* note 4, at 24-25; Oman, *The 1976 Copyright Revision Revisited: "Lector, si monumentum requiris, circumspice,"* 34 J. COPYRIGHT SOC'Y 29, 32, 35 (1986); Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1, 53-58 (1987).

²²⁴ The fact that the statute fails to make explicit provision for video cassette recorders and communications satellites highlights how very shortsighted the negotiation process has tended to be. Both were foreseeable developments at the time of the drafting process, but had not yet posed concrete problems for affected industries, and consequently received no attention.

²²⁵ See *infra* notes 341-416 and accompanying text.

²²⁶ See Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281 (1987) (discussing *Aldon Accessories v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)).

²²⁷ Some commentators have suggested that special interest legislation should be interpreted and enforced as if it were a contract between interest groups and the legislature or among interest groups. See, e.g., Easterbrook, *supra* note 213, at 18.

ambiguity. Indeed, industry representatives explained the strategy to Congress in unusually explicit terms. The bills that became the 1976 Act possessed a coherence that previous revision legislation lacked, although that coherence emerged as a byproduct of the efforts to achieve inter-industry consensus. Register Kaminstein suggested early on that the key to general revision would be to draft a copyright bill that benefited each of the competing interests.²²⁸ In that, the conferences succeeded. The bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained.²²⁹

C. Broad Rights and Narrow Exceptions

In 1961, two months after Register Kaminstein filed the controversial Register's Report, he convened a meeting of an augmented panel to discuss copyright revision. Kaminstein invited the original twenty-nine panelists, chairmen of bar association committees, delegations from a dozen federal agencies and departments, and representatives of several interests that had until then been excluded.²³⁰ Kaminstein announced that the purpose of the meeting was for the assembled government and industry representatives to use the recommendations made in the Register's Report as the foundation for the development of inter-industry consensus.²³¹ The meeting was the first of a series; the series of meetings spawned further series of meetings; with each meeting the number of interests represented on the panel increased.²³² Between panel meetings, the panelists met with one another in search of compromises, and the Copyright Office urged further meetings and negotiations among affected interests.²³³ During the many meetings, the Copyright Office and

²²⁸ See REGISTER'S 1961 REPORT, *supra* note 196, at 71.

²²⁹ This interpretation of the bill is not explicitly reflected on the face of the statute, or in the House and Senate Committee Reports. The evolution of the language of the bill through the process of negotiations, however, reveals broadening rights, narrowing exceptions, and redrafting of statutory language to close perceived loopholes open to future exploitation. The negotiation process encouraged each subsequent draft to treat absent interests less generously than its predecessor. See *infra* notes 230-312 and accompanying text.

²³⁰ See CLR PART 2, *supra* note 6, at 1-4. Two congressional staffers also attended as observers. See *id.*

²³¹ See *id.* at 4-5; see also *id.* at 4 (remarks of Rutherford D. Rogers, Chief Assistant Librarian of Congress) ("We are in the unenviable position of being the middle man here trying to reconcile the interests of special groups as well as the public interest.").

²³² Compare, e.g., *id.* at 55-56 with CLR PART 5, *supra* note 205, at 33-36.

²³³ See 1975 House Hearings, *supra* note 204, at 93-94 (testimony of Abraham Kaminstein, Former Register of Copyrights); *Copyright Law Revision: Hearings on H.R.*

industry representatives hammered out the substance of a revision bill.²³⁴

In the 1961 Register's Report, the Copyright Office suggested only modest changes in the law: the codification of courts' solutions to assorted copyright problems, the clarification and simplification of language, and the removal of some anomalies created by technological change or historical accident.²³⁵ Meetings with representatives of affected interests, however, produced proposals to broaden rights²³⁶ and narrow exemptions and privileges.²³⁷ Suggestions for broad or general privileges evolved through negotiations to very specific ones.²³⁸

4347 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 31-32 (1965) [hereinafter 1965 House Hearings] (prepared testimony of George Cary, Deputy Register of Copyrights); id. at 994 (prepared testimony of Motion Picture Ass'n of America); 113 CONG. REC. 8586 (1967) (remarks of Rep. Poff).

²³⁴ See, e.g., *Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents Trademarks and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 64 (1965) [Hereinafter 1965 Senate Hearings] (testimony of Abraham Kaminstein, Register of Copyrights).*

²³⁵ See CLR PART 1, *supra* note 196; CLR PART 2, *supra* note 6, at 19 (remarks of George Cary, Deputy Register of Copyrights). See generally Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 484-90 (1977).

²³⁶ See, e.g., CLR PART 5, *supra* note 205, at 61 (remarks of Irwin Karp, Authors' League of America); CLR PART 3, *supra* note 203, at 109-17, 184-86 (colloquy); CLR PART 2, *supra* note 6, at 247-62 (written comments of Authors' League of America, Inc.).

²³⁷ See, e.g., CLR PART 5, *supra* note 205, at 58-59 (remarks of Edward Sargoy, ABA); *id.* at 96 (remarks of Phillip Wattenberg, Music Publishers' Ass'n); *id.* at 105 (remarks of Sidney M. Kaye, BMI); CLR PART 3, *supra* note 203, at 168-69 (remarks of Bella Linden).

²³⁸ For example, a proposal for a broad exemption for educational institutions evolved into a request for a narrow photocopying privilege. Representatives of educational institutions were included on the panel, but sat through early panel meetings with few comments. See CLR PART 2, *supra* note 6, at 42 (remarks of William Fidler, American Ass'n of University Professors). Others suggested a broad exemption for nonprofit use. See, e.g., *id.* at 223 (written comments of Eugene Aleinikoff). When it appeared that the panel was unlikely to endorse a nonprofit exemption, representatives of educators proposed a broad educational exemption. See CLR PART 3, *supra* note 203, at 150-51 (remarks of Harry N. Rosenfield). Confronted with intense opposition from publishers of textbooks, the panelists drafted a narrower, conditional educational exemption. See HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 217-25 (Comm. Print 1964) [hereinafter CLR PART 4] (remarks of Harry N. Rosenfield, Nat'l Education Ass'n); CLR PART 5, *supra* note 205, at 222-23 (written comments of Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision). By the time of the first congressional hearings on the revision bill, educators focused their request on a privilege for limited educational photocopying. See *1965 Senate Hearings, supra* note

For example, the performance right developed through the conferences into something much broader than the Register had initially proposed, with much narrower exceptions. The 1909 Act gave the owner of the copyright in a musical work the exclusive right to perform the work publicly for profit, subject to the jukebox exemption.²³⁹ A 1952 amendment extended the right of public performance for profit to lectures, sermons, and other nondramatic literary works.²⁴⁰ Dramatic works had had a public performance right without a for-profit limitation since 1856, while motion pictures had no explicit performance right at all.²⁴¹ The Register's 1961 Report recommended that musical and nondramatic literary works continue to have a public performance for profit right and that motion pictures be given a public performance right with no for-profit qualification.²⁴² Representatives of authors and composers, however, insisted that the for-profit limitation be discarded;²⁴³ composers and motion picture producers argued for a broader definition of public performance.²⁴⁴ The Copyright Office drafted a provision granting copyright owners the exclusive right to perform the work publicly, subject to express exceptions for educational and religious performances, charitable benefits, and retransmissions of television and radio broadcasts.²⁴⁵

The response from the panelists was guardedly positive; they shifted their emphasis to requesting that the exceptions be radically narrowed.²⁴⁶ Representatives of industries that performed copyrighted works were willing to go along so long as the exemptions and privileges set forth in the bill continued to address their con-

234, at 85 (testimony of Harold Wigren, Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision).

²³⁹ See *supra* note 62.

²⁴⁰ See *supra* note 173.

²⁴¹ See generally CLR PART 1, *supra* note 196, at 22-23, 27-32.

²⁴² See *id.* at 27-32. The Register also recommended the repeal of the jukebox exemption. *Id.*

²⁴³ See, e.g., CLR PART 2, *supra* note 6, at 286-88 (written comments of Herman Finklestein); CLR PART 3, *supra* note 203, at 135-36 (remarks of Barbara Ringer, Assistant Register for Examining).

²⁴⁴ See, e.g., CLR PART 2, *supra* note 6, at 404-07 (written comments of John F. Whicher); CLR PART 3, *supra* note 203, at 148 (remarks of Herman Finklestein, ASCAP); see also *id.* at 155 (remarks of Douglas Anello, Nat'l Ass'n of Broadcasters).

²⁴⁵ See CLR PART 3, *supra* note 203, at 4-14 (Preliminary Draft §§ 5(c), 8, 13); *id.* at 135-40 (remarks of Barbara Ringer, Assistant Register for Examining).

²⁴⁶ See, e.g., *id.* at 149 (remarks of Herman Finklestein, ASCAP); *id.* at 152-53 (remarks of Irwin Karp, Authors' League of America); *id.* at 241 (remarks of James A. Stable, Nat'l Broadcasting Co.).

cerns.²⁴⁷ Industry representatives got together in meetings sponsored by the Copyright Office or subcommittees of the bar associations and tried to come to terms on the scope of exceptions to the performance right.

In 1964, the Copyright Office circulated a draft bill with a more expansive definition of public performance and further restrictions and conditions on specifically worded exemptions and privileges.²⁴⁸ Panelists insisted that the exemptions and privileges were still too broad, general, and ambiguous.²⁴⁹ Claimants of privileges and exemptions complained that the language of the bill was still unclear.²⁵⁰ Another round of meetings produced an even more conditional and restrictively worded series of exemptions and privileges. By the time the 1965 bill was ready for Congressional hearings, the broadly defined public performance right had become encumbered with specifically worded conditional exceptions for classroom teaching, educational television transmissions within educational institutions, religious services, charitable benefits, cable retransmissions at no charge, transmission to private hotel rooms, and reception of broadcasts in public places.²⁵¹ By the time Congress enacted a revision bill in 1976, these exceptions and privileges had grown still more numerous, more narrowly worded, and more detailed.²⁵²

That pattern of evolution pervaded the revision bill. Copyright owners wanted the broadest possible rights with the narrowest possible exceptions.²⁵³ Many representatives of interests that used

²⁴⁷ See, e.g., *id.* at 145 (remarks of Eugene N. Aleinikoff, National Educational Television and Radio Center); *id.* at 241-44 (remarks of George Schiffer, Schiffer & Cohen); *id.* at 433 (written comments of George Schiffer).

²⁴⁸ See CLR PART 5, *supra* note 205, at 4-9 (S. 3008, §§ 5, 6, 8, 12, 13); *id.* at 94-96 (remarks of Abe Goldman, Copyright Office General Counsel).

²⁴⁹ See, e.g., *id.* at 59 (remarks of Edward A. Sargoy, ABA); *id.* at 96 (remarks of Phillip B. Wattenberg); *id.* at 105 (remarks of Sidney M. Kaye, BMI); *id.* at 224-25 (written comments of American Book Publishers' Council and American Textbook Publisher's Institute).

²⁵⁰ See *id.* at 60, 75 (remarks of George Schiffer, National Community Television Ass'n); *id.* at 64-65 (remarks of Eugene N. Aleinikoff, Nat'l Education Television and Radio Center).

²⁵¹ See H.R. 4347, 89th Cong., 1st Sess. § 109 (1965).

²⁵² Compare H.R. 4347, 89th Cong., 1st Sess. § 109 (1965) with S. 22, 94th Cong., 2d Sess. §§ 110, 111, 116, 118 (1976).

²⁵³ See, e.g., CLR PART 5, *supra* note 205, at 58-59 (remarks of Edward Sargoy, ABA); *id.* at 78-80 (colloquy); *id.* at 233 (written remarks of American Textbook Publishers' Institute); CLR PART 4, *supra* note 238, at 316 (written comments of Authors' League of America); *id.* at 323 (written comments of Joshua Binion Cahn); CLR PART 3, *supra* note 203, at 112 (remarks of Herman Finklestein, ASCAP); *id.* at 112-14 (re-

copyrighted works were agreeable to such a strategy on the condition that such exceptions explicitly cover their activities.²⁵⁴ In addition, some insisted that the product of their use of pre-existing copyrighted works itself be copyrightable and entitled to the expansive rights.²⁵⁵ Thus, the field of copyrightable subject matter grew progressively more inclusive.²⁵⁶ The Copyright Office had committed itself to seeking a consensus solution, and consensus jelled around a strategy of granting broad rights in an expansive field of copyrightable works and subjecting the rights to specific, narrowly tailored exceptions.²⁵⁷

marks of Edward A. Sargoy, ABA); *id.* at 130-31 (remarks of Irwin Karp, Authors' League of America).

²⁵⁴ See, e.g., CLR PART 5, *supra* note 205, at 60 (remarks of George Schiffer, Nat'l Community Television Ass'n); *id.* at 77 (remarks of Douglas A. Anello, Nat'l Ass'n of Broadcasters); CLR PART 4, *supra* note 238, at 54 (remarks of Raymond G. Larocca, Midwest Program on Airborne Television); CLR PART 3, *supra* note 203, at 127, 145 (remarks of Eugene N. Aleinikoff, Nat'l Television Educ. and Radio Center); *id.* at 158 (remarks of Barbara Ringer, Assistant Register for Examining); *id.* at 198-99 (remarks of Douglas Anello, Nat'l Ass'n of Broadcasters).

²⁵⁵ See, e.g., CLR PART 5, *supra* note 205, at 78-80 (colloquy); CLR PART 3, *supra* note 203, at 322-23 (remarks of Eugene N. Aleinikoff, Nat'l Educ. Television and Radio Center); CLR PART 2, *supra* note 6, at 13 (remarks of Thomas J. Robinson, Motion Picture Ass'n of America).

²⁵⁶ The Register's 1961 Report recommended retaining the 1909 Act's approach to copyrightable subject matter by specifying classes of copyrightable works. The Register suggested specifying all classes mentioned in the 1909 Act, plus any others Congress chose to add, but describing them in somewhat broader language to permit the development of new forms of traditionally copyrightable works. See CLR PART 1, *supra* note 196, at 11. Conference participants preferred a more general approach. See, e.g., CLR PART 3, *supra* note 203, at 46-59 (colloquy). The 1965 revision bill defined copyrightable subject matter broadly, declaring that copyright subsisted "in original works of authorship fixed in any tangible means 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." H.R. 4347, 89th Cong., 1st Sess. § 102 (1965). Accompanying the declaration was a nonexclusive list of categories of works of authorship. The law enacted in 1976 retained the quoted language with a slightly augmented list of categories. See 17 U.S.C. § 102(a). The scope of copyrightable subject matter extends copyright protection to most creations fixed in tangible form, including television and radio programs, toys, sound recordings, computer software and video games. The Register of Copyrights anticipated that enactment of the new statute would increase copyright registrations significantly. See LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1976, reprinted in 3 N. HENRY, COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD 316-17 (1978).

²⁵⁷ See, e.g., 1965 House Hearings, *supra* note 233, at 1858-59 (testimony of Abraham Kaminstein, Register of Copyrights); CLR PART 5, *supra* note 205, at 56-58 (remarks of Abe Goldman, Copyright Office General Counsel). Some of my colleagues would quarrel with my characterization of broad rights subject to narrow exceptions. Professor Jane Ginsburg, for example, argues that the fact that the performance and display rights granted by the statute are limited to *public* performance and display makes those rights

The bill introduced in Congress in 1965 followed this scheme. In the first of a long series of congressional hearings on copyright revision, Deputy Register George Cary explained the bill's approach:

The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try and foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.

Obviously, no one can foresee accurately and in detail the evolving patterns in the ways authors' work will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill adopts a general approach of providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology, so that as the years go by his copyright loses much of its value because of unforeseen technical advances.

For these reasons the bill reflects our belief that authors' rights should be stated in the statute in broad terms and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.²⁵⁸

Thus, a strategy born by accident of accretion had acquired its rationale. The revision bill spelled out five expansively defined exclusive rights: the right to reproduce or copy the work, the right to make derivative works or adapt the work, the right to distribute the work, the right to perform the work publicly, and the right to display the work publicly.²⁵⁹ It then subjected the exclusive rights to a

narrow indeed in an era of widespread private use. Ginsburg also suggests that the statute's incorporation of the first sale and fair use doctrines, *see infra* notes 338-70 and accompanying text, represents very broad limitation of the copyright owner's bundle of rights. *See also* Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 593-94 (1985) (describing exemptions from performance and display rights set forth in 17 U.S.C. § 110 as "the pork-barrel exemptions"). Professors Ginsburg and Brown would, I believe, nonetheless agree that the grant of rights in the 1976 Act is far broader, and that the statutory exceptions are more narrowly worded, than their counterparts in the 1909 Act and the early drafts of a revision bill.

²⁵⁸ 1965 *House Hearings*, *supra* note 233, at 32-33 (prepared testimony of George Cary, Deputy Register of Copyrights).

²⁵⁹ *See* H.R. 4347, 89th Cong., 1st Sess. § 106 (1965).

variety of narrowly drawn exceptions.²⁶⁰

D. Ongoing Negotiations and Narrower Solutions

Not all of the disputes were resolved through the prelegislative process. When Congress held its first hearings on the revision bill in the tenth year of the revision program, several controversies remained,²⁶¹ and more disputes arose as the rapid pace of technological change created new players and new problems.²⁶² Significantly, however, none of the unresolved controversies concerned the overall structure and approach of the bill.²⁶³ Almost all of the disputes involved specific details of particular privileges and exemptions.²⁶⁴ Members of Congress declined, for the most part, to respond to the controversies by attempting to arrive at policy solutions of their own devising. Instead, Congress involved itself in the mediation process, urging opposing interests to meet, cajoling them to reach agreement, and sometimes sitting down with them and demanding that they compromise.²⁶⁵ During the eleven additional years that it

²⁶⁰ See *id.* §§ 107-114. Compare the greater variety of even more narrowly drawn exceptions in 17 U.S.C. §§ 107-118.

²⁶¹ See 1965 Senate Hearings, *supra* note 234, at 68-72 (testimony of Abraham Kaminstein, Register of Copyrights).

²⁶² The entry of computer programs and computer databases into the arena, for example, significantly complicated already difficult disputes. See, e.g., 1967 Senate Hearings, *supra* note 210, at 192-201 (testimony of Arthur Miller, Ad Hoc Committee of Educ. Insts. and Orgs. on Copyright Law Revision); 1965 House Hearings, *supra* note 233, at 74-79 (testimony of Len Deighton, American Textbook Publishers Inst.).

²⁶³ See 1965 House Hearings, *supra* note 233, at 1857-73 (testimony of Abraham Kaminstein, Register of Copyrights).

²⁶⁴ According to Register Kaminstein, the controversies that remained unresolved as of the 1965 Hearings were the fate of the jukebox exemption, the scope of privileges or exemptions to be provided for education and educational broadcasting, the scope of privileges or exemptions for cable television, the statutory rate for the compulsory license for mechanical reproductions of music, and the retention of the manufacturing clause, which required some books to be printed from type set within the United States. See 1965 Senate Hearings, *supra* note 234, at 68-72. All but the last of these disputes involved the conditions under which uses of copyrighted material would be privileged or exempt. The parties ultimately settled the jukebox, public television, and cable television disputes by agreeing to establish new compulsory licenses. The rate dispute for the mechanical compulsory license settled when the parties agreed to let it be decided by the Copyright Royalty Tribunal, an agency invented to administer the three new compulsory licenses. Interested parties resolved the manufacturing clause dispute with a complicated agreement to limit the scope and duration of the domestic typesetting requirement and reduce the penalties for noncompliance. The Register of Copyrights disapproved of the substance of all of these agreements, but nonetheless recommended that Congress enact them. See Litman, *supra* note 15, at 869-78 and sources cited therein.

²⁶⁵ Litman, *supra* note 15, at 871-79; see also 1975 House Hearings, *supra* note 204, at 237-38 (testimony of Townsend Hoopes, Ass'n of American Publishers); *id.* at 363 (re-

took to produce a bill that every industry representative would be willing to support, the solutions to inter-industry disputes became progressively more complicated and detailed.

1. *Reproduction by Broadcasters and Libraries*

For example, the 1965 bill included a provision permitting broadcasters licensed to perform a work to make a single ephemeral recording of the work.²⁶⁶ The privilege, included at broadcasters' insistence as a condition for supporting the expanded performance right,²⁶⁷ to which it had no direct relation, would have allowed a broadcaster to make a temporary tape of a copyrighted work for convenience in broadcasting the work. Thus, a radio station could have taped a program of copyrighted songs, broadcast the songs, and then destroyed the tape or retained it solely for archival purposes.²⁶⁸ After testimony revealing that the privilege was controversial, the House Judiciary Committee reported out a version of the privilege that excluded motion pictures, imposed further limitations and conditions on the use of the recording, and prohibited the copyrighting of the recording without the consent of the owner of the copyright in the underlying work.²⁶⁹ In 1969, the Senate expanded the privilege for educational broadcasters, but not other broadcasters, in order to permit up to twelve ephemeral recordings and delay their destruction for up to five years.²⁷⁰ Later, Congress expanded the twelve recordings to thirty, lengthened the five years

marks of Rep. Drinan); *id.* at 890-91 (testimony of Eric Smith, Public Broadcasting Sys.); *id.* at 971 (testimony of Edward Cramer, BMI); *id.* at 1840, 1847 (testimony of Barbara Ringer, Register of Copyrights); *1965 House Hearings, supra* note 233, at 591 (remarks of Rep. Poff); LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1969, *reprinted in* 2 N. HENRY, *supra* note 256, at 154; LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1968, *reprinted in* 2 N. HENRY, *supra* note 256, at 3-4; 122 CONG. REC. 3824 (1976) (remarks of Sen. Hollings); *id.* at 31,980-81 (remarks of Rep. Kastenmeier); *id.* at 31,985 (remarks of Rep. Drinan); 113 CONG. REC. 8585, 8592 (1967) (remarks of Rep. Celler).

²⁶⁶ See H.R. 4347, 89th Cong., 1st Sess. § 110 (1965).

²⁶⁷ See, e.g., CLR PART 3, *supra* note 203, at 127 (remarks of Eugene N. Aleinikoff, Nat'l Educ. Television and Radio Center); *id.* at 198-99 (remarks of Douglas Anello, Nat'l Ass'n of Broadcasters).

²⁶⁸ See HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., 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 44-47 (Comm. Print 1965) [hereinafter CLR PART 6].

²⁶⁹ See H.R. 4347, 89th Cong., 2d Sess. § 112 (1966); H.R. REP. NO. 2237, 89th Cong., 2d Sess. 36 (1966).

²⁷⁰ See S. 543, 91st Cong., 1st Sess. (1969).

to seven years, added a separate privilege with its own conditions for distribution of an ephemeral recording of religious music, and finally, incorporated a distinct ephemeral recording privilege (limited to ten copies with no firm destruction date) for nonprofit educational broadcasts of nondramatic literary works to blind or deaf audiences.²⁷¹

Also unsettled at the time of the initial congressional hearings was the issue of library photocopying. The 1961 Register's Report proposed that the statute permit nonprofit libraries to supply their patrons with single photocopies of articles or out-of-print books.²⁷² It proved impossible to reconcile the positions of authors, publishers, and librarians during the conferences. The Copyright Office drafted an elaborate provision setting forth the conditions under which libraries could make photocopies; authors, publishers, and library groups demanded its deletion.²⁷³ Thus, the bill introduced in Congress contained no provision addressing library copying. At the request of historians and archivists, the House subcommittee added a provision in 1967 permitting nonprofit institutions to make archival copies of unpublished works. During the next round of hearings, library associations pressed for their own express exemption.²⁷⁴ The Senate subcommittee expanded the archival privilege into a complicated provision permitting libraries to reproduce works or portions of works under specific conditions and restrictions.²⁷⁵ In 1974, the Senate added additional conditions and restrictions. The 1974 provision specified the kinds of libraries entitled to the privilege, the nature of the works that could be reproduced, the amount of the works that could be copied, the number of copies that could be made, and the extent of the investigation the library must undertake before making any reproductions in an as-

²⁷¹ See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 101-05, *reprinted in* 1976 U.S. CODE CONG. AND ADMIN. NEWS 5659, 5715-20.

²⁷² See CLR PART 1, *supra* note 196, at 25-26.

²⁷³ See CLR PART 6, *supra* note 268, at 26. Authors and publishers argued that the provision would legalize copying prohibited under current law and, thus, open the door to wholesale abuse. Librarians argued that the provision would prohibit copying legal under current law and, thus, curtail established services and impede legitimate scholarship. See *id.*

²⁷⁴ See U.S. COPYRIGHT OFFICE, (DRAFT) SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL 57-103 (1975) [hereinafter REGISTER'S SECOND SUPPLEMENTARY REPORT].

²⁷⁵ See S. 543, 91st Cong., 1st Sess. § 108 (1969).

sortment of situations.²⁷⁶

While authors, publishers, and libraries sought to reach an agreement,²⁷⁷ the House added some refinements of its own, including provisions to treat interlibrary loans more explicitly and to require the Register of Copyrights to prepare periodic reports to Congress on the section's practical success.²⁷⁸ Efforts to mediate the continuing dispute finally bore fruit on the day the House passed the 1976 bill and referred it to the conference committee. Organizations representing authors, publishers, and libraries agreed to accept the provision passed by the House, as interpreted by a series of complicated guidelines on which they had concurred. The guidelines specified further conditions and restrictions, adopted definitions of disputed statutory language, and imposed record keeping requirements. The conference committee approvingly incorporated the guidelines in the Conference Report.²⁷⁹

2. Cable Television

Another, even more complex example is the way the bill accommodated cable television. When the cable television issue first surfaced in the conferences,²⁸⁰ the cable television industry had just begun commercial development. In the 1950s and early 1960s, cable operators erected community antenna systems that amplified and transmitted broadcast signals to private homes in communities unable to receive satisfactory television signals by conventional

²⁷⁶ See S. 1361, 93d Cong., 2d Sess. § 108 (1974). Register Ringer's report to the House subcommittee in 1975 described the amended Senate provision this way:

Note that the conditions set out in subsection (a) are only a general starting point. For a library activity to be exempt, it must also qualify under one of the conditions laid out in subsections (b) through (f) and must not run afoul of subsection (g) and must involve copying of a work that is not mentioned in subsection (h).

REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 74.

²⁷⁷ See 1975 House Hearings, *supra* note 204, at 193 (testimony of Edmon Low, Representative of six Library Associations); *id.* at 219 (testimony of Irwin Karp, Authors' League of America); *id.* at 225 (testimony of Charles Lieb, Ass'n of American Publishers); *Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 103 (1973) [hereinafter 1973 Senate Hearings] (testimony of Edmon Low, American Library Ass'n).

²⁷⁸ See H.R. REP. NO. 1476, *supra* note 271, at 74-79, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5688-92.

²⁷⁹ H.R. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 70-74 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5810, 5811-15.

²⁸⁰ See CLR PART 3, *supra* note 203, at 238-41 (remarks of Barbara Ringer, Assistant Register for Examining).

means. Under the 1909 Act, whether cable retransmissions triggered copyright liability depended upon whether the retransmissions would be deemed a "public performance," at that juncture an unsettled question.²⁸¹ As the conferences struggled to redefine the exclusive performance right, panelists had to confront the issue of cable television's liability. Cable television companies argued that the copyright law should exempt their community antenna systems from its coverage. Broadcasters and copyright owners²⁸² insisted that community antenna operators were collecting fees for cable service, and should not be able to use copyrighted material free of charge. In addition, they argued, the proliferation of community antenna systems discouraged the development of UHF stations within the community antenna systems' service areas. The Copyright Office devoted much energy to trying to promote agreement.²⁸³ Compromise proved elusive, however, because the ground kept shifting in response to technological and regulatory developments and judicial decisions.

In the 1965 bill, the Copyright Office included a provision that exempted cable retransmissions if made without charge and without any alteration of the broadcast signal content or transmission of original programming.²⁸⁴ Any other retransmission exposed the cable operator to copyright liability. Meanwhile, however, microwave transmission technology had developed, enabling cable systems to import television signals from distant cities to augment available programming. Broadcasters began to perceive cable as a

²⁸¹ The Supreme Court ultimately determined that cable retransmission was public, but was not a performance. See *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

²⁸² Broadcasters did not then and do not now, as a rule, own the copyright in the programs that they broadcast. Independent producers create the programs and secure licenses from underlying copyright owners. The producers then lease the programs to network or non-network broadcasting companies for a fee that, typically, does not cover the expenses of producing the program. After broadcasting the programs under the terms of the lease, the network has no further rights in the programs, and the producers can then try to make up the rest of their costs and perhaps make a profit by reselling the programs to others. In addition to the fee paid to the program's producers, broadcasters pay a separate royalty entitling them to perform any copyrighted music incorporated in the program. Thus, the most significant copyright owners in television programs are the producers of the programs and the composers of the music in the programs. However, broadcasters do own the copyright in programs, such as news programs, that they produce in-house.

²⁸³ See CLR PART 6, *supra* note 268, at 40-43.

²⁸⁴ H.R. 4347, 89th Cong., 1st Sess. § 109(5) (1966); see CLR PART 6, *supra* note 268, at 40-43.

serious threat. Also, during this time, a motion picture studio brought the first copyright infringement suit against a cable television system for unauthorized retransmissions of the studio's movies. On both sides of the controversy, parties' positions hardened. In the House and Senate hearings, broadcasters and copyright owners argued that all cable television was copyright infringement; cable companies insisted that they were entitled to a complete exemption from copyright liability for retransmissions.²⁸⁵

While the congressional committees struggled with the problem, the Federal Communications Commission (FCC) had already entered the dispute in order to protect broadcasters from the competition it perceived that cable television threatened. The FCC promulgated regulations requiring cable systems to carry signals of all local television stations and greatly restricting the importation of distant signals.²⁸⁶ Two months later, a district court in the Southern District of New York held a cable system liable for copyright infringement on the ground that its retransmission of local television signals was a public performance for profit.²⁸⁷ The Copyright Office continued to urge the parties to negotiate an agreement, and the FCC added its voice of encouragement. Representative Kastenmeier, chairman of the House subcommittee, proposed a compromise provision, while the Senate subcommittee scheduled special hearings to consider the cable television issue. Under the Kastenmeier provision, transmission of local signals with no alteration would be exempt from copyright liability.²⁸⁸ Transmission of imported distant signals would expose the cable operator either to full liability or to limited liability, depending on variables such as the reception of broadcast signals in the community and the presence within the local service area of a broadcast station licensed to carry the programs in the imported signal.²⁸⁹

The Kastenmeier proposal received more opposition than support.²⁹⁰ Representatives of cable television companies presented

²⁸⁵ See, e.g., *1965 House Hearings, supra* note 233, at 1243-55 (testimony of Frederick Ford, Nat'l Community Television Ass'n); *id.* at 1288-90 (testimony of Thomas J. Whyte, West Virginia and Middle Atlantic Community Television Ass'n); *id.* at 1332-53 (testimony of Arthur Krim, United Artists Corp.); *id.* at 1722-24 (testimony of Douglas Anello, Nat'l Ass'n of Broadcasters).

²⁸⁶ See *United States v. Southwestern Cable*, 392 U.S. 157, 165-67 (1968).

²⁸⁷ *United Artists Television 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).

²⁸⁸ See H.R. REP. NO. 2237, 89th Cong., 2d Sess. 77-88 (1966).

²⁸⁹ See *id.* at 85-87.

²⁹⁰ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 121-22;

their own compromise proposals, which exempted local signals, provided a compulsory license entitling cable operators to import any distant signal for a statutory fee, and released cable operators from the obligation to pay any royalties for the performance of copyrighted music.²⁹¹ The House Judiciary Committee adopted the Kastenmeier proposal rather than the cable industry's request for a compulsory license and reported the copyright revision bill incorporating the provision to the full House.²⁹² Acrimonious debate ensued over the cable provision. After intense, last minute negotiation, the House adopted an amendment deleting the cable provision entirely before passing the bill and referring it to the Senate.²⁹³ Parties resumed their negotiations, but the ground soon shifted again.

In 1967, the Supreme Court agreed to review lower court decisions subjecting cable television operators to copyright liability, and efforts to reach agreement stalled in the expectation of judicial resolution. The following year, the Court issued a decision reversing the lower courts' determination that cable retransmissions of local signals was copyright infringement; the Court held that cable retransmissions did not "perform" the copyrighted work within the meaning of the 1909 copyright statute.²⁹⁴ In another decision, the Court upheld the FCC's jurisdiction to regulate cable television;²⁹⁵ the FCC responded by imposing more stringent regulations prohibiting the importation of distant signals into major television markets without prior permission from the originating stations.²⁹⁶ Under these conditions, representatives of broadcasters and cable television companies finally negotiated an agreement in 1969,²⁹⁷ but the National Association of Broadcasters proved unable to persuade its membership to ratify it.²⁹⁸ The Senate, nonetheless, used some of

LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1967, reprinted in 2 N. HENRY, *supra* note 256, at 1-2.

²⁹¹ See *Copyright Law Revision—CATV: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess. 86-89 (1966) [hereinafter *1966 Senate Hearings*] (testimony of Frederick Ford, Nat'l Cable Television Ass'n); *id.* at 248-52 (written comments of Westinghouse Broadcasting Co.)

²⁹² See H.R. REP. NO. 83, 90th Cong., 1st Sess. (1967).

²⁹³ See 113 CONG. REC. 8990-9022 (1967); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 122.

²⁹⁴ *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

²⁹⁵ *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

²⁹⁶ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 124-26.

²⁹⁷ See *id.* at 127.

²⁹⁸ See *id.* at 128.

the provisions in the aborted 1969 agreement as the basis for its own compromise provision, establishing a compulsory license for cable retransmissions of local and distant signals under conditions established in the private agreement.²⁹⁹

The FCC, however, had in the interim been formulating its own new approach.³⁰⁰ The FCC announced a plan of its own, which interested parties found completely unacceptable.³⁰¹ At this point, the FCC and the Senate Committee invited Clay Whitehead, director of the White House Office of Telecommunications Policy, to become involved in the effort to move private negotiations forward.³⁰² Whitehead's initial efforts at mediation were unsuccessful. Eventually, however, he came up with a proposal and presented it to the interested parties on a take-it-or-leave-it basis. Whitehead's plan contemplated a compulsory license for such cable television retransmissions as the FCC's regulations permitted, but envisioned the FCC's using the regulations to protect programmers' exclusivity from competition by imported signals. In essence, the copyright owners would agree to cede control of their programs' retransmissions in return for a statutory compensation for cable use and on the condition that the FCC's regulations protect copyright owners and broadcasters from cable importation of signals that duplicated their programs. The parties grudgingly accepted the "consensus agreement," as it came to be called, and the FCC then promulgated regulations permitting cable systems to import distant signals under the agreement's terms.³⁰³

Before the Senate could act on the consensus agreement, however, the Supreme Court issued its decision in *Teleprompter Corp. v.*

²⁹⁹ See S. 543, 91st Cong., 1st Sess. § 111 (1969).

³⁰⁰ See LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1970, reprinted in 2 N. HENRY, *supra* note 256, at 156-57.

³⁰¹ The FCC proposed a plan permitting importation of a limited number of independent (non-network-affiliated) commercial signals, and an unlimited number of Public Broadcasting System signals, in return for a healthy fee to be used as a subsidy for PBS. Cable operators located in areas that did not receive all three network signals would also have been permitted to import a distant signal affiliated with the absent network. A particularly bizarre feature of the proposal required cable systems to delete advertisements from commercial distant signals and substitute advertisements provided by local broadcast stations. Nobody liked this proposal except the Public Broadcasting Corporation, and the FCC never implemented it.

³⁰² See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 134; 1973 Senate Hearings, *supra* note 277, at 278-80 (prepared statement of Jack Valenti, Motion Picture Ass'n of America).

³⁰³ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 131-40.

Columbia Broadcasting System,³⁰⁴ holding the importation of distant signals to be completely exempt from copyright liability under the 1909 Act. Cable operators began to disavow the portion of the consensus agreement that outlined mutually agreeable principles of copyright revision.³⁰⁵ The Senate Committee nonetheless modified its copyright bill to incorporate many of the copyright principles contained in the consensus agreement.³⁰⁶ The new provision established a compulsory license for retransmission of local signals and of distant signals that the FCC's regulations permitted cable systems to import, set statutory fees on the basis of cable systems' gross receipts, and provided for a Copyright Royalty Tribunal to resolve controversies among claimants to the royalty payments and to revise the statutory royalty rates in response to changes in conditions or in applicable FCC regulations. Broadcasters, copyright owners, and cable operators remained dissatisfied with the provision and continued their private negotiations. Ultimately, cable operators and copyright owners reached a different agreement, and the House incorporated that agreement into the copyright bill that Congress finally enacted in 1976.³⁰⁷

Broadcasters were not party to the agreement reflected in the House bill.³⁰⁸ As might be expected, that agreement disadvantaged them in comparison with the provisions of the consensus agreement incorporated in the Senate bill. Where the Senate bill had established a compulsory license for the broadcast of local signals and distant network signals, the House bill provided a copyright exemption for local and distant network signal retransmission and retained the compulsory license only for distant non-network signal retransmission.³⁰⁹ Where the Senate bill presumptively entitled net-

³⁰⁴ 415 U.S. 394 (1974).

³⁰⁵ See 1975 House Hearings, *supra* note 204, at 485 (testimony of Rex Bradley, Nat'l Cable Television); *id.* at 598-613 (testimony of David Wicks, Community Antenna Television Ass'n); *id.* at 656-66 (testimony of George Barco, Pennsylvania Community Antenna Ass'n); see also 1973 Senate Hearings, *supra* note 277, at 397-411 (testimony of David Foster, Nat'l Cable Television Ass'n); *id.* at 512-55 (testimony of Amos Hostetter, Nat'l Television Ass'n).

³⁰⁶ See S. 1361, 93d Cong., 2d Sess. § 111 (1974). The consensus agreement began to break down almost immediately, and witnesses before both subcommittees disputed whether the Senate provision accurately incorporated its key provisions.

³⁰⁷ See H.R. REP. 1476, *supra* note 271, at 88-101, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5702-16.

³⁰⁸ See *id.* at 90, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5705; 122 CONG. REC. 31,979 (1976) (remarks of Rep. Kastenmeier); *id.* at 31,984 (remarks of Rep. Railsback).

³⁰⁹ See H.R. REP. 1476, *supra* note 271, at 90, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5704.

work and local broadcasters to recover royalties from the compulsory license royalty fund, the House bill excluded them from the pool of royalty claimants.³¹⁰ Where the Senate bill calculated the statutory royalty as a percentage of gross receipts, the House bill calculated the royalty on the basis of the number of distant signals imported by the cable system.³¹¹

It took eleven years and the combined efforts of the Copyright Office, the bar associations, the House and Senate Subcommittees, the FCC, and the White House Office of Telecommunications Policy to force interested parties to reach an agreement on the revision bill's treatment of cable television. The ultimate provision enacted contained pieces of the Copyright Office's 1965 revision bill, pieces of the unratified 1969 agreement between the National Association of Broadcasters and the National Cable Television Association, pieces of the 1971 consensus agreement, and pieces of the last minute accord between the National Cable Television Association and the Motion Picture Association of America. It is the copyright statute's longest provision, and its least comprehensible piece of prose. It became obsolete before its effective date.³¹²

Negotiations over the rest of the bill's provisions reflect much the same story. From the inclusive group conferences, negotiations evolved into interlocking bilateral and trilateral deals. The deals themselves worked to the advantage of the interests party to them and to the comparative disadvantage of others. The longer the negotiations on a particular dispute continued, the narrower and more specific was the resulting solution.

E. Flexible Limitations

In 1976 Congress finally enacted the modern copyright statute it had labored over so long, and the Senate optimistically dissolved its Subcommittee on Patents, Trademarks and Copyrights.³¹³ For

³¹⁰ See *id.* at 97, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5712.

³¹¹ Compare S. REP. 473, 94th Cong., 1st Sess. 80-82 (1975) with H.R. REP. 1476, *supra* note 271, at 97-98, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5710-11.

³¹² See *infra* notes 373-96 and accompanying text; see also *Copyright Issues: Cable Television and Performance Rights: Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 2 (1980) [hereinafter *1979 House Hearings*] (remarks of Rep. Kasstemeier); *id.* at 2-14 (testimony of Henry Geller, U.S. Dep't of Commerce).

³¹³ See *Oversight of the Copyright Office and the Copyright Royalty Tribunal: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. 1-2 (1983) [hereinafter *1983 Senate Hearings*] (statement of Sen. Mathias).

those familiar with the struggles to apply the 1909 Act to developing technology, however, the 1976 Act should have seemed designed to fail the future in predictable ways. Broadly phrased general provisions have inherent flexibility. Narrow, specific provisions do not. In order to answer the questions that the future will present, a statute needs flexible language embodying general principles.

General, flexible statutory language need not confer uncabined discretion on the courts, nor consign affected industries to case-by-case determinations of liability. Flexible provisions that invoke principles rather than fact-specific conditions will give courts and industry actors more guidance, rather than less, as to the statute's application to situations that arise after the law's enactment. Indeed, it is the language tailored to reflect specific factual conditions that gives the courts nothing to work with once the predicate facts have grown outdated.³¹⁴

New players that technological change will introduce into the game have a particularly compelling need for flexible statutory provisions. The representatives of yet-to-develop technology cannot be present in a bargaining room filled with current stakeholders. They must, therefore, rely on such general and flexible provisions as the statutory scheme includes. The narrower and more specific the prose is, the less likely it is that a statutory provision will be sufficiently flexible to be responsive to technological change, and the more quickly the provision will be outdated.

A process that relies upon negotiated bargains among industry representatives, however, is ill-suited to arrive at general, flexible limitations. The dynamics of inter-industry negotiations tend to encourage fact-specific solutions to inter-industry disputes.³¹⁵ The participants' frustration with the rapid aging of narrowly defined rights has inspired them to collaborate in drafting rights more broadly. No comparable tendency has emerged to inject breadth or flexibility into the provisions limiting those rights. The only general limitations reflected in the current copyright statute were devised by courts in the nineteenth century, before Congress turned to a revision strategy resting upon meetings among affected interests.

³¹⁴ See *supra* notes 152-59 and accompanying text (application of 1909 Act to motion pictures and radio broadcasts); *infra* notes 373-93 and accompanying text (application of 1976 Act to satellite technology); accord *Copyright and Technological Change*, *supra* note 2, at 23-29 (testimony of Benjamin Compaign, Harvard University).

³¹⁵ See *supra* notes 131-52 and accompanying text.

Although these provisions have survived the press of technological change better than the narrow and specific limitations that pervade the 1976 Act, they have not been equal to the task of providing the flexibility necessary to respond to the developments that have arrived with the future.

The courts developed several general limitations on the copyright owners' bundle of rights in interpreting the 1909 Act and the copyright statutes that preceded it. Four of these court-crafted doctrines found their way into the revision bill, typically in response to particular disputes.³¹⁶ It is these more general limitations that have born the brunt of supplying the flexibility that the statute requires to adjust to technological change. The narrow disputes that engendered these doctrines' inclusion in statutory text, however, have distorted their application and limited their usefulness. Before discussing the role of these limitations in adapting to the future, I would like to describe each doctrine briefly, and explain how it came to be included in the 1976 Act.

1. *Idea/Expression Distinction*

The most fundamental of these court-made limitations is the idea/expression distinction. The doctrine dates back at least to the 1879 case of *Baker v. Selden*,³¹⁷ in which the Supreme Court held that a copyright on a book describing a bookkeeping system conferred no exclusive rights in the system itself. Copyright protects only expression and not the ideas expressed.³¹⁸ Where idea and expression are inseparable, copyright law permits others to use as much of the expression as is necessary to convey the unprotected idea.³¹⁹ Similarly, copyright does not protect facts, systems, or methods, but only the form in which they are described.³²⁰ The

³¹⁶ Other limitations survived because the statute failed to overrule them expressly. See, e.g., Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987). That the statute's few general limiting principles derive from judge-made law is no accident. The legislative process that I have described is an unlikely source of broad, general limitations. If these doctrines had been born in the revision process rather than in judicial decisions, they would not have been general.

³¹⁷ 101 U.S. 99 (1879).

³¹⁸ E.g., *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Nichols v. Universal Pictures*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931); see OTA REPORT, *supra* note 3, at 62-63.

³¹⁹ E.g., *Herbert Rosenthal Jewelry v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971); *Continental Casualty v. Beardsley*, 253 F.2d 702 (2d Cir.), cert. denied, 358 U.S. 816 (1958).

³²⁰ E.g., *Rosemont Enterprises, v. Random House*, 366 F.2d 303, 309 (2d Cir. 1966),

1961 Register's Report began with a description of the idea/expression distinction:

Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic or artistic form in which the author expresses intellectual concepts. It enables him to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he doesn't copy the author's form of expression.³²¹

The revision bill that emerged from the conferences made no mention of the idea/expression distinction. In the 1967 Senate Subcommittee hearings, however, representatives of educational organizations voiced strong opposition to the broad language of the subject matter and exclusive rights provisions of the bill, on the ground that the language could be interpreted to extend protection to the functional processes embodied in computer software.³²² Educational organizations proposed a broad restatement of the idea/expression distinction,³²³ publishers and authors registered their opposition.³²⁴ The Senate Subcommittee drafted a more narrowly worded provision and inserted it into the section on copy-rightable subject matter.³²⁵ The Subcommittee added language to

cert. denied, 385 U.S. 1009 (1967). See Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981); Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios*, 29 J. COPYRIGHT SOC'Y U.S.A. 647 (1982); Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560 (1982).

³²¹ CLR PART 1, *supra* note 196, at 3.

³²² See 1967 Senate Hearings, *supra* note 210, at 196-200 (testimony of Arthur Miller, Ad Hoc Committee of Educ. Insts. and Orgs. on Copyright Law Revision); *id.* at 550 (testimony of Edison Montgomery, Interuniversity Communications Council); *id.* at 1058-59 (testimony of W. Brown Morton, Interuniversity Communications Council).

³²³ See *id.* at 1058 (testimony of W. Morton Brown, Interuniversity Communications Council). Professors Arthur Miller and Benjamin Kaplan drafted a proposed amendment to section 106:

Provided, however, That nothing in this title shall be construed to give the owner of copyright the exclusive right to any idea, process, plan or scheme embodied or described in the copyrighted work or the right to prevent the preparation of any copy or derivative work that is necessary to the use of any idea, process, plan, or scheme embodied or described in the copyrighted work as an incident of such use.

Id.

³²⁴ See *id.* at 1109 (written comments of American Book Publishers' Council); *id.* at 1155-56 (written comments of Authors' League of America).

³²⁵ See S. 543, 91st Cong., 1st Sess. § 102(b) (1969):

In no case does copyright protection for an original work of authorship extend

the Committee Report, explaining that the purpose of the subsection was to clarify the debate over computer programs and "make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law."³²⁶

2. *Useful Articles Doctrine*

A second longstanding doctrine, prohibiting copyright protection of utilitarian articles, also derives from *Baker v. Selden*.³²⁷ The Copyright Office refused to accept utilitarian articles for registration, and courts upheld the determination that utilitarian articles were ineligible for protection.³²⁸ In a 1954 decision, *Mazer v. Stein*,³²⁹ the Supreme Court took some of the teeth from the limitation by holding that an otherwise copyrightable work incorporated into a utilitarian design remained copyrightable.³³⁰ As interpreted by the Copyright Office in succeeding years, the decision permitted the copyrighting of the nonutilitarian features of utilitarian articles.³³¹ The Copyright Office was flooded with applications for registration of objects of industrial design with ornamental features, such as jewelry, textiles, toys, and dinnerware.³³² Meanwhile, the Register urged Congress to enact a bill giving industrial designs *sui generis* protection.³³³

Extended discussions with industry representatives during the period preceding the copyright revision effort produced a compromise in 1957, which dictated the substance of both an ultimately unsuccess-

to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

The provision enacted by Congress omitted the word "plan." See 17 U.S.C. § 102(b).
³²⁶ S. REP. NO. 983, 93d Cong., 2d Sess. 107 (1974). See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 10.

³²⁷ See, e.g., *Taylor Instrument v. Fawley-Brost Co.*, 139 F.2d 98, 100-01 (7th Cir. 1943), *cert. denied*, 321 U.S. 785 (1944); *Amberg File & Index v. Shea Smith & Co.*, 82 F. 314, 315 (7th Cir. 1897).

³²⁸ See, e.g., *Amberg File & Index*, 82 F. at 314; *Kemp & Beatley, Inc. v. Hirsch*, 34 F.2d 291 (E.D.N.Y. 1929).

³²⁹ 347 U.S. 201 (1954).

³³⁰ *Id.* at 214-15. See Denicola, *supra* note 180, at 711-17.

³³¹ See CLR PART 1, *supra* note 196, at 12-16; Brown, *Design Protection: An Overview*, 34 U.C.L.A. L. REV. 1341, 1352-53 (1987); Samuelson, *Contu Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 728-36.

³³² See CLR PART 1, *supra* note 196, at 12.

³³³ See *id.* at 13.

cessful sui generis design bill and the copyright revision bill's approach to protection of industrial designs.³³⁴ The compromise called for continuing the current level of industrial design protection under the copyright law; the Register obligingly incorporated the substance of his extant regulations on utilitarian articles into the revision bill. When the conferences produced provisions greatly broadening the scope of copyrightable subject matter and expanding the extent of exclusive rights, the Register added a provision purporting to freeze current law relative to the protection of useful articles.³³⁵ These provisions were placed in portions of the statute applicable solely to copyright in pictorial, graphic, and sculptural works.³³⁶ Although other limitations in the statute were drafted to have general application to particular exclusive rights rather than to particular classes of works,³³⁷ the limitations on copyright in useful articles remained, by accident of placement, relevant only to pictorial, graphic, and sculptural works.³³⁸

Both the idea/expression distinction and the useful articles doctrine are subject matter limitations on what aspects of a copyrighted work may be protected.³³⁹ By excluding ideas, facts, or utilitarian features from the realm of copyrightable subject matter, the statute puts them into the public domain, where they may be copied with impunity. The copyright in a work that is largely factual, for example, may be described as thinner than the copyright in a work that is entirely fictional. Similarly, the copyright in a functional work is thinner than the copyright in an entirely ornamental work.³⁴⁰ Two additional general limiting principles made their way into the statute. In contrast to the subject matter limitations, these principles restrict the extent of the copyright owner's rights rather than the scope of copyrightable subject matter.

³³⁴ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 274, at 194-96; CLR PART 2, *supra* note 6, at 189-94 (various witnesses).

³³⁵ See CLR PART 3, *supra* note 203, at 67 (remarks of Abraham Kaminstein, Register of Copyrights).

³³⁶ See 17 U.S.C. §§ 101, 113.

³³⁷ See, e.g., *id.* § 110. *But see id.* § 114(b) (limitations on exclusive rights in sound recordings).

³³⁸ See, e.g., *E.F. Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485, 1498 (D. Minn. 1985) ("The Court cannot accept defendant's characterization of plaintiff's programs as 'a useful work.' Congress has clearly defined computer programs as 'literary works.' . . . Accordingly, the limitations placed on the copyrightability of useful articles by section 101 of the Act are simply not applicable here." (citations omitted)).

³³⁹ See Brown, *supra* note 257, at 581.

³⁴⁰ See, e.g., Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1120-21 (1986).

3. *First Sale Doctrine*

The third doctrine developed by the courts is the first sale doctrine.³⁴¹ Under the first sale doctrine, the copyright owner's exclusive control over the public distribution of copies of a work is exhausted, as to a particular copy of a work, upon the first authorized sale of that copy.³⁴² It is the first sale doctrine that permits the operation of lending libraries and second hand book stores notwithstanding the copyright owner's exclusive right of distribution. Cases made clear that the first sale doctrine terminated the copyright owner's distribution right with respect to a particular copy;³⁴³ the 1909 Act incorporated that principle in terms.³⁴⁴ It was less clear whether the first sale doctrine had any effect on the rest of the rights in the copyright bundle.³⁴⁵ The majority view appeared to be that the copyright owner lost any right to display a particular copy in public along with the distribution right, but retained the rights of reproduction, adaptation, and public performance for profit.³⁴⁶

Two controversies led to the inclusion of a modified first sale doctrine in the copyright revision bill. First, representatives of authors requested an explicit rental and lending right, which would in essence have repealed the first sale doctrine entirely.³⁴⁷ Second, when the Register responded to requests to redraft a proposal that embodied broader rights with specific exceptions,³⁴⁸ the Copyright Office draft included an express right of public display for pictorial, graphic, and sculptural works only. No display right appeared in

³⁴¹ See, e.g., Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology*, 28 JURIMETRICS J. 179, 195-97 (1988).

³⁴² See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 690-91 (2d Cir. 1894); *Fawcett Publications v. Elliot Publishing*, 46 F. Supp. 717 (S.D.N.Y. 1942).

³⁴³ See, e.g., *Fawcett Publications*, 46 F. Supp. at 717.

³⁴⁴ See 1909 Act, *supra* note 10, § 27.

³⁴⁵ See Samuelson, *supra* note 341, at 196-98 & n.84.

³⁴⁶ See, e.g., *National Geographic Soc'y v. Classified Geographic*, 27 F. Supp. 655 (D. Mass. 1939). One factor complicating the inquiry was the fact that during the early part of the century, music publishers licensed the right to perform music as part and parcel of the sale of copies. The purchaser of sheet music thus bought the right to perform the music publicly for profit. See *Arguments on H.R. 11943 Before the House Comm. on Patents*, 59th Cong., 1st Sess. 11-16 (1906), reprinted in 4 E.F. BRYLAWSKI AND A. GOLDMAN, *supra* note 6, at pt. F (colloquy). Another complication was the widely held, but never tested in the courts, view that fair use permitted the owner of a copy to reproduce it. See *1965 House Hearings*, *supra* note 233, at 1497-1510 (testimony of Ralph Dwan, Minnesota Mining and Mfg. Co.).

³⁴⁷ See CLR PART 2, *supra* note 6, at 20-21 (colloquy); *id.* at 255-57 (written comments of Authors' League of America); *id.* at 313-14 (written comments of Irwin Karp).

³⁴⁸ See *supra* notes 236-48 and accompanying text.

the 1909 Act, and the 1961 Register's report made no mention of one.³⁴⁹ The Copyright Office's proposal called for a display right severely limited by the first sale doctrine: the right to display a copy, which included both display in a public place and television broadcast or motion picture exhibition, would terminate completely upon that copy's sale.³⁵⁰ Artists' representatives responded with dismay.³⁵¹ Book publishers echoed the objections.³⁵²

The Copyright Office held meetings with artists' and publishers' representatives and interested ABA members and then drafted a broad display right subject to a more limited first sale doctrine.³⁵³ Under the new first sale provision, sale of a copy of a work entitled the purchaser to resell or lend it and to display it to people located in the same room. The copyright owner retained the right to television or other remote display.³⁵⁴ Moreover, while the privilege codified in the 1909 Act could be exercised by anyone in lawful possession of a copy,³⁵⁵ the revision bill's narrower first sale provision applied only to owners of copies and persons acting with the owners' authority.³⁵⁶ This mollified artists' and publishers' representatives. Authors' representatives initially continued to press for a public lending right³⁵⁷ but abandoned their request in view of other concessions. The display right and the first sale doctrine received some further tinkering in Congress. The display right was expanded to vest in literary, musical, dramatic, and choreographic works, pantomimes, and the individual images of motion pictures or other audio-visual works, as well as pictorial, graphic, and sculp-

³⁴⁹ See CLR PART 3, *supra* note 203, at 157 (remarks of Barbara Ringer).

³⁵⁰ See *id.* at 6.

³⁵¹ See *id.* at 184-85 (remarks of Harriet Pilpel); CLR PART 4, *supra* note 238, at 323 (written comments of Joshua Binion Cahn) ("If the proposed provision with respect to the right to exhibit means what I think it does, I find it repugnant and shocking.").

³⁵² See CLR PART 3, *supra* note 203, at 185-87 (colloquy).

³⁵³ See CLR PART 5, *supra* note 205, at 56-59, 66 (remarks of Abe Goldman and Barbara Ringer, Copyright Office).

³⁵⁴ See *id.* at 66 (remarks of Barbara Ringer, Copyright Office).

³⁵⁵ See 1909 Act, *supra* note 10, § 27 ("[N]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of the copyrighted work the possession of which has been lawfully obtained . . .").

³⁵⁶ The 1964 draft of the revision bill restricted the privileges of transfer and display under the first sale doctrine to owners of lawfully made copies, expressly excluding renters and borrowers. See CLR PART 5, *supra* note 205, at 5. The Copyright Office's draft of the 1965 Revision bill extended the privileges to persons authorized by the purchaser of the copy. See H.R. 4347, 89th Cong., 1st Sess. § 108 (1965).

³⁵⁷ See CLR PART 5, *supra* note 205, at 61 (remarks of Irwin Karp, Authors' League of America).

tural works.³⁵⁸ Congress revised the first sale doctrine to limit the display privilege to displays involving the actual copy or the projection of no more than one image at a time.³⁵⁹

4. *Fair Use*

The fourth general limitation was the controversial doctrine of fair use. Fair use originated as a judicially created, implied limitation on copyright owners' rights. One of its earliest American expressions came in the 1841 case of *Folsom v. Marsh*.³⁶⁰ Fair use evolved in the case law into a privilege to use a reasonable portion of a copyrighted work for a reasonable purpose, but the privilege eluded precise definition.³⁶¹ Defendants commonly invoked the privilege in cases involving parody, biography, or scholarly research.³⁶² The Copyright Office's study on fair use concluded that the courts assessed a variety of factors in determining whether an allegedly infringing use was fair.³⁶³

The 1961 Register's Report suggested that the revision bill give explicit recognition to the fair use doctrine.³⁶⁴ The proposal proved controversial; conference participants disagreed on the scope of fair use under extant law and also disagreed on the wisdom of reducing their understanding to statutory text.³⁶⁵ The Copyright Office's efforts to negotiate a compromise before presenting a bill to Congress failed when the issue of fair use became tangled with the issue of educational use.³⁶⁶

³⁵⁸ See 17 U.S.C. § 106(5); S. 543, 91st Cong., 1st Sess. § 106(5) (1969).

³⁵⁹ See 17 U.S.C. § 109; H.R. 2512, 90th Cong., 1st Sess. § 109 (1967).

³⁶⁰ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). See generally W.F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3-64 (1985). *Folsom v. Marsh* involved a suit by a biographer of George Washington against a second biographer who had incorporated material from the plaintiff's work in a later biography of Washington.

³⁶¹ See generally Latman, *Fair Use of Copyrighted Works*, reprinted in SUBCOMM. ON PATENTS, TRADEMARKS AND PATENTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960).

³⁶² See, e.g., *Rosemont Enters. v. Random House*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Columbia Pictures v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

³⁶³ See Latman, *supra* note 361, at 14-18.

³⁶⁴ See CLR PART 1, *supra* note 196, at 25.

³⁶⁵ See 1965 *House Hearings*, *supra* note 233, at 37-40 (prepared statement of George Cary, Deputy Register of Copyrights); *id.* at 74-79 (testimony of Lee Deighton, American Textbook Publisher's Inst.); *id.* at 315-18 (testimony of Harold Wigren, Ad Hoc Comm. of Educ. Insts. and Orgs. on Copyright Law Revision); *id.* at 342-44 (prepared statement of Harry Rosenfield, Ad Hoc Comm. of Educ. Insts. and Orgs. on Copyright Law Revision); *id.* at 364-65 (colloquy); *id.* at 1451-53 (colloquy).

³⁶⁶ See Litman, *supra* note 15, at 875-77, 886-88.

Representatives of educational institutions requested a statutory exemption for educational use.³⁶⁷ Authors and publishers refused; they insisted that educators were already abusing the copyright law and should receive no further privileges beyond those the fair use doctrine already permitted.³⁶⁸ Educators responded that fair use was too unpredictable a doctrine for them to rely on;³⁶⁹ moreover, because most fair use cases arose in commercial contexts, they gave little guidance to the doctrine's application in a nonprofit educational setting.³⁷⁰ The Register and the House Subcommittee's general counsel convened several series of meetings; members of Congress urged further negotiations. Ultimately a compromise emerged, encompassing both the language of a statutory fair use section and the language of the House and Senate Reports to accompany it.³⁷¹ The resulting statutory provision combined language from the Register's initial proposal with examples of educational use. The accompanying passages in the House and Senate Reports grew by accretion to include the authors' and publishers' early demand that the goal of the statutory provision was "to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way"; the educators' demand for an extensive discussion of photocopying for classroom use; and the text of letters from representatives of affected interests together with exceedingly detailed guidelines on classroom reproduction that the representatives had negotiated among themselves.³⁷²

Each of these general limitations originated in judicial opinions of the nineteenth century. Each appeared in the 1976 Act in response to particular concerns. The codification process introduced its own distortions. The useful articles doctrine, for example, ceased to be a general limitation and became instead a peculiarity of copyright in pictorial, graphic, and sculptural works. The fair use doctrine be-

³⁶⁷ See CLR PART 5, *supra* note 205, at 116 (remarks of Harry Rosenfield, Ad Hoc Comm. of Educ. Insts. and Orgs. on Copyright Law Revision); *id.* at 125 (remarks of Robert Shafer, Nat'l Council of Teachers of English); CLR PART 3, *supra* note 203, at 150-51 (remarks of Harry Rosenfield).

³⁶⁸ See CLR PART 5, *supra* note 205, at 96 (remarks of Phillip Wattenberg, Music Publishers Ass'n); *id.* at 103 (remarks of Irwin Karp, Authors' League of America).

³⁶⁹ See 1965 House Hearings, *supra* note 233, at 351-53 (testimony of Harry Rosenfield, Ad Hoc Comm. on Copyright Law Revision); *id.* at 364-65 (colloquy); CLR PART 5, *supra* note 205, at 98-100 (Statement of Ad Hoc Comm. on Copyright Law Revision).

³⁷⁰ See, e.g., 1973 Senate Hearings, *supra* note 277, at 193 (testimony of Richard J. Schoeck, Modern Language Ass'n).

³⁷¹ See Litman, *supra* note 15, at 876-77.

³⁷² See H.R. REP. NO. 1476, *supra* note 271, at 65-74, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678-88; S. REP. 473, 94th Cong., 1st Sess. 61-67 (1975).

came encumbered with the idiosyncratic needs of educational users. These doctrines are, however, the most flexible limitations the statute offers in order to balance its expansive rights and broad subject matter.

V

THE FUTURE OF THE 1976 ACT

The 1976 Act's strategy has caused it difficulties in adjusting to technological development. The specificity of the statute's prose renders its detailed provisions increasingly irrelevant, while its few more general provisions are not elastic enough to compensate for the specific provisions' weaknesses. Although the statute is a relatively young one, its inability to adjust to the changes in the world it was designed to order has already become manifest. I will review two of the 1976 Act's most troublesome failures. First, I will illustrate the pitfalls of reliance on too-specific language by examining the fate of the statute's cable television provision. I will then explore the inadequacy of the law's few general provisions in a discussion of the problems posed by private use.

A. Cable Television and its Competitors

Under the 1976 Act's broad definition of public performance,³⁷³ any transmission of a radio or television signal is a public performance and can trigger copyright liability unless it comes within a privilege or license spelled out in the statute. For example, one subsection of the statute privileges the behavior of individuals who merely turn on a radio or television in a public place,³⁷⁴ without that exemption, a clerical worker's use of a transistor radio at the

³⁷³ See 17 U.S.C. § 101:

To perform or display a work "publicly" means—

- (1) To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) To transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

³⁷⁴ See *id.* § 110(5). Subsection 110(5) establishes a conditional privilege for the "public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes," but prohibits charging anyone to see or hear the transmission or any further transmission of the signal. The statute defines transmission as communication "by any device or process whereby images are received beyond the place from which they are sent." *Id.* § 101.

office would infringe the copyright owner's exclusive right "to perform the copyrighted work publicly."³⁷⁵

The cable television section includes an exemption for passive common carriers with "no direct or indirect control over the content or selection of the primary transmission or over recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others."³⁷⁶ It includes a complicated group of privileges and compulsory licenses for some, but by no means all, cable television transmissions.³⁷⁷ The complex provisions of the cable section were drawn to accommodate industry practices in the mid-1970s and to incorporate the substantive regulatory structure that the FCC had put in place, much of which was integral to the deal. Neither the industry practices of the mid-1970s nor the FCC's regulations, however, survived very long.

The development of satellite technology soon made satellite transmission preferable to microwave transmission for delivery of cable signals. The copyright status of satellites and satellite transmissions, however, was murky. Could a communications satellite come within the statutory exemption for passive common carriers? Nobody was sure.³⁷⁸ The use of satellite technology spurred the growth of original cable programming, which offered an attractive alternative to the importation of distant signals. Pay cable programming companies, such as Home Box Office, began to offer programs directly to cable systems. The FCC imposed stringent restrictions on pay cable programming, but, in 1977, the Court of Appeals for the D.C. Circuit struck those regulations down.³⁷⁹ Shortly thereafter, the FCC decided to re-examine the rest of its cable television regulations,³⁸⁰ and ultimately dismantled much of

³⁷⁵ *Id.* § 106.

³⁷⁶ *Id.* § 111(a)(3).

³⁷⁷ *Id.* § 111(c).

³⁷⁸ See 1979 *House Hearings*, *supra* note 312, at 23 (prepared statement of Barbara Ringer, Register of Copyrights). Ultimately, the courts concluded that communications satellites operating as common carriers were entitled to the passive carrier exemption in § 111(a)(3). See *Hubbard Broadcasting v. Southern Satellite Systems*, 777 F.2d 393 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986); *Eastern Microwave v. Doubleday Sports*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

³⁷⁹ See *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

³⁸⁰ See 1979 *House Hearings*, *supra* note 312, at 3 (prepared statement of Henry Geller, U.S. Dep't of Commerce).

the regulatory structure on which the copyright statute's language had been based.³⁸¹ Some of the remaining regulations were later held unconstitutional by the courts.³⁸² The newly established Copyright Royalty Tribunal attempted to compensate for the FCC's deregulation with a radical recalibration of compulsory license royalty fees;³⁸³ copyright owners, broadcasters, and cable operators came running to Congress demanding that it revise the balance.³⁸⁴ Members of Congress again applied pressure to encourage a privately negotiated solution.³⁸⁵ Tentative deals emerged from private negotiations but dissolved before final agreements could be reached.³⁸⁶

At the same time, the playing field grew more crowded. Alternatives to cable television systems sprung up. Apartment complexes installed Satellite Master Antenna Systems, which combined satellite dishes and conventional antennas to provide a range of programming to residents. The Register of Copyrights concluded that the application of the compulsory license provision to Satellite Master Antenna systems was unclear.³⁸⁷ Further complications arose in 1982 when the FCC authorized low-power television stations.³⁸⁸ Was a low-power television station located in the same community as a cable system a "local" station within the meaning of the statute and thus "entitled to insist upon its signal being re-transmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976"?³⁸⁹ Alternatively, was the station to be deemed a "distant" one, and entitled to royalties if the cable system

³⁸¹ See 1983 Senate Hearings, *supra* note 313, at 5 (testimony of David Ladd, Register of Copyrights).

³⁸² See *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

³⁸³ See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983).

³⁸⁴ See *Copyright/Cable Television: Hearings on H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870 and H.R. 5949 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 2 (1982) (remarks of Rep. Kastenmeier).

³⁸⁵ See, e.g., *id.* at 1266-67 (testimony of Thomas Wheeler, Nat'l Cable Television Ass'n); *id.* at 1335 (testimony of Jack Valenti, Motion Picture Ass'n of America).

³⁸⁶ See, e.g., *id.* at 1357 (testimony of Vincent T. Wasilewski, Nat'l Ass'n of Broadcasters).

³⁸⁷ See *Copyright and New Technologies*, *supra* note 2, at 53-54 (prepared statement of Ralph Oman, Register of Copyrights).

³⁸⁸ See 47 Fed. Reg. 21,468 (1982), *on recon.*, 48 Fed. Reg. 21,478 (1983).

³⁸⁹ 17 U.S.C. § 111(f).

chose to carry it? Low-power television stations asked the Copyright Office for a ruling on their status; the Copyright Office held a public hearing on the issue and concluded that the statute was ambiguous.³⁹⁰

As with the 1909 Act, linguistic fortuity appeared to control the legal status of developing technology. The increasing use of satellites led to the marketing of the home satellite dish, which enabled viewers to intercept satellite transmissions without paying a cable system to deliver them. Was the use of a satellite dish an infringement of copyright? The answer depended in part on whether the satellite dish could appropriately be characterized as a "single receiving apparatus of a kind commonly used in private homes."³⁹¹ In response to home satellite dish purchases, cable programmers began scrambling their signals. Cable services sought to scramble the broadcast signals they obtained via satellite, but the copyright statute posed a problem. Both the exemptions and the compulsory licenses in the statute prohibited signal alteration. If the satellite systems performed either the scrambling or unscrambling themselves, they could no longer claim that they had no control over the signal's content but merely provided "wires, cables, or other communications channels for the use of others."³⁹² If a cable system scrambled or unscrambled the signal itself, it would run afoul of the statutory provision that prohibited willful alteration of the signal "through changes, deletions, or additions."³⁹³

The essence of the problem for all of the newly developed entertainment technologies was that the 1976 Copyright Act gave copyright owners a very broad public performance right subject only to enumerated exceptions. The definition of performance was designed to encompass future technological developments; the privileges and limitations were not. The legality of a new entertainment service, therefore, depended entirely upon whether its activities fit within specifically worded exceptions negotiated without it in mind.³⁹⁴ This severely disadvantaged newcomers to the market-

³⁹⁰ See *Copyright and New Technologies*, *supra* note 2, at 7-10 (prepared statement of Ralph Oman, Register of Copyrights). In 1986, Congress enacted a narrow amendment to § 111, clarifying low-power television's status for the purpose of the cable compulsory license. See Pub. L. No. 99-397 (1986).

³⁹¹ 17 U.S.C. § 110(5). See *Entertainment and Sports Programming Network v. Edinburg Community Hotel*, 623 F. Supp. 647 (S.D. Tex. 1985); *Copyright and New Technologies*, *supra* note 2, at 122 (colloquy).

³⁹² 17 U.S.C. § 111(a)(3).

³⁹³ *Id.* § 111(c)(3).

³⁹⁴ See *Copyright and New Technologies*, *supra* note 2, at 4 (testimony of Ralph

place, since, at best, their legal status remained uncertain until Congress or the courts could speak. A new medium's only secure course was to pursue negotiated licenses with the innumerable copyright owners whose works appeared in the signals, at prohibitive transaction costs.

I pick on the cable compulsory license provision because it is a particularly easy target, and because the unsuccessful effort to clarify its ambiguities has occupied Congress throughout the past decade.³⁹⁵ The problems with the cable television provisions, however, are symptomatic of problems that pervade the 1976 Act. Defining very broad rights subject to very specific exceptions creates a systemic bias: the exceptions will quickly grow obsolete, while the increasingly less qualified rights will endure. The lesson that emerges from the rapid obsolescence of the cable provisions is that a statute needs more than a discernible strategy to adjust to technological change; it must also incorporate some flexibility.³⁹⁶

B. *Private Use*

Technological progress has gradually upset the overall balance that the statute struck when it was enacted by making the law's specific limitations trivial. The few more elastic limitations have been insufficiently powerful to restore the law's balance. In the

Oman, Register of Copyrights). In *Pacific & Southern Co. v. Satellite Broadcast Networks*, for example, the operator of a direct broadcast satellite, which made secondary transmissions of broadcast programming directly to home satellite dishes, argued that it was entitled to a cable compulsory license. The court held that defendant could not use a cable compulsory license because it was not a cable system within the meaning of the statutory language. "[T]he definition of a cable system . . . requires the cable system to be facility, located in any state, which makes secondary transmissions of signals. SBN's satellite which orbits the earth is not a facility located in any state." *Pacific & Southern Co. v. Satellite Broadcast Networks*, 694 F. Supp. 1565, 1570 (N.D. Ga. 1988).

³⁹⁵ Extensive inter-industry negotiations have yielded only partial, piecemeal solutions. In 1988, Congress clarified the rules for a subgroup of satellite systems operators by adding a complicated new compulsory license to the statute. See *Satellite Home Viewer Act of 1988*, Pub. L. No. 100-667, 102 Stat. 3935 (1988) (codified at 17 U.S.C. § 119); Olson, *supra* note 2, at 121-22; *supra* note 16.

³⁹⁶ In theory, courts could supply the flexibility that the statute lacks. Courts could attempt to interpret the 1976 Act in a manner that would give greater flexibility to its limitations. They could go further and use the statute's specific privileges as bases for generalization. The ephemeral recording privileges in 17 U.S.C. § 112, for example, might suggest a more general privilege to make temporary copies (or indeed other incidental use) of a copyrighted work in connection with a use that has already been licensed. Most contemporary courts, however, would view such an undertaking as within Congress's exclusive preserve.

years since the statute's enactment, these general doctrines have themselves come under attack.

In the decade since the 1976 Act took effect, the most vexing problems posed by new technology have involved new communications media, computer databases and software, and private use. Other, potentially more serious problems appear on the horizon, but have yet to manifest themselves in concrete disputes.³⁹⁷ I have already discussed some of the problems posed by new communications media.³⁹⁸ Computer software problems³⁹⁹ have generated an extensive literature of their own.⁴⁰⁰ I will not take time here to go back over that ground, except to note in passing that courts struggling with computer database and software cases have given the idea/expression distinction short shrift.⁴⁰¹ I would, however, like to devote some attention at this point to private use.

³⁹⁷ See generally OTA REPORT, *supra* note 3, at 102-16, 138-54; see also Fleischmann, *supra* note 3 (problems threatened by digital technology); Kost, *supra* note 3 (problems threatened by integrated digital network systems); Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723 (1987).

³⁹⁸ See *supra* notes 373-95 and accompanying text.

³⁹⁹ In 1980, Congress amended the copyright statute to add provisions to clarify the scope of copyright in computer programs. Pub. L. No. 96-517, 94 Stat. 3028 (1980) (codified at 17 U.S.C. §§ 101, 117). These provisions were drafted, not by agreement of industry representatives, but by a blue ribbon commission appointed by Congress to formulate solutions to copyright problems posed by technology. See NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT (1979). The resulting amendments are widely, if not universally, acknowledged to have been disastrous. They have failed to meet the legitimate needs of either software proprietors or software users. See, e.g., OTA REPORT, *supra* note 3, at 59-85; Derwin & Siegel, *Microcode Copyright Infringement*, 4 COMPUTER LAW., April, 1987, at 1; Haynes & Durant, *Patents and Copyrights in Computer Software Based Technology: Why Bother With Patents?*, 4 COMPUTER LAW., Feb., 1987, at 1; Samuelson, *supra* note 331; sources cited *infra* note 400. Their most obvious flaw appears to be that the Commission had only superficial understanding of computers and less understanding about processes of software design and use.

⁴⁰⁰ See, e.g., Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33 (1987); Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329 (1987); Nimmer & Krauthaus, *Copyright and Software Technology Infringement: Defining Third Party Development Rights*, 62 IND. L.J. 13 (1986); Oman, *supra* note 7; Samuelson, *supra* note 331; Samuelson, *supra* note 341; Staines, *Ideè or Ideè Fixe?*, 50 MOD. L. REV. 368 (1987); *The Future of Software Protection*, 47 U. PITT. L. REV. 903 (1986); Comment, *A Rose by any Other Name: Computer Programs and the Idea-Expression Distinction*, 34 EMORY L.J. 741 (1985).

⁴⁰¹ See, e.g., Whelan Assoc. v. Jaslow Dental Laboratory, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); National Business Lists v. Dun & Bradstreet, 552 F. Supp. 89 (N.D. Ill. 1982); Karjala, *supra* note 400; Reback & Hayes, *Copyright Gone Astray: The Misappropriation Alternative*, 3 COMPUTER LAW., April, 1986, at 1; Staines, *supra* note 400. The courts have also rejected arguments based on the useful articles doctrine. See, e.g., Apple Computer v. Franklin Computer Corp., 714 F.2d

Private use is the unauthorized use of copyrighted works by individuals in private, at home or otherwise.⁴⁰² The 1976 Act accords no exclusive rights in private performances or displays. Singing in the shower is not yet copyright infringement. The statute does, however, give exclusive reproduction and adaptation rights and exclusive distribution rights qualified by the first sale doctrine.⁴⁰³ The Act includes no broad private use exception; unauthorized private copying and adaptation, and private distribution of unauthorized copies of a work, infringe the work's copyright except to the extent that they come within a statutory exception, express or implied. The copyright owners' exclusive rights with respect to private use, however, have been essentially unenforceable.

As recently as 1965, when the revision bill emerged from the conferences, the unenforceability of rights against private use may not have been the source of much concern. The economic impact of private use seemed insignificant. Institutional photocopying appeared to dwarf aggregate individual copying; photocopy machines were, after all, not cheap. Record pirates selling bootlegged records seemed a greater threat than the throng of teenagers taping music from the radio. Videocassette recorders had yet to be marketed as a consumer product; home computers had not been invented.

Times change. Markets developed that made all sorts of copyrighted works available to consumers in their homes.⁴⁰⁴ Technology made copying cheap and convenient.⁴⁰⁵ Instead of going to the movies, a family might subscribe to a movie channel on cable television. Instead of watching the transmission, it could program its videocassette recorder to record the film; when it finished watching it, the family could trade the videotape to friends for another. Instead of purchasing software, a computer user could use a modem to download programs from computer bulletin boards through the

1240, 1249 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984). See generally Samuelson, *supra* note 331, at 741-49.

⁴⁰² The OTA Report defines private use as "the unauthorized, uncompensated, non-commercial and noncompetitive use of a copyrighted work by an individual who is a purchaser or user of that work." OTA REPORT, *supra* note 3, at 194. I have not adopted the OTA definition because it evades controversial questions about the commercial or competitive nature of private use by excluding commercial or competitive use from the term it defines.

⁴⁰³ 17 U.S.C. §§ 106, 109.

⁴⁰⁴ See OTA REPORT, *supra* note 3, at 105-11, 194-95; *Copyright and Technological Change*, *supra* note 2, at 79-84 (testimony of Frederick Weingarten, Office of Technology Assessment).

⁴⁰⁵ See OTA REPORT, *supra* note 3, at 99-103.

telephone lines. Computer hackers could make cheap, easy copies of their programs on diskettes and trade them with their colleagues. By the time Congress enacted the 1976 Act, the contours of the economic threat posed by private use had begun to emerge. Copyright owners began to worry about enforcing the hitherto unenforceable rights over private use that the 1976 Act appeared to give them.

Less than a month after Congress passed the 1976 Act, two motion picture studios filed an infringement action against the manufacturer, distributors, retailers, and a user of the Sony Betamax videocassette recorder.⁴⁰⁶ The suit posed the following problem for the courts: the language of the 1976 Act discouraged the courts from discovering implied privileges, by couching its multiplicity of express privileges in such specificity and detail. A conclusion that the 1976 Act ruled out implied exemptions and privileges, however, compelled the conclusion that the statute also prohibited any unauthorized copying or adaptation unless it fit within an express exemption. Or unless an express exemption could be stretched to encompass it.

In *Sony*, the Supreme Court responded to the problem by stretching fair use. Influenced, perhaps, by the copious references to non-profit education in the legislative history, the Court established a presumption that all unauthorized noncommercial use was fair. Conversely, all unauthorized commercial use would be presumptively infringing.⁴⁰⁷ This reformulation permitted the Court to hold that the sale and use of videocassette recorders did not infringe the rights of copyright owners. It also introduced distortions and rigidity into the fair use doctrine.⁴⁰⁸ The most troubling aspect of the reformulation for copyright owners is that it makes most private use of copyrighted works presumptively fair.⁴⁰⁹ The reformulation's most troubling aspect for users of developing technology is that it makes fair use, a doctrine developed in the context of unauthorized commercial use of copyrighted works, presumptively unavailable for any commercial endeavor.⁴¹⁰

⁴⁰⁶ *Universal City Studios v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). See Lardner, *Annals of Law: The Betamax Case—1*, *NEW YORKER*, Apr. 6, 1987, at 45, 50.

⁴⁰⁷ See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984).

⁴⁰⁸ See Litman, *supra* note 15, at 897-99.

⁴⁰⁹ See, e.g., Adelstein & Perez, *supra* note 223 (arguing for restriction of fair use privilege); Fleischmann, *supra* note 7 (arguing for repeal of fair use).

⁴¹⁰ See, e.g., *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985);

The Court's twin presumptions have drawn widespread criticism.⁴¹¹ Participants in the revision effort agree that the Court's interpretation turned fair use on its head. The statute's structure, however, presented the Court with an intolerable dilemma. Consumer videocassette recorders did not yet exist at the time the statutory language was drafted. The consumers who owned and used videocassette recorders could hardly have participated in the drafting process. The legislative record indicated that the generic problem of private copying, as distinguished from copying by libraries and schools, had received little attention during the drafting process. But the negotiated deals embodied in the statutory language called for imposing liability on millions of users of videocassette recorders. Such a result seemed intolerable; indeed, even the plaintiffs in the lawsuit declined to seek it.⁴¹² Instead, the plaintiffs sought to enjoin the sale of a machine that permitted individual users to record copyrighted works, something that the legislative record indicated had never even been mentioned during the revision effort. The only palatable result seemed to require privileging the use, but the statute offered no reasonable route to that destination. Faced with a single flexible limitation that could conceivably apply, the Court used it.

The result of the dilemma was to stretch fair use until it lost its flexibility. Commercial actors—authors, news reporters, legal database publishers, and parodists—now face a copyright statute whose fair use privilege is, absent disingenuous inventions by the lower courts,⁴¹³ presumptively unavailable.⁴¹⁴ Copyright owners, who find that their works are increasingly being delivered to and

West Publishing Co. v. Mead Data Cent., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987); Bourne Co. v. Speeks, 670 F. Supp. 777 (E.D. Tenn. 1987).

⁴¹¹ See, e.g., Adelstein & Perez, *supra* note 223; Oman, *supra* note 223, at 32; *The Supreme Court, 1984 Term: Leading Cases*, 99 HARV. L. REV. 120, 299 (1985); Note, *When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in Harper & Row Publishers, Inc. v. Nation Enterprises*, 72 CORNELL L. REV. 218 (1986).

⁴¹² See Lardner, *supra* note 406, at 48-50.

⁴¹³ See Litman, *supra* note 15, at 899; *infra* note 438 and accompanying text.

⁴¹⁴ See, e.g., United Tel. Co. of Mo. v. Johnson Publishing, 855 F.2d 604 (8th Cir. 1988); Original Appalachian Artworks v. Topps Chewing Gum, 642 F. Supp. 1031 (N.D. Ga. 1986); Lakedale Tel. Co. v. Frontier Directory Co. of Minn., 230 U.S.P.Q. 694 (D. Minn. 1986). Both presumptions may be rebutted with evidence as to a particular use's actual and potential effect on the market for the copyrighted work. The burden of proof on rebuttal has proved heavy as a practical matter, and conclusions about market effect are invariably circular. See, e.g., Clemmons, *Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3, 8 (1985).

used by individuals in their homes,⁴¹⁵ face a copyright statute that presumptively privileges many unauthorized uses. Unauthorized reception of satellite signals for home television viewing, unauthorized home taping of copyrighted music and films, and unauthorized adaptation or copying of computer programs on floppy disks seem potentially within the new fair use privilege.⁴¹⁶ In the aggregate, the economic impact of these uses is substantial, and copyright proprietors would prefer that they be viewed as consumer theft. But much of the pain that friends of copyright insist they feel over *Sony* is self-inflicted. Representatives of copyright owners resisted the incorporation of broad privileges into the revision bill throughout the revision process. The courts turned to fair use because the statute left them no alternative; a statute that incorporated more general, flexible limitations might have weathered *Sony* with significantly less damage.⁴¹⁷ The application of a statute granting broad rights with narrow exceptions to new technology forces courts to reach peculiar results.

Although copyright owners lost a significant battle in court, they did not abandon the fight to assert the rights they believed they had bargained for in the 1976 Act. They have continued to insist that the 1976 Act gives them the right, albeit unenforceable, to prohibit private use and have campaigned to close the statutory loopholes that permit the widespread unauthorized use of their works by individuals in private. Even while *Sony* was pending, representatives of copyright owners peppered Congress with legislative proposals. Efforts to prohibit private use by millions of consumers directly, they recognized, would be politically unpopular and impossible to enact. Instead, copyright owners proposed indirect methods, beginning with an assault on the first sale doctrine.⁴¹⁸

The immediate targets of the audio and video first sale bills were

⁴¹⁵ See OTA REPORT, *supra* note 3, at 193-95.

⁴¹⁶ See, e.g., Brown, *supra* note 257, at 595.

⁴¹⁷ A statutory privilege to make temporary incidental copies similar to the privilege described *supra* note 393, for example, would have permitted timeshifting of television programs but would not have privileged many of the multiplicity of private uses that seem to come within the *Sony* formulation.

⁴¹⁸ See *Audio and Video First Sale Doctrine: Hearings on H.R. 1027, H.R. 1029, and S. 32 before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, 98th Cong., 1st & 2d Sess. (1985)*. The effort began as a proposal by industry representatives to amend the definition of public performance to encompass rental of copyrighted works. The Copyright Office responded to a request to draft such a bill by suggesting that a more appropriate tactic would be to revise the first sale doctrine. See *id.* at 378 (testimony of Dorothy Schrader, General Counsel, U.S. Copyright Office).

businesses that rented videocassette tapes or phonograph records for profit. The proposed legislation modified the first sale doctrine by prohibiting owners of copies of audiovisual works⁴¹⁹ or phonorecords⁴²⁰ from renting, leasing, or lending them for commercial advantage. After negotiations between representatives of copyright owners and representatives of educational institutions yielded language removing educators' objections by exempting nonprofit libraries and educational institutions completely,⁴²¹ Congress enacted the Record Rental Amendment, prohibiting the commercial rental of phonorecords.⁴²² The video first sale bill stalled, as did a computer software first sale bill⁴²³ drafted in similar language.⁴²⁴

Another phase of the effort attacked the home copying problem through the manufacturers of copying equipment. One sort of proposal would have required manufacturers to install devices in retail

⁴¹⁹ See H.R. 1029, 98th Cong., 1st Sess. (1984).

⁴²⁰ See H.R. 1027, 98th Cong., 1st Sess. (1984).

⁴²¹ See *Audio and Video First Sale Doctrine*, *supra* note 418, at 338-41 (testimony of August Steinhilber, Chairman of Educators' Ad Hoc Committee on Copyright Law).

⁴²² Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified at 17 U.S.C. §§ 109(b), 115(c)(3)). The law, as amended in 1988, has a 13 year sunset provision. See Pub. L. No. 100-617, 102 Stat. 3194 (1988). Evidence of the commercial rental of phonorecords to facilitate unauthorized private copying assisted copyright owners in securing the Record Rental Amendment. See *Home Audio Recording Act*, *supra* note 2, at 28 (testimony of Ralph Oman, Register of Copyrights). Although copyright owners have offered similar evidence about the rental of videocassettes, *see, e.g., Home Video Recording*, *supra* note 2, at 2-32 (testimony of Jack Valenti, Motion Picture Ass'n of Am.), they have not been successful in securing an amendment to prohibit videocassette rental.

⁴²³ See S. 3074, 98th Cong., 2d Sess. (1984). The software first sale bill has been reintroduced in successive sessions of Congress. See S. 198, 101st Cong., 1st Sess. (1989); S. 2727, 100th Cong., 2d Sess. (1988); H.R. 1743, 100th Cong., 1st Sess. (1987).

⁴²⁴ In another ring of the circus, proprietors of copyright in computer software mounted another assault on the first sale doctrine. In 1980, Congress amended the statute to clarify the scope of copyright in computer software and included a *sui generis* first sale doctrine for computer programs. The provision gave owners of copies of computer programs the privilege to make backup copies and limited adaptations of the programs, on the condition that when the owner sold, leased, or otherwise transferred her copy of the program, she destroy any adapted copy and either destroy any backup copies or transfer them along with the original copy. 17 U.S.C. § 117. In order to defeat the privilege, which was limited in terms to "owners" of copies of programs, software manufacturers purported to stop selling computer software. They devised a "shrink-wrap license" that advised purchasers of off-the-shelf software that the transaction whereby they paid money in return for a copy of a computer program was not a "sale" at all, but rather a "license." The terms of the license, which the would-be purchaser was deemed to accept upon opening the cellophane shrink-wrap, provided that the software manufacturer retained ownership of the copy of the software, and, typically, restricted the licensee's use, copying, adaptation, and transfer of the copy much more narrowly than the statute restricted owners. See *generally* Samuelson, *supra* note 341. See also *Vault Corp. v. Quaid Software*, 847 F.2d 255 (5th Cir. 1988) (holding shrink-wrap license unenforceable).

audiotape and videocassette recorders that prevented unauthorized copying.⁴²⁵ A second variety of bill would have imposed a surcharge on recording equipment and blank tape, to be distributed as a royalty fund for home taping.⁴²⁶ Neither approach has acquired the consensus required for enactment.

Copyright owners have gradually realized that the unenforceability of the rights they claim in private uses is itself a threat, because it breeds disrespect for copyright among potential infringers and clouds the marketplace with confusion.⁴²⁷ They have not, however, been able either to resolve their differences with opponents of private use legislation or to abandon the fight.⁴²⁸

Hearings on these proposals have consumed a lot of congressional time, as have hearings on other private use issues. The Copyright Office has for several years suggested that Congress must make a policy determination on the treatment of private use.⁴²⁹ Legal academics and the Office of Technology Assessment have endorsed the recommendation.⁴³⁰ Representatives of affected interests insist that Congress made that policy determination when it enacted the 1976 Act, although the witnesses disagree about what Congress determined. Those who represent motion picture producers and record companies, for example, insist that the 1976 Act gives them the exclusive right of reproduction, including private reproduction in the home.⁴³¹ Those who represent manufacturers and retailers of

⁴²⁵ See *Copyright Issues Presented by Digital Audio Tape*, *supra* note 2; *Home Video Recording*, *supra* note 2, at 2-50 (various witnesses).

⁴²⁶ See *Home Audio Recording Act*, *supra* note 2; *Video and Audio Home Taping: Hearing on S. 31 and S. 175 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1984).

⁴²⁷ See, e.g., *Copyright and Technological Change*, *supra* note 2, at 267-80 (materials from Feb., 1984 Congressional Copyright and Technology Symposium in Fort Lauderdale, FL).

⁴²⁸ See, e.g., *Home Video Recording*, *supra* note 2, at 77 (remarks of Sen. Thurmond).

⁴²⁹ See, e.g., *Copyright and New Technologies*, *supra* note 2, at 11-13 (prepared statement of Ralph Oman, Register of Copyrights); *Copyright Issues Presented by Digital Audio Tape*, *supra* note 2, at 142-44 (testimony of Ralph Oman, Register of Copyrights); *Home Audio Recording Act*, *supra* note 2, at 85 (testimony of Ralph Oman, Register of Copyrights); *Audio and Video First Sale Doctrine*, *supra* note 418, at 379-80 (testimony of Dorothy Schrader, General Counsel, Copyright Office); *Video and Audio Home Taping*, *supra* note 426, at 51 (testimony of David Ladd, Register of Copyrights).

⁴³⁰ See OTA REPORT, *supra* note 3, at 288-90; see, e.g., *Home Audio Recording Act*, *supra* note 2, at 952-55 (written comments of Prof. Paul Goldstein, Stanford Law School); *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 20-25 (1982) (testimony of Prof. Leon Friedman, Hofstra Law School).

⁴³¹ See, e.g., *Home Video Recording*, *supra* note 2, at 3 (testimony of Jack Valenti,

audio and video tape recorders, in contrast, claim that the 1976 Act establishes the public's right to make home recordings.⁴³² Representatives of both interests, however, agree that Congress settled the issue in 1976. Perhaps members of Congress have found this testimony of industry representatives persuasive. They have, in any event, demonstrated little eagerness for grappling with the general problems that private use poses. If the history of copyright revision is a guide, we should not expect answers to be forthcoming any time soon: the problems of private use do not seem amenable to negotiated solution.

VI

NEGOTIATED STATUTES AND TECHNOLOGICAL POLICY

Not all of the suggested amendments to the 1976 Copyright Act have been of the close-the-loophole variety. Many others have been more in the nature of widen-the-loophole bills.⁴³³ Bills of both types have mired Congress in more minutia than did the twenty-one year revision effort that culminated in the 1976 Act. Meanwhile, the 1976 Act's few general limitations have suffered serious erosion.

Ten years after the effective date of the Act, the idea/expression distinction has received progressively more narrow construction from the courts.⁴³⁴ Fewer aspects of copyrighted works are held unprotected facts and ideas. More courts are conferring broad copyright protection on works that are primarily factual;⁴³⁵ more

Motion Picture Ass'n of America); *Audio and Video First Sale Doctrine*, *supra* note 418, at 4 (testimony of Stanley Gortikov, Recording Industry Ass'n of America).

⁴³² See, e.g., *Home Video Recording*, *supra* note 2, at 84-94 (prepared statement of Charlie Ferris, Home Recording Rights Coalition).

⁴³³ See, e.g., Pub. L. No. 97-366, § 3, 96 Stat. 1759 (1982) (codified at 17 U.S.C. § 110(10)) (establishing exemption for performances by veterans and fraternal organizations); S. 2881, 100th Cong., 1st Sess. (1988) (bill to create exemption for public performance of videotapes in hospitals and nursing homes); S. 1980, 99th Cong., 1st Sess. (1985) (bill to restrict right of public performance in musical works used in syndicated television programs); S. 1734, 98th Cong., 1st Sess. (1983) (bill to remove various restrictions and annual royalty payments from jukebox compulsory license); S. 175, 98th Cong., 1st Sess. (1983) (bill to create exemption for noncommercial videotaping of any copyrighted work); H.R. 8098, 95th Cong., 1st Sess. (1978) (bill to expand exemption for transmissions of performances of literary works to blind and handicapped audiences).

⁴³⁴ See, e.g., Karjala, *supra* note 400.

⁴³⁵ See, e.g., *National Business Lists v. Dun & Bradstreet*, 552 F. Supp. 89 (N.D. Ill. 1982).

courts are protecting systems and methods of operation.⁴³⁶ The useful articles doctrine remains limited to buildings, bicycle racks, clothing, clothing mannequins, and articles of the same sort.⁴³⁷ Fair use remains presumptively unavailable to commercial endeavors, although courts have found the twin presumptions so unworkable that they have begun crafting ways to sidestep them.⁴³⁸ The modified first sale doctrine has become increasingly irrelevant as greater proportions of copyrighted works are disseminated to the public by methods that involve no purchase of tangible copies.⁴³⁹ Interests that were involved in the drafting process have been insulated from this erosion, because they received the benefit of specifically tailored privileges. The narrowness of those privileges, however, has caused them to age rapidly. Although the interests that participated in the legislative process have fared better under the statute than some of their upstart competitors who did not, the aging of the narrow privileges may have brought home to some of them that drafting a statute with too few exceptions to balance the breadth of the rights it confers may not have been in their long term best interests. Or perhaps not. If such a realization is indeed dawning, industry representatives have yet to translate it into action.

Representatives of affected industries have inundated Congress with narrow legislative proposals to respond to technological change. Some members of Congress have recently expressed almost unprecedented⁴⁴⁰ interest in considering such bills within the context of the larger picture. Representative Kastenmeier, who has chaired the House Subcommittee responsible for copyright legislation since 1966, has called hearings on the general issue of copyright and technological change, and held a symposium for the general

⁴³⁶ See, e.g., *Whelan Assoc. v. Jaslow Dental Laboratory*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 429 U.S. 1031 (1987).

⁴³⁷ See, e.g., *E.F. Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485, 1498 (D. Minn. 1985). See generally *Brown*, *supra* note 257, at 600-06.

⁴³⁸ See, e.g., *Hustler Magazine v. Moral Majority*, 796 F.2d 1148 (9th Cir. 1986); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *New Era Publications Int'l, ApS v. Henry Holt and Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989); *Salinger v. Random House*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd on other grounds*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987).

⁴³⁹ See OTA REPORT, *supra* note 3, at 206-08.

⁴⁴⁰ Most copyright hearings during the past century have focused on particular problems or on pending legislation. In 1932, however, Rep. Sirovich scheduled general hearings on copyright matters with a view to educating fellow committee members on copyright issues as a prelude to the introduction of any legislation. See *supra* note 120 and accompanying text.

education of subcommittee members.⁴⁴¹ The House and Senate Judiciary Committees commissioned a report from the Office of Technology Assessment to examine the pressures of technological development on copyright law.⁴⁴² The House Subcommittee has listened to far ranging and even radical proposals,⁴⁴³ proposals that have gone largely unnoticed in academic legal scholarship. Both House and Senate Subcommittees, however, have retained their commitment to negotiated solutions. The course of recent negotiations among affected interests reveals little possibility of a consensus on any major proposal.

Suggestions for radical re-examination of Congress's approach to copyright law have inspired little enthusiasm among industry representatives. The Office of Technology Assessment floated a proposal for complete restructuring of the copyright law.⁴⁴⁴ Industry representatives responded to the proposal with distrust.⁴⁴⁵ One witness recommended replacing the current copyright statute with an administrative agency charged with responding to technological development with substantive regulations;⁴⁴⁶ the proposal received no

⁴⁴¹ See *Copyright and Technological Change*, *supra* note 2.

⁴⁴² OTA REPORT, *supra* note 3. See generally *OTA Report on Intellectual Property Rights in an Age of Electronics and Information*, *supra* note 2.

⁴⁴³ See, e.g., *Copyright and Technological Change*, *supra* note 2, at 29-55 (testimony of Joseph Coates, J.F. Coates, Inc.) (suggesting, inter alia, removing copyright jurisdiction from courts); *id.* at 129-38 (prepared statement of Richard Stern, Washington, D.C.) (suggesting variety of intellectual property systems tailored to particular technologies); *CRT Reform and Compulsory Licenses: Hearings on H.R. 2752 and H.R. 2784 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 206-44 (1986) (testimony of Daniel W. Toohey, Dow, Lohnes & Albertson) (suggesting federal copyright regulatory agency).

⁴⁴⁴ The OTA Report is a brilliant critique of current law and policy and has been controversial among those who have reviewed it. The Report's major thrust is that recent technological developments are having a profound effect on intellectual property law, and have rendered many of the assumptions on which the law is based obsolete. See OTA REPORT, *supra* note 3, at 3-15, 31. The Report suggests several possible approaches to reform. One of the Report's most provocative proposals calls for a wholesale revision of the copyright law that would set forth different rules for protection of works of art, works of fact and works of function.

⁴⁴⁵ See Garcia, *The OTA Report on Intellectual Property Rights*, Network Planning Paper No. 16, *supra* note 3, at 9, 11-12; see, e.g., Baumgarten & Meyer, *supra* note 4.

⁴⁴⁶ See *CRT Reform and Compulsory Licenses*, *supra* note 443, at 206-44 (testimony of Daniel Toohey, Dow, Lohnes & Albertson); see also OTA REPORT, *supra* note 3, at 282 (suggesting federal intellectual property agency). The few witnesses and the occasional commentator, see, e.g., Stern, *The Bundle of Rights Suited to New Technology*, 47 U. PITT. L. REV. 1229, 1262-67 (1986), who support the idea of a federal copyright agency cite the speed with which it could respond to problems posed by technological change as its most attractive feature. Mr. Toohey, the attorney who testified in favor of

support.⁴⁴⁷ Every proposal to change the status quo has received opposition from some camp on the ground that it would remove a perceived advantage enjoyed under current law.⁴⁴⁸

Members of Congress have continued to encourage negotiated solutions.⁴⁴⁹ Interested parties meet with each other but cling to provincial negotiating postures. Current stakeholders are unwilling to part with short term statutory benefits in the service of long term legal stability.⁴⁵⁰ Those disfranchised by current law lack the bargaining chips to trade for concessions. Thus, the process is unlikely to produce any legislative proposals that would reduce the imbalance in the current act.

Furthermore, the process is securely entrenched. The inquiry relevant to copyright legislation long ago ceased to be “is this a good bill?” Rather, the inquiry has been, and continues to be “is this a bill that current stakeholders agree on?” The two questions are not the same.

Negotiations among current stakeholders tend to produce laws that resolve existing inter-industry disputes with detailed and specific statutory language, which rapidly grows obsolete. Such laws consign the disputes of the future to resolution under models biased in favor of the status quo.⁴⁵¹ A copyright law cannot make sensible

such an approach, seems especially impressed with an agency’s ability to craft narrow solutions to narrow problems. See Toohey, *supra* note 7, at 568. Giving responsibility for formulating substantive copyright law to a federal administrative agency would require abandoning a longstanding tradition, animated largely by first amendment concerns, of distrust for such a solution. The Copyright Office, for example, is not viewed as administrative agency and has no adjudicatory and only very limited rulemaking authority. The Copyright Royalty Tribunal, in contrast, is an agency but its jurisdiction is limited to the setting of rates and division of fees for compulsory licenses. Concerns about issues such as capture loom large when one is considering entrusting to the government the authority for regulating a wide variety of expression protected by the first amendment. The FCC’s performance in this regard has not been reassuring.

⁴⁴⁷ See, e.g., *CRT Reform and Compulsory Licenses*, *supra* note 443, at 74 (testimony of Irwin Karp, Authors’ League of America); *id.* at 153 (testimony of Prof. Paul Goldstein, Stanford Law School).

⁴⁴⁸ See, e.g., *id.* at 491-93 (testimony of Stephen R. Effros, President, Community Antenna Television Ass’n, Inc.).

⁴⁴⁹ See, e.g., *id.* at 259-61 (colloquy); *Copyright and Technological Change*, *supra* note 2, at 27 (remarks of Rep. Sawyer); *Home Video Recording*, *supra* note 2, at 77 (remarks of Sen. Thurmond).

⁴⁵⁰ See, e.g., *U.S. Adherence to the Berne Convention*, *supra* note 16, at 212 (prepared statement of Carol Risher, Ass’n of American Publishers); *id.* at 388 (testimony of Elroy Wolff, Amusement & Music Operators Ass’n).

⁴⁵¹ Fledgling technologies faced with uncertainty about their status under copyright law encounter barriers to doing business and difficulty securing funding. See, e.g., *Over-sight of the Copyright Act of 1976 (Cable Television): Hearings Before the Senate Comm.*

provision for the growth of technology unless it incorporates both the flexibility to make adjustments and the general principles to guide courts in the directions those adjustments should take. The negotiation process that has dominated copyright revision throughout this century, however, is ill-adapted to generate that flexibility. It cannot, therefore, be expected to produce statutes that improve with age.

CONCLUSION

I have thus far criticized the pitfalls of a legislative process that relies heavily on negotiations among affected interests without acknowledging its strengths. Although I believe that the process's advantages are outweighed by its disadvantages, those strengths are not trivial. Indeed, this legislative process continues to outlive the legislation that it has produced because its advantages are significant.

The process brings together the real copyright experts, and allows Congress to exploit their accumulated expertise. The participants are the people who will have to order their day-to-day business relations with one another around the provisions of the legislation. They can bring their perspective on the real world in which they interact to bear on the law with which they will have to live.

The process permits a give and take among a wide field of players whose competing interests are exceedingly complex. The universe of current stakeholders does not divide easily into monolithic camps.⁴⁵² There may be no simple, overarching principles that can

on the Judiciary, 97th Cong., 1st Sess. 29-33 (1981) (testimony of Barbara Ringer, former Register of Copyrights). Users of new technology confront formidable obstacles to their efforts to exploit the new products or services within the confines of a cloudy copyright law. See, e.g., Kost, *supra* note 3, at 23-24. A law whose application to new technology depends on linguistic fortuity will, at best, distort technological policy in a haphazard fashion. At worst, it will skew technological policy in favor of current stakeholders and away from technological development.

⁴⁵² It may once have been possible to talk about interests affected by copyright as if some were creators of copyrighted works and others were users of copyrighted works. By the turn of the twentieth century, that dichotomy was too simple to describe the array of players in the game. It is now a nearly meaningless distinction. Composers compose music, but the music uses sounds that they have heard in other music. Directors make movies, but much of what they do comes down to choosing what aspects of other people's work to incorporate into their films. Television networks assemble a combination of independently-produced and in-house programs to create a broadcast day. Network affiliates choose from items available on the network feed and programming syndicated by other sources to create their own compilations of programs. Cable systems select among available broadcast and non-broadcast programming to assemble

easily define how all of these actors should order their interactions with one another. Putting all of them into a room and asking them not to come out until they have agreed to be bound by the same rules may be the most efficient approach to formulating law that will work well enough for each of them.

The process also makes copyright revision politically feasible. If one could overcome the difficulties in educating members of Congress in a technical legal field with little publicity value, and find ways to impart enough knowledge about the complex inner workings of the myriad affected industries, one would still face daunting obstacles to coming up with enactable legislation. Every adjustment to the copyright statute will disadvantage some current stakeholder, who will be someone's constituent. Perhaps a statute might be enacted over that stakeholder's pitched opposition; but efforts to accomplish that in the past have not succeeded. If the stakeholder will instead agree to accept the disadvantage in return for an advantage conceded by another stakeholder, there will be no pitched opposition and the bill will be much more likely to go through.

The need to balance concessions in order to achieve such agreement, of course, imposes constraints on the sort of legislation that is likely to emerge from the process. Unless the participants become convinced that the new legislation gives them no fewer benefits than they currently enjoy, they are likely to press for additional concessions. It must, therefore, be expected that any successful copyright legislation will confer advantages on many of the interests involved in hammering it out, and that those advantages will probably come at some absent party's expense. But nobody need take the responsibility for making difficult political choices associated with selecting the interests that the legislation will disadvantage. Indeed, the process is almost tailor-made to select those interests thoughtlessly and automatically, as a byproduct of ongoing negotiations.

It is the seeming inevitability of bias against absent interests, and of narrow compromises with no durability, that makes such a process so costly. Each time we rely on current stakeholders to agree on a statutory scheme, they produce a scheme designed to protect themselves against the rest of us. Its rigidity leads to its breakdown; the statute's drafters have incorporated too few general principles to guide courts in effecting repairs.

Reliance on the real copyright experts has led to Congress's en-

an anthology of signals for subscribers. The copyright law defines authorship broadly enough to include all of these activities within its purview.

actment of laws that few of its members understand.⁴⁵³ Nobody would quarrel with the statement that political expediency sometimes causes Congress to enact legislation its members have not thought through. The entrenched nature of the process for developing copyright legislation, however, works to foreclose any possibility that Congress will enact copyright laws that its members have framed, or at least comprehend.

It would seem naive to suggest that Congress simply reclaim its legislative responsibilities and write a revised copyright statute embodying general principles instead of negotiated deals. Current stakeholders have controlled the playing board for more than eight decades, and would doubtless prefer to keep it that way. Although they squabble with one another over specifics, they have managed to unite in fierce opposition to copyright revision bills drafted without their participation.⁴⁵⁴ They are unlikely to support a movement to divest them of responsibility for drafting copyright legislation.⁴⁵⁵

But perhaps the current stakeholders would be receptive to a cautionary note. Those involved in the process of copyright legislation complain about widespread disregard of the copyright law enacted in 1976.⁴⁵⁶ Copyright owners bemoan unenforceable statutory rights.⁴⁵⁷ Participants and commentators complain that courts misinterpret the bargains embodied in the statute.⁴⁵⁸ It is hardly surprising, however, that a statute too long, complex, and technical for

⁴⁵³ See, e.g., *1975 House Hearings*, *supra* note 204, at 1285-95 (various witnesses); *id.* at 1358-60 (colloquy); *id.* at 1578 (remarks of Rep. Pattison); *id.* at 1713-14 (colloquy); *id.* at 1748-49 (colloquy); *id.* at 1753 (colloquy); 122 CONG. REC. 31,985-86 (1976) (remarks of Rep. Drinan); 43 CONG. REC. 3853-54 (1909). See generally Litman, *supra* note 15, at 865-82.

⁴⁵⁴ See *supra* notes 119-30, 197-200 and accompanying text.

⁴⁵⁵ In any event, such a movement is unlikely to arise. The public has become increasingly cynical about the legislative process. Highly publicized criticisms in recent years have inured most constituents to the fact that the way Congress actually goes about its job diverges sharply from the model presented in high school civics courses.

⁴⁵⁶ See, e.g., *Home Video Recording*, *supra* note 2, at 3-52 (testimony of Jack Valenti, Motion Picture Ass'n of America).

⁴⁵⁷ See, e.g., *Copyright and Technological Change*, *supra* note 2, at 271, 280 (Congressional Copyright And Technology Symposium, Panel on the Administration of Rights in Copyrighted Works in the New Technologies).

⁴⁵⁸ See, e.g., *Civil and Criminal Enforcement of the Copyright Laws: Hearings on the Authority and Responsibility of the Federal Government to Protect Intellectual Property Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 89-95 (testimony of Barbara Ringer, former Register of Copyrights); Abrams, *Who's Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. L. REV. 181 (1985); Adelstein & Perez, *supra* note 223, at 228-33; Karp, *Reflections on the Copyright Revision Act*, 34 J. COPYRIGHT SOC'Y U.S.A. 53, 61-68 (1986); Litman, *supra* note 15, at 896-903; Oman, *supra* note 223, at 32, 35-37.

members of the Congress that enacted it to understand confounds the courts. It is even less surprising that members of the public will behave in accord with their sense of what the rules ought to be in preference to deciphering an entire volume of the United States Code. If the private parties who negotiate copyright legislation among themselves cannot come up with bills that look as if they were drafted by members of Congress to embody general principles rather than like a web of interdependent bilateral and trilateral deals, the bills they do come up with are unlikely to work very well in practice. Technology will develop, and statutory provisions will grow obsolete with breathtaking speed.

Current stakeholders may prefer today's world or, indeed yesterday's world, to tomorrow's. They may, understandably, prefer a copyright law that forces tomorrow's players to order their business by today's rules. They may even be the beneficiaries of a legislative process that allows them to create a copyright law that meets that specification. They cannot, however, force time to stop. Representatives of affected interests insist that they want a workable copyright law. They could use the familiar process to produce one. They need only do what Congress seems to be unable to do for them: draft a law that balances elastic rights with comparably elastic, flexible limitations.