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COPYRIGHT, COMPROMISE, AND LEGISLATIVE HISTORY

Jessica D. Litman †

Copyright law gives authors a “property right.” But what kind of property right? Indeed, a property right in what? The answers to these questions should be apparent from a perusal of title seventeen of the United States Code—the statute that confers the “property” right.¹ Courts, however, have apparently found title seventeen an unhelpful guide. For the most part, they look elsewhere for answers, relying primarily on prior courts’ constructions of an earlier and very different statute on the same subject.²

When Congress enacted the 1976 General Revision of Copyright Law (1976 Act),³ the courts had been deciding copyright cases for more than sixty years under a statute enacted in 1909 (1909 Act).⁴ Although the 1909 Act had been outmoded for a long time,⁵ various general revision bills introduced between 1924 and 1974 had failed.⁶ The 1909 Act’s ambiguity had required judicial interpretation and interpolation,⁷ and years of technological develop-

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¹ 17 U.S.C. §§ 101-810 (1982 & Supp. III 1985).

² See, e.g., *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Topolos v. Caldewey*, 698 F.2d 991 (9th Cir. 1983); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982).

³ Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁴ Copyright Act of March 4, 1909, 35 Stat. 1075, *repealed by* 1976 General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁵ See Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

⁶ A. GOLDMAN, *THE HISTORY OF COPYRIGHT LAW REVISION FROM 1901 TO 1954* 4-11 (1955), *reprinted in* SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *COPYRIGHT LAW REVISION* (COMM. PRINT 1960).

⁷ See B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 40-41 (1967):

[T]he statute, like its predecessors, leaves the development of fundamentals to the judges. Indeed the courts have had to be consulted at nearly every point, for the text of the statute has a maddeningly casual prolixity and imprecision throughout. One takes 1909 as a starting place not

ment had made the need for judicial creativity acute.⁸ Courts "stretched the limits of statutory language" in order to make the obsolete 1909 Act serviceable.⁹ By the time Congress replaced the 1909 Act, courts had embroidered the old statute with a wealth of common law interpretation.¹⁰

The common law of statutory copyright possessed a number of strengths and some unsurprising weaknesses. Like many bodies of judge-made law, the common law doctrines were often inconsistent and contradictory, not only among courts but within courts; not only among lines of cases, but within lines of cases.¹¹ The law was riddled with analytically indefensible distinctions, impractical definitions, and wholesale distortion of statutory language.¹² It was nonetheless a magnificent edifice.¹³

In 1976, Congress replaced that edifice with a very different kind of statute. Register of Copyrights Barbara Ringer described the new statute this way:

The revisions contained in the New Act are certainly "general" in scope; they substantially revise the provisions of that antiquated law under which we have been struggling to operate for sixty years But the New Act is not a "general revision" in the same sense that the 1909 Act was, *i.e.*, a bringing together of scattered statutory provisions with relatively few changes or innovations. The New Act is rather a completely new copyright statute, in-

merely because of the fact of recodification, but because there was thenceforth a crowding of suggestive case law.

See also Henn, *Cassandra Considers Copyright*, 25 BULL. COPYRIGHT SOC'Y 453, 460 (1978).

⁸ See, e.g., *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 89th Cong., 1st Sess. 65 (1965) [hereinafter 1965 *House Hearings*] (testimony of Abraham Kaminstein, Register of Copyrights).

⁹ U.S. COPYRIGHT OFFICE, BRIEFING PAPERS ON CURRENT ISSUES, reprinted in *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. 2053 (1975) [hereinafter 1975 *House Hearings*].

¹⁰ See, e.g., B. KAPLAN, *supra* note 7, at 41. I use the term "common law" to describe the judge-made law of statutory copyright to emphasize that, by the early 1970s, much of the judicial doctrine was both independent of and apparently unconnected with the language of the 1909 Act.

¹¹ See generally B. KAPLAN, *supra* note 7, at 79-97. An example appearing often in the legislative history of the 1976 Act is the courts' various treatments of the concept of publication. See, e.g., 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 81 (Comm. Print 1965) [hereinafter REGISTER'S SUPPLEMENTARY REPORT] ("The present situation is chaotic, and it is becoming worse all the time.").

¹² See B. KAPLAN, *supra* note 7, at 81-82 ("Judges, however, who in recent times have inclined against brutality, have run the risk of appearing slightly ridiculous in their tortuous interpretations.").

¹³ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (Holmes, J.); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (Hand, J.).

tended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act. Even more important, the new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself. Properly designated, the New Act is not a "general revision," but is as radical a departure as was our first copyright statute, in 1790.¹⁴

Unlike the porous 1909 Act, the 1976 Act is a detailed comprehensive code, chock-full of specific, heavily negotiated compromises.¹⁵ Some of the 1976 Act's provisions purport to adopt common law doctrine;¹⁶ others purport to abrogate it.¹⁷

Were the new code less complicated or its legislative history less impenetrable, its passage might have ended the story. Huge portions of the judge-made federal common law of statutory copyright would have passed into the twilight zone occupied by, for example, the pre-*Erie*¹⁸ federal common law of unfair competition.¹⁹ A decade after passage of the 1976 Act, however, the decided cases manifest judicial reluctance to abandon prior doctrine.

In *Rockford Map Publishers, Inc. v. Directory Service Co.*,²⁰ for example, the Seventh Circuit relied exclusively on 1909 Act case law in holding that the copyright in a map compiled entirely from public domain sources was infringed by a second map publisher's incorporation of information from the first map into its own maps. Although the 1976 Act addresses the copyrightability of informa-

¹⁴ Ringer, *supra* note 5, at 479 (footnotes omitted).

¹⁵ Professor Melvin Nimmer wrote of the 1976 Act:

Where previously the statute had too little to say in many vital copyright areas, it may now be argued that it says too much. I for one regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Code.

I M. NIMMER, NIMMER ON COPYRIGHT vi (1978); accord Henn, *supra* note 7, at 459-64.

¹⁶ E.g., 17 U.S.C. § 109(a) (1982) (first sale doctrine); see H.R. REP. NO. 1476, 94th Cong., 2d Sess. 79, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5693 ("Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means.").

¹⁷ E.g., 17 U.S.C. § 101 (definition of "perform"); H.R. REP. NO. 1476, *supra* note 16, at 63, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5676-77. See generally Ringer, *supra* note 5.

¹⁸ *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹⁹ See, e.g., *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526 (1924). Some pre-*Erie* cases remain influential to state and federal courts. See generally Note, *The Problem of Functional Features: Trade Dress Infringement under Section 43(a) of the Lanham Act*, 82 COLUM. L. REV. 77 (1982).

²⁰ 768 F.2d 145 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986).

tion,²¹ the court apparently found it unnecessary to consult it.²² Similarly, in *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*,²³ the court relied on what it regarded as a century-long tradition of protecting data contained in compilations, as well as the mode in which the data were expressed,²⁴ to hold that the copyright in a directory extended to the information it contained,²⁵ notwithstanding statutory language to the contrary.²⁶

In *Videotronics, Inc. v. Bend Electronics*,²⁷ the court analyzed the copyright statute's pre-emptive effect on state misappropriation doctrine without examining or citing the 1976 Act's express pre-emption provisions.²⁸ Instead, the court relied on pre-1976 Supreme Court cases that analyzed pre-emption in broad policy terms. In *Topolos v. Caldewey*,²⁹ the Ninth Circuit applied older case law to determine which copyright claims came within its federal subject matter jurisdiction.³⁰ Although the 1976 Act contains substantive and procedural provisions that fundamentally alter that inquiry,³¹ the court ignored them.

In large part, the courts' persistent reliance on older precedent reflects a genuine and understandable confusion about how to interpret the 1976 Act. The statute is complicated and its language is often unclear.³² Courts consult the statute's legislative history for guidance, but find that it compounds their confusion.³³

Indeed, the statute's legislative history is troubling because it reveals that most of the statutory language was not drafted by mem-

²¹ See 17 U.S.C. § 102.

²² See also *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985) (holding telephone directory copyrightable without mention of § 102(b)).

²³ 552 F. Supp. 89 (N.D. Ill. 1982).

²⁴ *Id.* at 94.

²⁵ The court explained: "If . . . protection is limited solely to the form of expression, the economic incentives underlying the copyright laws are largely swept away. Recognizing this, the courts have long afforded protection under the Copyright laws against appropriation of the fruits of the compiler's industry." *Id.* at 92.

²⁶ See 17 U.S.C. § 102(b).

²⁷ 564 F. Supp. 1471 (D. Nev. 1983).

²⁸ See 17 U.S.C. § 301.

²⁹ 698 F.2d 991 (9th Cir. 1983).

³⁰ *Id.* at 993-95.

³¹ 17 U.S.C. §§ 201, 301, 501.

³² See, e.g., 17 U.S.C. § 301 (preemption of state law). Reamis have been written about section 301's ambiguity. See, e.g., Abrams, *Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509 (1983); Gorman, *Fact or Fancy, the Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560, 608-10 (1982); Shipley & Hay, *Protecting Research: Copyright, Common-Law Alternatives and Federal Preemption*, 63 N.C.L. REV. 125, 164-67 (1984); Note, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 B.C.L. REV. 963 (1983); Comment, *The Fine Art of Preemption: Section 301 and the Copyright Act of 1976*, 60 OR. L. REV. 287 (1981).

³³ See, e.g., *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1981); *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987).

bers of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.³⁴ In some cases, affected parties agreed upon language, which was then adopted by Congress, while disagreeing about what the language meant.³⁵ So it is perhaps understandable that some courts have preferred to interpret the 1976 Act as if it had made no change in the 1909 Act, for which, at least, there are precedents.³⁶ But it would be a mistake to conclude that simply because the statutory language and legislative history are difficult to interpret, they convey nothing about what the 1976 Act was intended to accomplish. The statute was a complicated and delicate compromise, but the nature of most aspects of that compromise is possible to unearth. Examination of recent cases in light of that knowledge reveals that courts' reliance on inapposite precedent has seriously distorted the statute and the subtle compromises it incorporates.³⁷

³⁴ See *infra* notes 83-151 and accompanying text. See generally Feist, *The Copyright Client*, 26 BULL. COPYRIGHT SOC'Y 437 (1979); Ringer, *supra* note 5, at 481-82.

³⁵ See 1975 *House Hearings*, *supra* note 9, at 1789-94 (testimony of Barbara Ringer, Register of Copyrights, on negotiations among authors, publishers and educators leading to the language of section 107 and its accompanying legislative history). See also U.S. COPYRIGHT OFFICE, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL 1789-94 (1975) [hereinafter REGISTER'S SECOND SUPPLEMENTARY REPORT]; *infra* notes 118-30 and accompanying text. Compare 1975 *House Hearings* at 295 (testimony of Harry Rosenfield for Ad Hoc Committee of Educational Institutions and Organizations) with *id.* at 345 (testimony of Ernest Farmer for Music Publishers Association).

³⁶ See, e.g., *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 551-53 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Videotronics, Inc. v. Bend Elecs.*, 564 F. Supp. 1471 (D. Nev. 1983).

³⁷ See *infra* notes 242-84 and accompanying text. In two recent decisions, for example, the Supreme Court and the Second Circuit unraveled complicated compromises involving various aspects of copyright ownership. See *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). For a discussion of these cases see *infra* text accompanying notes 266-82. For a detailed discussion of the compromises see *infra* notes 54-67, 202-35 and accompanying text. In two other cases, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court adopted a test for fair use that rigidifies the statute's major flexibility principle. See *infra* text accompanying notes 261-65. The Supreme Court's decisions have met with much criticism. See generally *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 (1985) [hereinafter *Civil and Criminal Enforcement*] (testimony of Barbara Ringer, former Register of Copyrights) (criticizing *Mills Music*); W. PATRY, *LAYMAN'S THE COPYRIGHT LAW* 113 (2d ed. 1986) (criticizing *Mills Music*); Abrahams, *Who's Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. L. REV. 181 (1985) (criticizing *Mills Music*); Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986) (criticizing *Harper & Row*). But see Kernochan, *Protection of Unpublished Works in the United States Before and After the Nation Case*, 33 J. COPYRIGHT SOC'Y 322 (1986) (argu-

This article examines the unusual legislative history of the 1976 Copyright Act. That legislative history reflects an anomalous legislative process designed to force special interest groups to negotiate with one another.³⁸ Courts and commentators frequently seek guidance from this legislative history,³⁹ but find it difficult to interpret because it is not the sort of legislative history they are used to interpreting. In this article, I first explore why the 1976 Act's legislative history is not amenable to the usual methods of interpretation. Second, I examine what this legislative history reveals about congressional intent and about the meaning of the statutory language. The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus. During more than twenty years of negotiations, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright. The record demonstrates that members of Congress chose to enact compromises whose wisdom they doubted because of their belief that, in this area of law, the solution of compromise was the best solution. I examine the legislative materials detailing some of those compromises in order to learn what the persons who negotiated them believed them to mean. Finally, I argue that courts' resort to 1909 Act precedent whenever they find the statute ambiguous disservices Congress's intent and distorts the compromises embodied in the language of the statute.

I

SEARCHING FOR LEGISLATIVE INTENT

[T]he bill is so full of things that people do not understand about it, that cannot be understood, it should not be passed. There are

ing that although *Harper & Row* distorts the statute, the result is an improvement over 1976 Act).

³⁸ See *infra* notes 81-151 and accompanying text; 1965 *House Hearings*, *supra* note 8, at 1872-73 (testimony of Abraham Kaminstein, Register of Copyrights). Although negotiation and compromise commonly accompany legislation, it is rare that Congress designs, funds and supervises third-party negotiations in a forum that generates an official record of the bargaining. See *infra* note 83; *infra* notes 153-61 and accompanying text.

³⁹ See, e.g., *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 732 (8th Cir. 1986); *Donald Frederick Evans & Assocs. v. Continental Homes, Inc.*, 785 F.2d 897, 905 (11th Cir. 1986); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 433-34 (4th Cir. 1986); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 193 (2d Cir. 1985); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 416-18 (2d Cir. 1985); *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 158-59 (3d Cir. 1984); *Gay Toys, Inc. v. Buddy L. Corp.*, 703 F.2d 970, 972-73 (6th Cir. 1983); *Schnapper v. Foley*, 667 F.2d 102, 114-15 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980).

a lot of people who have instigated and brought about this bill which is being presented to us. I have talked to members of the Committee on the Judiciary who admit they do not know what is in it.

Representative Paul C. Jones⁴⁰

Most analyses of a statute's legislative history seek either to determine a legislature's specific intent with respect to a narrow substantive issue⁴¹ or to support an argument that a legislature specifically intended a particular result.⁴² Such analyses of the 1976 Copyright Act's legislative history have failed to clarify the statute's ambiguity.⁴³ The legislative history of the 1976 Act contains little evidence of Congress's specific intent on any substantive issue. Courts searching for such evidence have ultimately relied upon an assortment of often conflicting inferences drawn from the absence of such evidence.

In *Mills Music v. Snyder*,⁴⁴ for example, the Supreme Court scoured the 1976 Act's legislative history to discern Congress's specific intent regarding the scope of the derivative works exception to the termination of transfers provisions in section 304(c).⁴⁵ The Court split five to four, with both the majority and the dissent relying heavily on section 304(c)'s legislative history.⁴⁶ Each insisted

⁴⁰ 113 CONG. REC. 8581 (1967).

⁴¹ See, e.g., Abrahms, *supra* note 37, at 204-32.

⁴² See, e.g., Brief Amicus Curiae of the Association of American Publishers, Inc. at 7-8, 10 & n.7, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (No. 83-1632).

⁴³ Compare, e.g., *Roth v. Pritkin*, 710 F.2d 934 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983) with *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981).

⁴⁴ 469 U.S. 153 (1985).

⁴⁵ Under the 1976 Act:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

17 U.S.C. § 304(c)(6)(A) (1982). The Act's termination provisions are very complex, and the reader needs no further familiarity with their terms. The curious, however, may be interested that section 304 extended the term of subsisting copyrights for an additional 19 years. Subsection 304(c) permitted authors to recapture the rights protected by the extended term and subsection 304(c)(6)(A) exempted from the rights reverting to the author the right to continue to use a derivative work prepared under a terminated grant. See generally Curtis, *Caveat Emptor in Copyright: A Practical Guide to the Termination of Transfer Provisions of the New Copyright Code*, 25 BULL. COPYRIGHT SOC'Y 19 (1977); Rothenberg, *Old Copyrights, Old Copyright Lawyers and the New Copyright Act*, 29 J. COPYRIGHT SOC'Y 395, 396-99 (1982). The Court in *Mills Music* held that the § 304(c)(6)(A) exemption protected the interest of intermediate transferees in receiving the proceeds from the derivative work's further exploitation rather than subjecting that interest to the author's right of recapture. 469 U.S. at 164.

⁴⁶ Compare 469 U.S. at 170-76 (majority opinion) with *id.* at 180-88 (White, J., dissenting).

that an exegesis of the legislative history led inexorably to its conclusion. Neither the majority nor the dissent, however, could cite evidence that any member of Congress had ever considered the issue before the Court. Instead, both relied upon inferences drawn from congressional silence, and upon assumptions about matters within congressional knowledge.⁴⁷ Professor Abrahms' recent analysis of *Mills Music* takes this approach a step further. He concludes that the dissent was probably correct because "Congress accepted the position of the Register of Copyright on those issues [upon] which it did not formulate a position of its own,"⁴⁸ and, although the "Register never directly announced a position on the issue," the Register attended discussions among industry representatives during which the issue was raised.⁴⁹ All three analyses contain a thorough review of such evidence as the legislative history contains, and all three confess the absence of evidence of *any* substantive intent on the part of any member of Congress. All three, nonetheless, conclude that Congress can be deemed to have intended something in particular and engage in convoluted logical maneuvers to infer what that something in particular might be.

Several assumptions underlie such an exercise. First, these analyses assume that legislative intent must refer to the intent of members of Congress. Second, they assume that this intent must be substantive and specific. Third, they assume that in the absence of evidence of substantive, specific intent on the part of members of Congress, it is appropriate to impute an intent to Congress that is both substantive and specific.⁵⁰ All three assumptions are particu-

⁴⁷ Compare *id.* at 172 (majority opinion) ("Rather than assuming that Congress was unaware of a common practice . . . , we think it more probable that Congress saw no reason to draw a distinction between a direct grant by an author to a party that produces derivative works and a situation in which a middleman is given authority to make subsequent grants to such producers.") with *id.* at 181 (White, J., dissenting) ("The Committee apparently assumed that the grantee of the underlying copyright and the utilizer of the derivative work would be one and the same.").

⁴⁸ Abrahms, *supra* note 37, at 228.

⁴⁹ *Id.* at 228-32. Former Register of Copyrights Barbara Ringer, who actually drafted the provision, recently testified before a Senate Subcommittee about her recollection as to Congress's intent. See *Civil and Criminal Enforcement*, *supra* note 37, at 79-95.

⁵⁰ These assumptions arise because legislative "intent" is essentially a legal fiction. For purposes of interpretation, courts and commentators assume that members of Congress write statutes, that they know what the statutes say, and that they intend something in particular to follow from the language they choose. The most cursory familiarity with the usual legislative process, however, indicates that these assumptions describe the process poorly. Indeed, much of courts' and commentators' discomfort with the concept of legislative intent derives from an awareness that the concept is a fiction. See generally MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966). In the typical case, however, this discomfort lessens because most legislative histories do not expressly contradict the usual assumptions about legislative intent. In this regard, the 1976 Copyright Act is very different from most statutes.

larly difficult to apply to the legislative history of the 1976 Copyright Act. The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.⁵¹ Yet one can read this history in its entirety and find no evidence that any member of Congress intended anything in particular to follow from many provisions of the statute. Indeed, even the sponsors of copyright revision demonstrated little knowledge and few opinions about the substance of the bills they introduced.⁵²

The legislative history of section 304(c), the provision at issue in *Mills Music*, is illustrative.⁵³ That provision was part of a compromise package involving the controversial and intertwined issues of initial ownership, duration of copyright, and reversion of rights.⁵⁴

⁵¹ See I A. LATMAN & J. LIGHTSTONE, *THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 xxxi-xliii* (1981). The Kaminstein Project is a six volume index to more than 160 items of legislative history. Much of the legislative history is collected in the seventeen-volume microfiche compilation G. GROSSMAN, *OMNIBUS COPYRIGHT REVISION* (1976), which comprises 143 microfiche cards.

⁵² Representative Celler, who introduced H.R. 11947, 88th Cong., 2d Sess. (1964), reprinted in *HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 1* (Comm. Print 1965) [hereinafter CLR PART 5] at the Register's request, made a general but atypically substantive statement before the House subcommittee during the 1965 House Hearings. See 1965 *House Hearings*, *supra* note 8, at 1851-55. More frequently, sponsors disclaimed specific positions on the bills they introduced. 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. 1 (1965) [hereinafter 1965 *Senate Hearings*] (remarks of Sen. McClellan, sponsor of S. 1006). See also *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. 1, 172-75 (1967) [hereinafter 1967 *Senate Hearings*] (remarks of Sen. McClellan, sponsor of S. 597). Moreover, sponsors of amendments displayed remarkable inexpertise regarding the subject matter of their amendments; that inexpertise plagued even the members of the subcommittees responsible for copyright revision. See, e.g., 1975 *House Hearings*, *supra* note 9, at 1285 (remarks of Rep. Danielson, sponsor of H.R. 5345, 94th Cong., 1st Sess. (1975), reprinted in 1975 *House Hearings*, *supra* note 9, at 80).

⁵³ See *supra* note 45.

⁵⁴ See REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 66-68, 71-76, 86-96; 1965 *House Hearings*, *supra* note 8, at 129-36 (testimony of Horace Manges, American Book Publishers Council); *id.* at 994 (prepared statement of Motion Picture Association). For a taste of the controversy, see *HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 93-94* (Comm. Print 1963) [hereinafter CLR PART 2]; *HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT AND DISCUSSION AND COMMENTS 262-63* (Comm. Print 1964) [hereinafter CLR PART 3] (remarks of Irwin Karp, Authors League of America) *id.* at 278-90 (colloquy); *HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSION AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 34* (Comm.

The Register, convinced that opposition to any provision of the Revision Bill would scuttle the proposed legislation,⁵⁵ drafted a number of alternative proposals designed to achieve an acceptable compromise.⁵⁶ Each proposal, however, met with more opposition than its predecessor.⁵⁷

Print 1964) [hereinafter CLR PART 4] (remarks of Horace Manges, Joint Copyright Committee of the American Book Publishers Council and the American Textbook Publishers Institute).

⁵⁵ See, e.g., CLR PART 5, *supra* note 52, at 219-20 (remarks of Abraham Kaminstein, Register of Copyrights).

⁵⁶ Under the 1909 Act, copyrights had an initial 28-year term and could be renewed for an additional 28-year term. One purpose of the renewal term was reversion of rights to the author; unless the work was a "work made for hire," the renewal term vested in the work's author notwithstanding any grants made during the initial term. However, in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), the Supreme Court held an author's expectation of a renewal term assignable, effectively gutting the reversionary feature of renewal. See J. GUINAN, *DURATION OF COPYRIGHT 77-79* (1957) *reprinted in* SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *COPYRIGHT LAW REVISION* (1960).

Initially, the Register proposed retaining renewal, but extending the renewal term from 28 to 48 years and eliminating its reversionary feature. 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 53-58* (Comm. Print 1961) [hereinafter CLR PART 1]. Subsisting copyrights already in their renewal term would be extended for 20 additional years but the extended term would revert to the work's author. *Id.* The Register favored replacing reversion with a time limit of 20 years on lump-sum transfers. *Id.* at 92-94. Based upon a study of judicial decisions that had concluded that works made for hire included works created by salaried employees but not commissioned works, see B. VARMER, *WORKS MADE FOR HIRE AND ON COMMISSION 142* (1958), *reprinted in* SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *COPYRIGHT LAW REVISION* (1960), the Register proposed defining works made for hire to include works prepared by employees and to exclude commissioned works. See CLR PART 1, *supra*, at 90-91. Because employers were deemed the "authors" of works made for hire, the reversion of the extended term and the time limitation on lump-sum transfers would not have affected works for hire.

The response to these proposals was generally negative. See sources cited *infra* note 57. Almost no one agreed with the recommendation to retain renewal. Representatives of publishers and motion picture studios insisted that industry practice identified various commissioned works as works for hire and opposed the proposed definition as well as the extended duration and time limitation on transfers. The Register next proposed an extended single term with two alternative provisions permitting an author either to recapture the copyright after 25 years or to recover a share of the grantee's profits after 20 years. The Register also proposed a revised definition of works made for hire that included commissioned works. This proposal met an even more ardently negative response. The Register's third proposal, in 1964, more closely resembled the scheme ultimately enacted in 1976, including a single term of life plus 50 years, a provision for terminating grants after 35 years, and a parallel provision for recapture of the extended term of subsisting copyrights. Opposition, however, remained strong.

⁵⁷ See CLR PART 2, *supra* note 54, at 88-104 (opposition to retaining renewal); *id.* at 104-05 (opposition to limiting duration of transfers); *id.* at 153-60 (opposition to excluding commissioned works from works made for hire); CLR PART 3, *supra* note 54, at 257-75 (argument over revised definition of works made for hire); *id.* at 278-92 (opposition to reversion); CLR PART 4, *supra* note 54, at 248-50 (written comments of American Book Publishers Council on reversion, duration, and works made for hire); *id.* at 313-14

Finally, the Copyright Office succeeded in urging negotiations among representatives of authors, composers, book and music publishers, and motion picture studios that produced a compromise on the substance and language of several provisions.⁵⁸ The compromise provisions appeared in H.R. 4347, and were presented to the House subcommittee as such.⁵⁹ The prepared testimony of the Motion Picture Association of America, for example, described the provisions this way:

After much travail and debate for several years, at panel meetings, symposia, and ad hoc meetings, through published papers and articles, but with a joint desire to promote copyright revision, substantial changes were made in the original proposals by way of major compromises worked out under the guidance and assistance of the Copyright Office. These are reflected in *H.R. 4347*.

As presently drawn in *H.R. 4347*, the compromise provisions on "works for hire," and on "recapture," provide a minimal basis on which motion picture interests can learn to live with these provisions, and can accept the same in the interests of promoting revision legislation, even though we are still strongly opposed in principle to the whole concept of recapture.

Any change or dilution to our disadvantage of the minimal basis on which these compromise provisions were found acceptable, in the interests of furthering acceptable copyright revision, would be working an injustice, and we would strongly oppose the same.⁶⁰

Once the compromise had been incorporated into the bill, most

(written comments of Authors League of America on works made for hire); CLR PART 5, *supra* note 52, at 146-50 (opposition to new, revised definition of works made for hire); *id.* at 154-65 (opposition to new, revised, reversion provision).

⁵⁸ See 1965 *House Hearings*, *supra* note 8, at 107 (testimony of Irwin Karp, Authors League of America); *id.* at 129 (testimony of Horace Manges, American Book Publishers Council); *id.* at 134-36 (Memorandum of American Book Publishers Council, Inc., American Guild of Authors & Composers, American Society of Composers, Authors and Publishers, American Textbook Publishers Institute, The Authors League of America, Inc., Composers and Lyricists Guild of America, Inc., Music Publishers Protected Association, Inc., Music Publishers Association of the United States Re: H.R. 4347); *id.* at 257 (testimony of Tom Mahoney, Society of Magazine Writers); *id.* at 1048-49 (testimony of Adolph Schimel, Motion Picture Association of America).

⁵⁹ See, e.g., 1965 *House Hearings*, *supra* note 8, at 92, 98 (statement of Rex Stout for the Authors League of America); *id.* at 107 (testimony of Irwin Karp, Authors League of America); *id.* at 257 (testimony of Tom Mahoney, Society of Magazine Writers); *id.* at 1866 (testimony of Abraham Kaminstein, Register of Copyrights). See also REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 296-307.

⁶⁰ 1965 *House Hearings*, *supra* note 8, at 994 (prepared statement of the Motion Picture Association of America). See also *id.* at 1537-38 (testimony of Joseph Dubin, American Patent Law Association); 1967 *Senate Hearings*, *supra* note 52, at 74 (testimony of Horace Manges, American Book Publishers Council).

of the once-bitter controversy evaporated⁶¹ and the provisions received little congressional attention. Over the next ten years several witnesses appeared before Congress with proposals to vary the package.⁶² The Registers⁶³ of Copyrights, however, consistently advised Congress to resist suggestions to alter the terms of the compromise.⁶⁴ Congress enacted the relevant provisions essentially without change.

Close examination of the dialogue preceding the 1965 compromise reveals what the negotiating parties believed their compromise to mean.⁶⁵ The Register's few remarks seem at least mildly confirmatory.⁶⁶ Because the controversy surrounding the provisions disappeared once the parties reached a compromise, however, Congress gave the provisions little or no detailed consideration, and addressed them only briefly in committee reports. The Register's reports and testimony on these provisions were equally superficial.⁶⁷ Thus, there is no evidence whatsoever of what members of Congress believed the language to mean. And although the pre-legislative dialogue reveals the extent to which the industry representatives believed that their compromise altered prior law,⁶⁸ later legislative materials gave the compromise little explicit attention.

⁶¹ See 1965 *House Hearings*, *supra* note 8, at 1866 (testimony of Abraham Kaminstein, Register of Copyrights); 1967 *Senate Hearings*, *supra* note 52, at 74 (testimony of Horace Manges, American Book Publishers Council); see generally Lehman, *Legislative Background*, 25 BULL. COPYRIGHT SOC'Y 192 (1978).

⁶² See, e.g., 1965 *House Hearings*, *supra* note 8, at 264-71 (testimony of Leonard Zissu, Composers & Lyricists Guild, proposing replacing works made for hire provision with "shop right" provision); 1975 *House Hearings*, *supra* note 9, at 133-34 (testimony of Irwin Goldblum, Department of Justice, proposing shorter duration of copyright term and altered termination of transfer provisions).

⁶³ During the 21 year revision process, three persons held the office of Register of Copyrights. Abraham Kaminstein served until his retirement in 1971, when George Cary took over. Cary retired in 1973 and Barbara Ringer became Register. Kaminstein and Ringer were both active and extremely influential in the revision effort.

⁶⁴ See 1965 *House Hearings*, *supra* note 8, at 1866 (testimony of Abraham Kaminstein, Register of Copyrights); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 306-07 (opposing alteration of "carefully negotiated definition" of works made for hire or first refusal exception in section 203, "one of the compromises on which the delicate balance of section 203 rests").

⁶⁵ See *infra* notes 202-35 and accompanying text. With respect, for example, to the provision at issue in *Mills Music* permitting the continued exploitation of a derivative work, it appears that all parties believed that termination pursuant to the provision would divest intermediary grantees, such as music publishers, of any rights whatsoever. See *infra* note 226.

⁶⁶ See, e.g., REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 299; see also CL.R PART 3, *supra* note 54, at 278 (remarks of Barbara Ringer, Assistant Register of Copyrights for Examining); *Civil and Criminal Enforcement*, *supra* note 37, at 90 (testimony of Barbara Ringer, former Register of Copyrights).

⁶⁷ See, e.g., 1975 *House Hearings*, *supra* note 9, at 1889-91 (testimony of Barbara Ringer, Register of Copyrights).

⁶⁸ See *infra* notes 210-35 and accompanying text.

If the paucity of congressional participation in framing the substantive terms of the provisions concerning initial ownership, duration, and termination of transfers were unique to these provisions, the problem of interpreting the statute as a whole would be a familiar and manageable one.⁶⁹ Instead, the pattern underlying the adoption of these provisions pervades the 1976 Act. Most of the statute's substantive provisions derive from compromises negotiated among those with economic interests in copyright: the statute's treatment of cable television,⁷⁰ library photocopying,⁷¹ phonorecord publishing,⁷² jukebox operation,⁷³ and the manufacturing clause⁷⁴ resulted from verbatim congressional adoption of such negotiated compromises. The wording of the fair use provision, and the language of the committee reports accompanying it, emerged from a hard fought compromise involving protracted, down-to-the-wire negotiations among representatives of authors, composers, publishers, music publishers, and educational institutions.⁷⁵

Congressman Railsback's description of the Bill during the 1976 House floor debates seems apt: "A good compromise is probably one that satisfies no one, but is acceptable to everyone, and it

⁶⁹ The usual approach to statutory interpretation is to read ambiguous provisions in light of the legislation's overall purpose. See, e.g., Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250 (1986). Recourse to some overarching statutory purpose in the copyright context, unfortunately, has proven particularly treacherous. Is the statute's purpose to benefit authors? To provide incentives for authors to create works? To further public dissemination? Even settling on a particular purpose fails to advance the inquiry appreciably because what is most unclear is the means Congress chose to achieve its (surely multiple) purposes. Compare *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 170-78 (1985) (Congress did not intend to distinguish direct grants from authors to producers of derivative works from authors' grants to middlemen) with *id.* at 186-88 (White, J., dissenting) (derivative works exception intended to protect authors); compare also *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984) with *id.* at 495 (Blackmun, J., dissenting).

⁷⁰ 17 U.S.C. § 111 (1982). See, e.g., REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 118-44; 122 CONG. REC. 31,984 (1976) (remarks of Rep. Railsback); *id.* at 32,008 (remarks of Rep. Kastenmeier).

⁷¹ 17 U.S.C. § 108. See H.R. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 72, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5810, 5813.

⁷² 17 U.S.C. § 115. See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 246-80; 1975 House Hearings, *supra* note 9, at 1868 (testimony of Barbara Ringer, Register of Copyrights).

⁷³ 17 U.S.C. § 116. See 1975 House Hearings, *supra* note 9, at 111 (testimony of Barbara Ringer, Register of Copyrights); 122 CONG. REC. 3824-26 (1976) (colloquy).

⁷⁴ 17 U.S.C. §§ 601-602. See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 360-62.

⁷⁵ See, e.g., 1975 House Hearings, *supra* note 9, at 1789-96 (testimony of Barbara Ringer, Register of Copyrights); 122 CONG. REC. 31,980-81 (1976) (remarks of Rep. Kastenmeier).

has been said that this bill is a compromise of compromises."⁷⁶ The House subcommittee drafted a compromise treatment of public television after negotiations between representatives of public television and copyright owners failed;⁷⁷ the compromise itself seeks to encourage continuing negotiations toward voluntary licenses.⁷⁸ The invention of the Copyright Royalty Tribunal and the definition of its jurisdiction were both compromises negotiated by interested parties and then ratified by Congress.⁷⁹ Indeed, the Copyright Office and interested parties hammered out the basic structure of the entire statute before including Congress in the legislative revision.⁸⁰

II

NEGOTIATIONS AND COMPROMISE IN THE LEGISLATIVE PROCESS

"Really, all interests in this bill are, in one form or another, special interests."

—Representative Kastenmeier⁸¹

The legislative history of the 1976 Copyright Act is, at the very least, a troublesome aid in determining the statute's meaning. One can choose a statutory provision almost at random; a review of the provision's legislative history will show that credit for its substance belongs more to the representatives of interested parties negotiating among themselves than to the members of Congress who sponsored, reported, or debated the bill. The congressional sponsors may have given almost no thought to the meaning of the provision. That fact presents a vexing puzzle in statutory interpretation.⁸²

Negotiation, brokering and compromise commonly accompany the enactment of a statute. One might conclude that the participa-

⁷⁶ 122 CONG. REC. 31,982-83 (1976).

⁷⁷ 17 U.S.C. § 118. See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 154-67, 176; 122 CONG. REC. 31,985 (1976) (remarks of Rep. Drinan).

⁷⁸ See 122 CONG. REC. 31,985 (1976) (remarks of Rep. Drinan). In the context of the Act as a whole, the provision is unusual because members of Congress, rather than representatives of affected industries, designed the compromise.

⁷⁹ See 1975 *House Hearings*, *supra* note 9, at 734, 757 (testimony of Jack Valenti, Motion Picture Association); *id.* at 777-80 (testimony of John Summers, National Broadcasting Association); 122 CONG. REC. 3822-26 (1976) (colloquy).

⁸⁰ See 1965 *House Hearings*, *supra* note 8, at 31-33 (prepared statement of George Cary, Deputy Register of Copyrights); *id.* at 1858-59 (testimony of Abraham Kaminstein, Register of Copyrights).

⁸¹ 1975 *House Hearings*, *supra* note 9, at 1853.

⁸² Congressional inattention, without more, would not make the puzzle an unusual one. The substantive content of many statutes receives only cursory attention from individual members of Congress. A probing analysis of the legislative process that generated the 1976 Act, however, demonstrates how significantly it differs from the more familiar variety of legislation through brokering. See *infra* notes 83-161 and accompanying text.

tion of industry representatives in the copyright revision process was simply an extreme case of vigorous lobbying, different in degree, but not in kind, from the process producing most other statutes. Alternatively, one might conclude that the tremendous influence of industry-negotiated compromises resulted from Congress's passive ratification of the compromises so struck. Both conclusions would be wrong.

The negotiations over copyright revision were not merely incidental to lobbying.⁸³ Indeed, Congress consistently resisted lobbying over substantive issues, insisting instead that would-be lobbyists sit down with their opponents and seek mutually acceptable solutions.⁸⁴ Nor did Congress pass the 21 years of copyright revision waiting idly for industry representatives to do its work. Members of Congress worked very hard on the copyright revision bill. They held repeated, lengthy subcommittee hearings, attended numerous executive sessions, and drafted a flood of committee reports.⁸⁵ More important, they encouraged, cajoled, bullied, and threatened the parties through continuing negotiations.⁸⁶ They mediated disputes and demanded that combative interests seek common ground.⁸⁷ Viable compromises emerged from the interminable negotiations largely because of congressional midwifery.

⁸³ See 122 CONG. REC. 31,985 (1976) (remarks of Rep. Drinan) ("the compromises in this bill do not represent the kind frequently associated with the legislative process"). The legislative process that I describe may be functionally equivalent in many ways to the familiar process by which bar association committees, trade associations, or uniform law commissions negotiate the provisions of bills ultimately submitted to Congress. See, e.g., A.B.A. SECTION OF PATENT TRADE-MARK AND COPYRIGHT LAW, REPORT OF THE COMM. ON FEDERAL AND STATE TRADE-MARK LEGISLATION 66 (1938) (A.B.A. committee drafted proposed trademark statute introduced by Rep. Lanham as H.R. 9041). It is nonetheless atypical for these negotiations to proceed with congressional funding, supervision, and sponsorship and even more unusual for such negotiations to generate an official government record of the bargaining sessions. Although administrative agencies in recent years have increasingly relied on industry compromises in framing regulations, those compromises typically receive only tacit acknowledgement. The official legislative history of this statute is distinctive in the explicit and officially sponsored character of the compromises it produced. That difference is itself significant. See *infra* notes 154-62 and accompanying text.

⁸⁴ See, e.g., 1975 *House Hearings*, *supra* note 9, at 1713 (remarks of Rep. Drinan); *id.* at 1796 (testimony of Barbara Ringer, Register of Copyrights).

⁸⁵ See Kaminstein, *The Current Status of U.S. Copyright Law Revision: An Experiment in Legislative Technique*, 13 BULL. COPYRIGHT SOC'Y 371 (1966); see also sources cited *supra* note 51.

⁸⁶ See *infra* notes 100-44 and accompanying text; see also, e.g., 1965 *House Hearings*, *supra* note 8, at 591 (remarks of Rep. Poff); 1965 *Senate Hearings*, *supra* note 52, at 93 (remarks of Sen. McClellan); 1975 *House Hearings*, *supra* note 9, at 193 (remarks of Rep. Pattison); *id.* at 363 (remarks of Rep. Drinan); 113 CONG. REC. 8585 (1967) (remarks of Rep. Celler).

⁸⁷ See *infra* notes 104-33 and accompanying text; see also, e.g., 1975 *House Hearings*, *supra* note 9, at 971 (testimony of Edward Cramer, Broadcast Music, Inc.); *Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the*

The incessant pressure to achieve agreement among industry representatives was deliberate and planned in advance. The Register of Copyrights initially designed the revision process to give compromise among affected interests a central role. The program began in 1955 with the congressional funding of 35 studies on copyright issues.⁸⁸ The Copyright Office circulated the studies among members of an advisory panel of lawyers representing various parties with interests in copyright revision. After reviewing the panel's comments, the Register prepared a report.⁸⁹ The Copyright Office then held a series of meetings with the advisory panel, which eventually swelled to include "more than a hundred persons, representing almost everyone who had any real interest in this subject."⁹⁰ At the first of these meetings, the Register explained that his report contained tentative recommendations intended only to generate discussion. The Register designed the meetings to reach inter-industry consensus on a proposal before drafting a bill for congressional consideration.⁹¹ In his 1965 testimony to the Senate Subcommittee on Patents, Copyrights and Trademarks, Register Abraham Kaminstein explained:

In the hearings on this bill held before Subcommittee No. 3 of the House Judiciary Committee earlier this year a question was raised as to why, in view of the fast-evolving communications technology, there have not been more frequent revisions of the copyright law. If there is a single answer to this question, I believe it is that there are so many interrelated creator-user interests in the copyright field, and they present such sharp conflicts on individual issues, that the consensus necessary for any general revision is extremely difficult to achieve. Examples of this difficulty are found throughout the concentrated efforts to revise the 1909 act which went on continuously between 1924 and 1940 and which all ended in failure and futility. Realizing fully what copyright law revision is up against, Arthur Fisher, my predecessor as Register of Copyrights, planned a program that would be based on a thorough knowledge of all the issues and a painstaking effort to re-

Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 288 (1973) [hereinafter 1973 *Senate Hearings*] (remarks of Sen. McClellan).

⁸⁸ SUBCOMM. ON PATENTS TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960). See CLR PART 1, *supra* note 56, at x-xi.

⁸⁹ CLR PART 1, *supra* note 56, at ix.

⁹⁰ 1965 *Senate Hearings*, *supra* note 52, at 64 (testimony of Abraham Kaminstein, Register of Copyrights).

⁹¹ CLR PART 2, *supra* note 54, at 4-5. Indeed, few of the recommendations in the Register's 1961 Report remained in the Bill that emerged from the pre-legislative meetings, and fewer still remained in the Bill ultimately enacted in 1976. Compare CLR PART 1, *supra* note 56, with H.R. 11947, 89th Cong., 1st Sess. (1965) and Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1982 & Supp. III 1985)).

solve as many disputes as possible before a bill reached the stage of congressional hearings. It took us 10 years, but the program he planned has been carried out to the best of our ability.⁹²

After each series of meetings, the Register solicited additional written comments and drafted responsive proposals.⁹³ During the years of the panel discussions the Copyright Office attempted to iron out as many disagreements as possible,⁹⁴ and the Register urged that more intractable controversies be resolved through further negotiations.⁹⁵

By the time the House and Senate subcommittees began holding hearings on copyright revision legislation, the participants in the pre-legislative dialogue had reached agreement on the bill's basic structure and approach,⁹⁶ but many parties were still wrangling about specifics.⁹⁷ The Register gave both subcommittees progress reports, accompanied by a voluminous record of the pre-legislative process,⁹⁸ and explained that many of the bill's provisions were "carefully worked-out compromises which, while not especially welcome to either side on a particular issue, have proved a satisfactory way of balancing the interests."⁹⁹ Members of Congress then joined the effort to encourage further attempts to reach compromise.¹⁰⁰

During the 1965 House Subcommittee Hearings, for example, numerous witnesses testified about the controversy over the liability of jukebox operators for using copyrighted music.¹⁰¹ Representative Poff urged the jukebox operators to reach a compromise with composers,¹⁰² while Representative Celler, the bill's sponsor, sug-

⁹² 1965 *Senate Hearings*, *supra* note 52, at 66. See also REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at xii-xiii.

⁹³ See CLR PART 3, *supra* note 54; CLR PART 4, *supra* note 54; CLR PART 5, *supra* note 52; REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at ix-xvi.

⁹⁴ 1965 *House Hearings*, *supra* note 8, at 31-32 (prepared statement of George Cary, Deputy Register of Copyrights); Ringer, *supra* note 5, at 479-82.

⁹⁵ See, e.g., 1965 *Senate Hearings*, *supra* note 52, at 71 (testimony of Abraham Kaminstein, Register of Copyrights); see also sources cited *supra* notes 54.

⁹⁶ I analyze the bill's basic structure and approach *infra* notes 170-201 and accompanying text.

⁹⁷ See 1965 *House Hearings*, *supra* note 8, at 1858-59 (testimony of Abraham Kaminstein, Register of Copyrights). The compromise package on ownership, duration, and termination, discussed *supra* notes 54-68 and accompanying text, was among the settled issues. See 1965 *House Hearings*, *supra* note 8, at 1866 (testimony of Abraham Kaminstein, Register of Copyrights).

⁹⁸ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11; CLR PART 1, *supra* note 56; CLR PARTS 2 to 4, *supra* note 54; CLR PART 5, *supra* note 52.

⁹⁹ 1965 *Senate Hearings*, *supra* note 52, at 66.

¹⁰⁰ See, e.g., 1965 *House Hearings*, *supra* note 8, at 1855 (testimony of Rep. Celler, Chairman of House Judiciary Committee); *id.* at 1856 (remarks of Rep. Poff); 1965 *Senate Hearings*, *supra* note 52, at 93 (remarks of Sen. McClellan).

¹⁰¹ See 1965 *House Hearings*, *supra* note 8, at 170-219, 537-658, 921-974 (testimony of various witnesses).

¹⁰² *Id.* at 590-93 (colloquy). See also *id.* at 59 (remarks of Rep. Kastenmeier).

gested that if the jukebox industry refused to negotiate with composers, the subcommittee should adopt a provision subjecting the industry to full copyright liability.¹⁰³ After the hearings, the Subcommittee and the Register pressured the two groups to reach a negotiated solution. The Register made suggestions. The members of the Subcommittee made suggestions. The House Judiciary Committee sent its counsel to meet representatives of the jukebox industry in Chicago about possible bases for compromise.¹⁰⁴ Finally, after protracted negotiations, the parties agreed on the principle of royalty payments with a statutory ceiling, but could not agree on a royalty amount.¹⁰⁵ In April of 1967, after the House had begun debating the revision bill, the Chairman of the Judiciary Committee convened a meeting between representatives of the jukebox industry and representatives of composers and publishers and demanded that they reach agreement. The parties ultimately compromised on a flat annual royalty of eight dollars per jukebox, paid to and distributed by the Copyright Office. The substance of the compromise was not what the Register or any member of the subcommittee would have designed, but they supported it because the parties to the agreement found it acceptable.¹⁰⁶

Even more difficult negotiations ensued over the copyright liability of cable television systems.¹⁰⁷ Sharp controversy arose during the 1965 House Subcommittee Hearings, and the subcommittee members drafted a compromise provision that proved acceptable to no one.¹⁰⁸ Negotiations over the next few years among representatives of broadcasters, cable television operators, and copyright owners yielded no agreement.¹⁰⁹ The Senate Subcommittee drafted alternative provisions, which drew angry protests.¹¹⁰ In 1971, Senator McClellan persuaded both the FCC and the White House Office of Telecommunications Policy to join the fracas.¹¹¹ When none of their compromise proposals to the parties proved agreeable, the chairman of the FCC and the director of the Office of Telecommuni-

¹⁰³ *Id.* at 1855.

¹⁰⁴ 113 CONG. REC. 8592 (1967) (remarks of Rep. Celler).

¹⁰⁵ *Id.* (remarks of Rep. Kastenmeier).

¹⁰⁶ 113 CONG. REC. 8992-94 (1967) (colloquy); *see also* 1975 *House Hearings, supra* note 9, at 1885 (testimony of Barbara Ringer, Register of Copyrights); 122 CONG. REC. 3824-25 (1976) (remarks of Sen. Hollings).

¹⁰⁷ *See generally* REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 118-48.

¹⁰⁸ *See id.* at 121-22; H.R. REP. NO. 2237, 89th Cong., 2d Sess. 77-88 (1966); 113 CONG. REC. 8598-604 (1967) (colloquy).

¹⁰⁹ *See* S. REP. NO. 1168, 90th Cong., 2d Sess. 6 (1968); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 127-28.

¹¹⁰ *See* REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 128-29.

¹¹¹ *See id.* at 134; 1973 *Senate Hearings, supra* note 87, at 278-280 (prepared statement of Jack Valenti, Motion Picture Association).

cations Policy forced what came to be called the "consensus agreement" down the throats of all concerned, and sent the parties back to Senator McClellan's subcommittee.¹¹² The Copyright Royalty Tribunal¹¹³ originated with the consensus agreement's proposal that, should the parties fail to agree on a royalty rate, compulsory arbitration would settle the issue.¹¹⁴ Perhaps because the participants sensed that their consensus agreement had been coerced, many remained unhappy with it and with those provisions of the copyright bill written to reflect its terms.¹¹⁵ Negotiations continued, and the cable and motion picture industries ultimately agreed on their own proposal,¹¹⁶ which the House Subcommittee adopted¹¹⁷ and Congress enacted.¹¹⁸

The House Subcommittee's general counsel participated actively in the tortuous negotiations on fair use.¹¹⁹ Relentless pressure from House Subcommittee members persuaded the participants in the negotiations to find a solution on which they could agree.¹²⁰ The Register's initial report in 1961¹²¹ suggested that the general revision bill give explicit statutory recognition to the judicially created concept of fair use. The proposal sparked controversy; efforts to draft a provision embodying fair use inspired greater controversy.¹²² The Copyright Office tried unsuccessfully to encourage consensus by organizing meetings between authors, publishers, and educators before the House Subcommittee held hear-

¹¹² See 1973 Senate Hearings, *supra* note 87, at 278-515 (testimony of various witnesses); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 134-37.

¹¹³ See 17 U.S.C. § 801 (1982).

¹¹⁴ See, e.g., 1975 House Hearings, *supra* note 9, at 734, 757 (testimony of Jack Valenti, Motion Picture Association); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 9, at 145-47.

¹¹⁵ See, e.g., 1975 House Hearings, *supra* note 9, at 436-90, 700-856 (testimony of various witnesses).

¹¹⁶ See H.R. REP. NO. 1476, *supra* note 16, at 90-91, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5705.

¹¹⁷ See *id.*; 113 CONG. REC. 31,984 (1967) (remarks of Rep. Railsback).

¹¹⁸ See H.R. CONF. REP. NO. 1733, *supra* note 71, at 75-76, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5816-17. See also 122 CONG. REC. 32,007-08 (1976) (House debates).

¹¹⁹ The fair use doctrine originated as an implied limitation, initially defined by the courts, on the rights of copyright owners. In 1961, the Register's Report described fair use as follows: "That term eludes precise definition; broadly speaking, it means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work." CLR PART I, *supra* note 56, at 24.

¹²⁰ See, e.g., 1975 House Hearings, *supra* note 9, at 363 (remarks of Rep. Drinan); *id.* at 1793 (testimony of Barbara Ringer, Register of Copyrights); 122 CONG. REC. 31,981 (1976) (remarks of Rep. Kastenmeier).

¹²¹ See CLR PART I, *supra* note 56, at 25.

¹²² See 1965 House Hearings, *supra* note 8, at 37-40 (prepared statement of George Cary, Deputy Register of Copyrights).

ings on the revision bill.¹²³ Complicating efforts at compromise was the fact that the parties disagreed violently about the scope of fair use under then-existing law.¹²⁴

There was a quite sharp confrontation in 1965 in the hearings between the authors and publishers on the one side, and the Ad Hoc Committee of Educational Organizations and Institutions on the other. And the center of the issue was section 107. The ad hoc committee was urging that it contain a more expanded language, which referred to teaching, plus a very broad educational exemption. . . . And the crux of that proposal was that if the activity was nonprofit, was for no commercial purpose of any kind, and if it was for the purpose of teaching or scholarship or research that it be allowed, without any limitations. This was combated very vigorously by authors and publishers¹²⁵

At the close of the House Subcommittee's hearings, Representative Celler urged the subcommittee to arrange for further negotiations toward a compromise provision.¹²⁶ Meanwhile, in the Senate, Senator McClellan demanded that the parties reach a compromise.¹²⁷ After long and difficult negotiations convened by the Register and the House Subcommittee's general counsel, the parties compromised on a proposal that included both statutory language and a discussion, to be inserted in the committee reports, of how the fair use privilege would apply in the context of education.¹²⁸ In the next round of hearings, controversy centered around whether the language in the House and Senate Committee Reports accurately reflected either the meaning of the compromise language or current legal doctrine.¹²⁹ Parties on both sides of the controversy refused

¹²³ See 1965 *House Hearings*, *supra* note 8, at 315-18 (testimony of Harold Wigren, Ad Hoc Committee of Educational Organizations and Institutions).

¹²⁴ See, e.g., 1965 *House Hearings*, *supra* note 8, at 342-44 (prepared statement of Harry Rosenfield, Ad Hoc Committee on Educational Institutions and Organizations); *id.* at 364-65 (colloquy); *id.* at 412-17 (testimony of Robert Gerletti, National Education Association); *id.* at 1451-53 (colloquy); *id.* at 1497-1510 (testimony of Ralph Dwan, Minnesota Mining and Manufacturing Co.).

¹²⁵ 1975 *House Hearings*, *supra* note 9, at 1790 (testimony of Barbara Ringer, Register of Copyrights).

¹²⁶ *Id.* at 1854-55.

¹²⁷ See 1965 *Senate Hearings*, *supra* note 52, at 93.

¹²⁸ 1975 *House Hearings*, *supra* note 9, at 1790 (testimony of Barbara Ringer, Register of Copyrights); see 1967 *Senate Hearings*, *supra* note 52, at 38-42 (testimony of Herman Wouk, Authors League of America).

¹²⁹ See, e.g., 1967 *Senate Hearings*, *supra* note 52, at 144-46 (testimony of Harold Wigren, Ad Hoc Committee on Educational Institutions and Organizations); *id.* at 434 (testimony of Phillip Wattenberg, Music Publishers Association); *id.* at 640-42 (prepared statement of American Historical Association); *id.* at 844 (testimony of Don White, National Audiovisual Association); *id.* at 903-05 (testimony of John Stedman, American Association of University Professors). Witnesses typically favored the language in the bill, but disagreed sharply on what the language meant.

to budge, and the compromise came unglued.¹³⁰ At the House and Senate Subcommittees' insistence, the parties continued to hold negotiations with the hope of reaching another, more durable compromise. They agreed, finally, on the language.¹³¹ They failed, however, to agree on what the language meant.¹³² Congress adopted their compromise verbatim.¹³³

The history of the 1976 Act's manufacturing clause,¹³⁴ which required domestic manufacture of books written by United States authors and distributed in the United States, also illustrates Congress's efforts at accommodation. The Copyright Office, the Justice Department, the State Department, and the Commerce Department all opposed the manufacturing clause.¹³⁵ The House and Senate Subcommittees concluded that little justified the clause in principle,¹³⁶ but were impressed that both those opposing the clause and those supporting it were willing to compromise.¹³⁷ Authors, pub-

¹³⁰ See 1975 House Hearings, *supra* note 9, at 1791 (testimony of Barbara Ringer, Register of Copyrights).

¹³¹ See 1975 House Hearings, *supra* note 9, at 1791 (testimony of Barbara Ringer, Register of Copyrights); REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 33; 122 CONG. REC. 31,980-81 (1976) (remarks of Rep. Kastenmeier).

¹³² See, e.g., 1975 House Hearings, *supra* note 9, at 1792-93 (testimony of Barbara Ringer, Register of Copyrights); 1967 Senate Hearings, *supra* note 52, at 39 (testimony of Herman Wouk, Authors League of America); *id.* at 144-46 (testimony of Harold Wigren, Ad Hoc Committee of Educational Institutions and Organizations); *id.* at 434 (testimony of Phillip Wattenberg, Music Publishers Association); *id.* at 844 (testimony of Don White, National Audiovisual Association); *id.* at 903-05 (testimony of John Stedman, American Association of University Professors); *id.* at 1044 (testimony of Harry Rosenfield, Ad Hoc Committee of Educational Institutions and Organizations); 122 CONG. REC. 31,985 (1976) (remarks of Rep. Drinan).

¹³³ The portion of the House Report accompanying section 107 abounds with evidence of partial compromise and incompletely resolved disputes. It makes exceedingly peculiar reading. The House Report refers to, but does not include, passages from earlier Committee Reports that had sparked controversy. See H.R. REP. NO. 1476, *supra* note 16, at 66-67, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680. The House Report then includes verbatim the text of joint letters sent to the subcommittee by representatives of the Ad Hoc Committee of Educational Institutions and Organizations, the Authors League of America, the Association of American Publishers, the Music Publishers Association of the United States, the National Music Publishers Association, the Music Teachers National Association, the Music Educators National Conference, and the National Association of Schools of Music, along with the text of the agreements they negotiated regarding the interpretation of the language of section 107 in the context of reproduction for classroom use. *Id.* at 67-71, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680-85.

¹³⁴ 17 U.S.C. § 601 (1982).

¹³⁵ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 379.

¹³⁶ See, e.g., H.R. REP. NO. 83, 90th Cong., 1st Sess. 134 (1967).

¹³⁷ See *id.* at 132; S. REP. NO. 1168, *supra* note 109, at 9-10. Authors opposed the manufacturing clause because it limited their ability to exploit copyrighted works and led to forfeiture of their copyrights in circumstances that were often beyond their control. Publishers opposed the clause because it substantially increased their publishing costs. Book manufacturers insisted that the manufacturing clause protected the domestic printing industry against potentially ruinous foreign competition. See generally, 1975

lishers, and book manufacturers met to negotiate a provision that all of them could support.¹³⁸ These negotiations stalled,¹³⁹ and the House Judiciary Committee drafted a provision embodying the compromise it believed the parties were approaching.¹⁴⁰ In 1968, however, representatives of publishers and book manufacturers reached a different, formal agreement,¹⁴¹ which the State and Commerce Departments strenuously opposed.¹⁴² The Senate incorporated the compromise into the revision bill,¹⁴³ and the Register reluctantly recommended its adoption.¹⁴⁴ Congress went along.

The 1976 debates in both houses of Congress include repeated paeans to compromise.¹⁴⁵ Members of Congress testified in favor of provisions on the ground that they were compromises,¹⁴⁶ and successfully opposed proposed amendments because they would distort those compromises.¹⁴⁷ Such veneration for compromise runs through the entirety of the Act's legislative history. Congress invited, nurtured, and occasionally compelled the compromises embodied in the 1976 Act. Sometimes, it disregarded everyone's better judgment in favor of giving effect to the agreement of interested parties. Congress welcomed compromise for compromise's sake.

In some cases members of Congress explained, in committee reports or on the House or Senate floor, what they believed the compromises to mean. In the vast majority of cases, however, they failed to explain, and many of the extant explanations are general,¹⁴⁸ superficial,¹⁴⁹ confusing,¹⁵⁰ or confused.¹⁵¹ As often as not,

House Hearings, supra note 9, at 1695-1714 (testimony of various witnesses); REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 143-50.

¹³⁸ See, e.g., 1965 *House Hearings, supra* note 8, at 116 (testimony of Dan Lacy, American Book Publishers Council).

¹³⁹ See 1965 *Senate Hearings, supra* note 52, at 71 (testimony of Abraham Kaminstein, Register of Copyrights).

¹⁴⁰ See H.R. REP. NO. 83, *supra* note 136, at 131-38; 113 CONG. REC. 8597 (1967) (remarks of Rep. Roth).

¹⁴¹ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 362, 369-71.

¹⁴² See *id.* at 387-88.

¹⁴³ See *id.* at 372-74.

¹⁴⁴ *Id.* at 392.

¹⁴⁵ See, e.g., 122 CONG. REC. 3821-24 (1976) (Senate debate); *id.* at 31,979-85 (House debate).

¹⁴⁶ See, e.g., *id.* at 3821-22 (Copyright Royalty Tribunal); *id.* at 31,980-81 (fair use); *id.* at 31,984 (cable television).

¹⁴⁷ See *id.* at 32,008 (remarks of Rep. Kastenmeier); *id.* at 3826 (remarks of Sen. Baker).

¹⁴⁸ See, e.g., H.R. REP. NO. 1476, *supra* note 16, at 56-57, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5670 (general discussion of distinction between ideas and expression embodied in section 102(b)).

¹⁴⁹ See, e.g., 122 CONG. REC. 31,984 (1976) (remarks of Rep. Railsback on provisions affecting cable television).

¹⁵⁰ See, e.g., H.R. REP. NO. 1476, *supra* note 16, at 88-101, *reprinted in* U.S. CODE

the reason a specific provision was deemed to be good was that industry representatives had agreed on it.¹⁵²

III

RECONSIDERING LEGISLATIVE INTENT

“I wish you people would settle your differences and come to us with a compromise.”

—Representative Drinan¹⁵³

A review of the 1976 Copyright Act's legislative history demonstrates that Congress and the Registers of Copyrights actively sought compromises negotiated among those with economic interests in copyright and purposefully incorporated those compromises into the copyright revision bill, even when they disagreed with their substance. Moreover, both the Copyright Office and Congress intended from the beginning to take such an approach, and designed a legislative process to facilitate it.

One might argue that this was an improper way to create a statute, on the ground that it involved an egregious delegation of legislative authority to the very interests the statute purports to regulate. Alternatively, one might argue that the process constituted an ingenious solution to the problem of drafting a statute for an area so complicated that no member of Congress could acquire meaningful expertise. I will make neither of these arguments here. The worth of a given legislative process depends, at least in part, on the statute that the process produces. If courts disregard or misread the statute in favor of earlier precedent, as I argue they have, it is difficult to assess the wisdom of the process by which the statute was drafted. Seeking a consensus among affected industries is a plausible road to arrive at a statute, and it is the road that Congress took. I suggest that retracing that road can help clear up the 1976 Act's ambiguities.

Others have written elsewhere on the appropriate uses of legislative history, and have generated their own normative models of interpretation. Much of the commentary reflects discomfort with the degree to which the idea of legislative “intent” is necessarily a

CONG. & ADMIN. NEWS at 5702-16 (nearly incomprehensible explanation of compulsory license for cable television transmission embodied in section 111).

¹⁵¹ See, e.g., 122 CONG. REC. 31,985-86 (1976) (remarks of Rep. Drinan explaining the rate set in section 115 for the manufacture of recordings as a royalty for “the right to play recordings”).

¹⁵² Cf. *id.* at 31,979 (remarks of Rep. Kastenmeier) (“For the most part, affected industries and groups are satisfied with the compromises reached in the bill. I believe that the fact that the bill was approved by the committee on a vote of 27 to 1 testifies vividly to this fact.”).

¹⁵³ 1975 House Hearings, *supra* note 9, at 900.

fictional one.¹⁵⁴ Traditional approaches to statutory interpretation assume that members of Congress draft the statutes that they enact, know the details of those statutes, and intend their legislation to achieve particular ends. Concededly, this describes most actual legislative processes inaccurately. It, nonetheless, is generally consistent with the record evidence contained in most legislative histories. When statutes are written by outsiders, the drafting typically occurs offstage. Those reading such a statute's legislative history may suspect that the statute was conceived in a backroom bargain, but the record rarely confirms their suspicions.¹⁵⁵ Indeed, most legislative histories support an inference of specific, substantive legislative intent. The legislative record here is a different one. Members of Congress openly acknowledged their limited substantive expertise and their largely supervisory role in the drafting process. They emphasized that they had delegated to industry representatives the task of forging the statute's substantive provisions and they praised the negotiating process that evolved. Courts have attempted to interpret this legislative history within the context of the traditional fiction of legislative intent. The effort has required them to engage in intolerable analytical contortions and to disregard much of the probative evidence that the legislative history in fact contains.

Recently, some commentators have suggested that courts should view statutes as negotiated, enforceable bargains between lobbyists and legislators.¹⁵⁶ They see the legislative process as a "market" in which special interests barter campaign contributions, votes, and endorsements in return for favorable legislation.¹⁵⁷ Courts, they argue, should interpret and enforce at least some statutes as if they were integrated contracts.¹⁵⁸ This economic model has generated controversy, with detractors responding that courts

¹⁵⁴ See, e.g., MacCallum, *supra* note 50.

¹⁵⁵ My colleague, Avery Katz, has suggested that any analysis of a statute's legislative history must differentiate between the "official" legislative history contained in the record and the unofficial back-room bargaining sessions. Unlike Judge Easterbrook, who would have courts inquire into cloakroom deals, see Easterbrook, *The Supreme Court 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984), Professor Katz would limit legitimate inquiry to that contained in materials actually available to legislators, if not in fact examined by them. An unusual feature of the legislative history I have been describing is the detail with which negotiations among representatives of special interests are described and often reproduced in the official legislative documents. These negotiations are part of the official record. See *supra* note 83.

¹⁵⁶ See Easterbrook, *supra* note 155, at 18 ("If statutes are bargains among special interests, they should be enforced like contracts."); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

¹⁵⁷ See Landes & Posner, *supra* note 156, at 877 ("In the economist's version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation."); Macey, *supra* note 69, at 231 n.42.

¹⁵⁸ See Easterbrook, *supra* note 155, at 46, 51.

have an implicit obligation to discourage special interest legislation.¹⁵⁹ I allude to the controversy to clarify what I am *not* saying. The participants in this debate use the concept of a negotiated bargain metaphorically. I do not. Commentators debating the market model distinguish between record evidence, i.e., the contents of the official legislative history, and extrinsic evidence of the bargaining process.¹⁶⁰ The bargains that I have described are well documented in the official record. Finally, the market model—representing groups of special interests striking deals with venial legislators, or lobbying as market activity—fits the 1976 Copyright Act poorly. The negotiated bargains in the 1976 Act were struck not between legislators and lobbyists¹⁶¹ but among representatives of opposing interests precisely because Congress publicly and on the record demanded that they sit down and agree.

I offer no alternative metaphor or competing model. My own position is that the legislative history of a statute is helpful if, and to the extent that, it yields useful information about what the drafters intended the statutory language to mean and why the legislature enacted it. Whether and how the legislative history of any particular statute proves illuminating depends on the particular statute involved and the process that accompanied its enactment. Maxims and models of interpretation¹⁶² may or may not be probative of what a particular legislative history can offer in the way of illumination. The 1976 Act is an unusual statute; the process of its enactment was itself unusual. Congress's approach to enacting a modern copyright statute reflects an exceptional willingness to adopt particular language *because* industry representatives had agreed on it. If the reasons industry representatives agreed on that language and their interpretations of what the language meant can illuminate the statutory language, then considering their story will yield a useful interpretive tool.

That possibility is especially attractive in the context of the 1976 Copyright Act because courts need this additional tool. The statute is facially ambiguous, complicated, and confusing. Courts' attempts to apply the plain meaning rule have left them per-

¹⁵⁹ See Macey, *supra* note 69, at 264-65. See also Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 593-98 (1985) (utilitarian methodologies tend to overlook or ignore non-market values). Instructively, participants on both sides of this debate appear to argue that courts should examine the record legislative history to discern whether a given statute fits the model.

¹⁶⁰ See, e.g., Macey, *supra* note 69, at 253-55.

¹⁶¹ Indeed, the parties to these bargains included representatives of many interests that lacked the funds to hire lobbyists and that made no campaign contributions.

¹⁶² See, e.g., Macey, *supra* note 69, at 264.

plexed.¹⁶³ Traditional searches for legislative intent have compounded the problem.¹⁶⁴ A rash of commentators have sought to provide guidance by articulating broad normative principles that describe how a copyright system should operate and inviting courts to use them as prisms through which to focus the inquiry.¹⁶⁵ These normative theories, however, share a common disregard for the statutory provisions with which courts must work. Although such theories may offer guidance to Congress in deciding how next to revise the copyright law, they say little about what Congress in fact wrought in 1976. Courts could, of course, continue to decide copyright cases as if the 1976 Act merely codified judicial interpretation of the 1909 Act; indeed, some courts have.¹⁶⁶ This approach disregards the most emphatic evidence of substantive congressional intent available: the repeated statements of a purpose to replace the antiquated 1909 statute with a modern one.¹⁶⁷ Moreover, it means that huge numbers of people will have labored for 21 years in vain. Ultimately, to understand the language of the 1976 Act, one must look to the understanding of the people who agreed on the compromises reflected in the statute. That insight is vital to deciphering the statute's complexities.

IV

CONSTRUING THE 1976 COPYRIGHT STATUTE

"Of course, sir, as you know, both the phrasing in the bill and the

¹⁶³ See, e.g., *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 633 (2d Cir. 1982) (Newman, J., concurring) ("It is simply not clear from the statute or the regulations who must receive notice of termination, and the legislative history offers no guidance.").

¹⁶⁴ See *supra* notes 41-75 and accompanying text.

¹⁶⁵ See, e.g., Bernstein, *Parody and Fair Use in Copyright Law*, 31 COPYRIGHT L. SYMP. (ASCAP) 1, 38-43 (1984); Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983); Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209 (1983); Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600 (1982).

¹⁶⁶ See *supra* notes 20-31 and accompanying text. The common law of statutory copyright was itself not uniform during the revision process. For example, courts disagreed sharply on the scope of copyright protection due works involving historical facts. Compare, e.g., *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 304 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) with e.g., *Toksvig v. Bruce Publishing Co.*, 181 F.2d 644 (7th Cir. 1950). Courts concluding that the 1976 Act essentially codified prior law have not distinguished among the myriad lines of conflicting cases from which Congress might have chosen. Instead, courts appear to assert that, by codifying prior law, Congress confirmed that court's own prior views of the conflicts.

¹⁶⁷ See, e.g., 1965 Senate Hearings, *supra* note 52, at 1 (remarks of Sen. McClellan: "I personally have no preconceived opinion about any provision of this bill. My sole objective in introducing it was to devise a modern copyright statute that would encourage creativity and protect the interest which the public has in the subject matter of this legislation."). See also, e.g., 122 CONG. REC. 31,979 (1976) (remarks of Rep. Kastenmeier); *id.* at 31,982 (remarks of Rep. Railsback); *id.* at 33,813 (remarks of Sen. McClellan).

discussion in the House report are the outcome of many meetings with both sides.”

Herman Wouk¹⁶⁸

I have thus far described the 1976 Act's negotiations and compromises with little attention to the substantive content of the bargaining. I now return to two of the many compromises embodied in the statute, the fair use provision and the ownership compromise package, to examine what the legislative history of these provisions reveals about their content. The fair use provision resulted from elaborate, protracted, down-to-the-wire negotiations conducted under congressional sponsorship. The ownership compromise package, on the other hand, was settled before Congress began considering the legislation. Both illustrate the interrelationship between the bill's overall structure and each of the substantive compromises negotiated over the years. Both demonstrate the influence that compromise in one dispute had on the negotiations in others. Finally, both compromises have generated important litigation in the years since the 1976 Act took effect.

A. Fair Use

Although the final wording of the fair use provision did not emerge until the last moment of the revision process,¹⁶⁹ the parameters of the fair use dispute were fixed by the early agreements on the statute's structure and approach. By the time the House Subcommittee held its first series of hearings in 1965, the Copyright Office and industry representatives had devised a structure and approach that almost everyone supported.¹⁷⁰ The nature of that structure and approach represented precisely what one might have expected to evolve from negotiations among parties with economic interests in copyright. The bill granted authors expansive rights covering any conceivable present and future uses of copyrighted works, and defined those uses very broadly. It then provided specific, detailed exemptions for those interests whose representatives had the bargaining power to negotiate them. All uses not expressly exempted remained within the control of the copyright owner. The bill, therefore, solved the problem of defining the rights in uses made possible through future technology by reserving those rights to the copyright owner.¹⁷¹ Because exploiters of yet-to-be-invented

¹⁶⁸ 1967 *Senate Hearings*, *supra* note 52, at 39-40.

¹⁶⁹ See *supra* notes 119-33 and accompanying text.

¹⁷⁰ See 1965 *House Hearings*, *supra* note 8, at 31-33 (prepared statement of George Cary, Deputy Register of Copyrights); *id.* at 1858-59 (testimony of Abraham Kaminstein, Register of Copyrights).

¹⁷¹ See 1965 *House Hearings*, *supra* note 8, at 32-33 (prepared statement of George Cary, Deputy Register of Copyrights); REGISTER'S SUPPLEMENTARY REPORT, *supra* note

communications technology were the very parties who could not be present at the bargaining table, there was nobody to argue that the bill's basic structure gave them too little consideration.

The 1909 Act, in contrast, had granted authors rights that were subject to many more intrinsic limitations.¹⁷² For example, the 1909 Act limited the copyright owner's exclusive right of public performance in non-dramatic works to performance for profit. The Supreme Court further limited the performance right with a narrow construction of "performance" in *Fortnightly Corp. v. United Artists Television, Inc.*¹⁷³ and *Twentieth Century Music Corp. v. Aiken*.¹⁷⁴ In his 1961 Report, the Register of Copyrights recommended retention of the 1909 Act's "for profit" limitation.¹⁷⁵ Industry representatives, however, objected strongly to the proposal, and the Register drafted an alternative provision, replacing the broad "for profit" limitation with specific narrow exemptions.¹⁷⁶ The Register also drafted expansive definitions of "perform" and "perform publicly."

Furthermore, the 1909 Act had, for the most part, extended federal copyright only to published works.¹⁷⁷ Most unpublished¹⁷⁸ works were protected, if at all, under state "common law copyright."¹⁷⁹ The state common law copyright regime offered authors substantially broader protection than federal statutory copyright:¹⁸⁰ in many states, a work that remained unpublished received perpetual protection, free from the intrinsic limitations of statutory copyright. The "for profit" limitation, the privilege of fair use, and even

11, at 13-25; accord Brown, *The Joys of Copyright*, 30 J. COPYRIGHT Soc'y 477, 479 (1983); B. KAPLAN, *supra* note 7, at 101.

¹⁷² See, e.g., Ringer, *supra* note 5, at 484.

¹⁷³ 392 U.S. 390 (1968) (cable television transmission of copyrighted television programs not a performance); see also *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.* 415 U.S. 394 (1974) (importation of "distant" cable television signals from one community into another not a performance).

¹⁷⁴ 422 U.S. 151 (1975) (playing radio broadcast through restaurant loudspeakers not a performance).

¹⁷⁵ CLR PART 1, *supra* note 56, at 27; see REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 21.

¹⁷⁶ CLR PART 3, *supra* note 54, at 135-57; REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 14.

¹⁷⁷ Section 12 of the 1909 Act permitted copyright registration for unpublished works belonging to particular categories.

¹⁷⁸ Under the majority of courts' constructions of the 1909 Act a work was published if copies of it had been distributed to the public.

¹⁷⁹ The term "common law copyright" describes the protection afforded unpublished works by state statutes or case law. The 1909 Act expressly left the protection of most unpublished works to state law, and thus established a dual system of copyright whereby the federal statute protected published works while state law protected unpublished works. See W. STRAUSS, PROTECTION OF UNPUBLISHED WORKS 8-15 (1957), reprinted in SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960).

¹⁸⁰ See generally Kernochan, *supra* note 37.

the distinction between idea and expression were generally deemed inapplicable to common law copyright.¹⁸¹ Common law copyright protection, however, was alienable without formalities, easily forfeited, and, therefore, significantly more fragile than statutory copyright.¹⁸² The revision bill extended statutory copyright to all works upon creation,¹⁸³ a change viewed by authors' representatives as a substantial gain.¹⁸⁴ It pre-empted state copyright law¹⁸⁵ and made federal protection automatic and subject to statutory limitations regardless of publication or other dissemination of the work.¹⁸⁶ Finally, the bill extended the duration of that protection dramatically.

These benefits for copyright owners did not come without cost. Many industry representatives implicitly predicated their support of the revision bill's basic structure on the inclusion of satisfactory exemptions for the interests they represented.¹⁸⁷ Each of the parties whose economic interest in copyright was more akin to use than to investment sought to negotiate for itself the broadest specific exemption possible.¹⁸⁸ The ensuing negotiations over these exemptions produced statutory privileges for uses that would have constituted copyright infringement under the 1909 Act.¹⁸⁹ Furthermore, authors' representatives reluctantly agreed to proliferation of the compulsory license device and its restriction of copyright owners' exclusive rights.¹⁹⁰ As enacted, the statute contained provisions

¹⁸¹ See *id.*

¹⁸² See, e.g., *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 307-08, 39 N.E.2d 249, 250-51 (1942).

¹⁸³ 17 U.S.C. §§ 102(a), 201 (1982).

¹⁸⁴ See REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 82. Initially, the Register proposed keeping the dual system, but changing the dividing line between state and federal protection from "publication" to "public dissemination," thereby affording statutory protection to works that are exploited without distribution of copies, such as television programs. Everyone objected: "[T]he overwhelming sentiment was definitely in favor of a single Federal copyright system with protection starting upon creation, and with a limited term for all works, published or unpublished, disseminated or undissemated." *Id.*

¹⁸⁵ 17 U.S.C. § 301(a).

¹⁸⁶ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 83.

¹⁸⁷ See, e.g., 1965 *House Hearings*, *supra* note 8, at 380-86 (testimony of Lois Edinger, National Education Association); *id.* at 1138-43 (testimony of Julian Boyd, Society of American Archivists); *id.* at 1144-49 (testimony of John Banzhaf, Computer Program Library); *id.* at 1157-59 (testimony of Maxwell Freudenberg, U.S. Air Force).

¹⁸⁸ See, e.g., *id.* at 342-417 (various witnesses testifying in favor of a broad educational exemption).

¹⁸⁹ See, e.g., 17 U.S.C. § 112; 1975 *House Hearings*, *supra* note 9, at 1748-67 (various witnesses); H.R. REP. NO. 1476, *supra* note 16, at 101-05, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5716-20.

¹⁹⁰ See, e.g., 1975 *House Hearings*, *supra* note 9, at 968-69 (testimony of Bernard Korman, ASCAP); see generally Ringer, *Copyright in the 1980s—The Sixth Donald C. Brace Memorial Lecture*, 23 J. COPYRIGHT SOC'Y 299 (1976).

for four compulsory licenses in place of the 1909 Act's one.¹⁹¹

In the midst of these expansively defined rights and rigid exemptions, the fair use doctrine became the statute's central source of flexibility. In the earliest versions of the bill, the beleaguered fair use provision offered the sole means of tempering the expansive scope of the copyright owner's exclusive rights.¹⁹² Fair use was also the sole safe harbor for interests that lacked the bargaining power to negotiate a specific exemption. In 1969, the Senate Subcommittee added a second provision limiting the general scope of copyright. This second limitation was the distinction between idea and expression, a fundamental principle of traditional copyright law codified in section 102(b) "in response to the great debate over computers. [The provision was] intended to disclaim any intention to protect a programmer's algorithms under the bill."¹⁹³ These two provisions remained the only general limiting principles in the statute as enacted in 1976.

Successive versions of the fair use provision and the language of the committee reports accompanying them were increasingly ambiguous. Indeed, the final version did one thing while claiming to do another. By agreement of the representatives of interested parties, the statute and ultimate House committee report simultaneously define fair use in ways that depart significantly from many of the parties' understanding of that doctrine as articulated in prior case law,¹⁹⁴ and insist that the provision's goal was "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."¹⁹⁵ The key to understanding what the parties believed they were bargaining over lies in the fair use doctrine's structural significance.

¹⁹¹ 17 U.S.C. §§ 111, 115, 116, 118.

¹⁹² See REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 25-28.

¹⁹³ REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 10. See 1967 Senate Hearings, *supra* note 52, at 197 (testimony of Prof. Arthur Miller, Ad Hoc Committee of Educational Organizations and Institutions); *id.* at 1058-60 (testimony of W. Brown Morton, Jr., EDUCOM, Interuniversity Communications Council).

¹⁹⁴ See 1965 House Hearings, *supra* note 8, at 1772 (testimony of Harry Rosenfield, Ad Hoc Committee of Educational Organizations and Institutions); *id.* at 1859-60 (testimony of Abraham Kaminstein, Register of Copyrights); 1967 Senate Hearings, *supra* note 52, at 39-40 (testimony of Herman Wouk, Authors League of America); *id.* at 434 (testimony of Phillip Wattenberg, Music Publishers Association); *id.* at 844 (testimony of Don White, National Audiovisual Association); *id.* at 1044-46 (testimony of Harry Rosenfield, Ad Hoc Committee of Educational Organizations and Institutions); 1973 Senate Hearings, *supra* note 87, at 193 (remarks of Richard Schoeck, Modern Language Association); 1975 House Hearings, *supra* note 9, at 268-345 (various witnesses); H.R. REP. 1476, *supra* note 16, at 65-74, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5679-87.

¹⁹⁵ H.R. REP. NO. 1476, *supra* note 16, at 66, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680. The late Professor Nimmer remarked on this inconsistency. See Nimmer, *Preface—The Old Copyright Act as Part of the New Act*, 22 N.Y.L. SCH. L. REV. 471, 473 (1977) ("[O]ne may question the House Committee's statement of its intent.").

The bill's structural solicitude for copyright owners' interests in uses made possible through technological advances ran counter to the Supreme Court's tendency to hold newly developed technologies exempt under prior copyright statutes.¹⁹⁶ By limiting future technology's exemptions to those available under the fair use provision, the bill restricted the impact of judicial creativity on the copyright owner's bundle of rights. Because the parties viewed the concept of fair use as inherently flexible and fact-specific,¹⁹⁷ they felt that a court's ruling establishing that a particular use was fair and not infringing might not create a firm exception; a court could still impose liability for the same sort of use in a later case with different facts.

Representatives of copyright owners, therefore, preferred that the fair use doctrine represent the only flexibility principle in the statute's complex scheme of expansive rights and rigid exceptions.¹⁹⁸ Educational organizations went along only on the condition that the statutory definition of fair use restrict the doctrine's unpredictability¹⁹⁹—the very feature that authors and publishers found attractive.²⁰⁰ Copyright owners had long claimed that much of what educational users were doing and wanted to continue doing, including most educational photocopying, was not within the fair use exception.²⁰¹ Educational organizations were unwilling to accept a definition of fair use unless it were stretched to include educational photocopying and other common educational uses. The parties agreed to insert words here and there, in both the statutory provision and the House Committee Report, that appeared to stretch the fair use privilege enough to offer educators some minimal certainty. The language on which they compromised, however,

¹⁹⁶ See, e.g., *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974) (cable television); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (piano rolls).

¹⁹⁷ See, e.g., 1965 *Senate Hearings*, *supra* note 52, at 86 (testimony of Harold Wigren, Ad Hoc Committee of Educational Institutions and Organizations); *id.* at 105-06 (prepared statement of John Schulman, American Bar Association); 1965 *House Hearings*, *supra* note 8, at 364-65 (colloquy).

¹⁹⁸ See *supra* note 119; see also, e.g., 1975 *House Hearings*, *supra* note 9, at 360-61 (remarks of Irwin Karp, Authors League of America); 1973 *Senate Hearings*, *supra* note 87, at 114-71 (various witnesses). See generally Brown, *supra* note 171, at 479.

¹⁹⁹ See, e.g., 1975 *House Hearings*, *supra* note 9, at 273-74 (testimony of Leo Raskind, American Council on Education); *id.* at 295-302 (testimony of Harry Rosenfield, Ad Hoc Committee of Educational Organizations and Institutions).

²⁰⁰ See, e.g., 1965 *House Hearings*, *supra* note 8, at 130-31 (testimony of Horace Manges, American Book Publishers Council); CLR PART 5, *supra* note 52, at 103 (remarks of Irwin Karp, Authors League of America).

²⁰¹ See, e.g., 1973 *Senate Hearings*, *supra* note 87, at 844 (prepared statement of Don White, National Audiovisual Association); *id.* at 1053-54 (testimony of Horace Manges, American Book Publishers Council); 1975 *House Hearings*, *supra* note 9, at 311 (prepared statement of Bella Linden, Association of American Publishers).

was ambiguous, and intentionally so, because copyright owners and educational organizations never fully resolved their disputes. Both interests envisioned flexible application of the fair use doctrine, but they failed to reach a consensus as to the doctrine's scope.

B. Issues Surrounding Ownership

At the same time that interested parties agreed on the bill's basic structure and approach, they were also negotiating a compromise on the intertwined issues of copyright ownership, duration, and reversion.²⁰² The provisions of the ownership package that emerged differed from the law that developed under the 1909 Act in significant respects. In one respect, the difference was uncontroversial: the new provisions narrowed the potential for uncertainties surrounding ownership to cloud copyright titles and impede copyright exploitation.²⁰³ Proposals to tinker with who owned the copyright evoked more controversy.

The 1909 Act left initial ownership of copyright to state common law copyright doctrine. Upon publication, whomever state law deemed to be the owner could register her copyright for an initial term of 28 years.²⁰⁴ After the initial term, the work's author²⁰⁵ could renew the copyright for a second 28 year term. One of the features of the 1909 Act's renewal provision was its reversionary purpose: unless the work were a work made for hire, the renewal term vested in the work's creator despite any grants made during the initial term.²⁰⁶ In 1943, however, the Supreme Court eviscerated the reversionary feature of renewal by holding that the expectancy of a renewal term was assignable.²⁰⁷

²⁰² See *supra* notes 53-60 and accompanying text.

²⁰³ See *infra* text accompanying notes 211-35. The provisions for automatic vesting of statutory copyright, divisibility of ownership, recordation of transfers, relaxation of notice requirements, cure of notice defects and the proposed definitions of works made for hire and joint works all advanced this goal. See *generally* REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 66-78, 99-112. Indeed, the principle of clarifying copyright ownership to remove obstacles to exploitation came to pervade the 1976 Act.

²⁰⁴ The owner of the copyright under state law might or might not be the author of the work. See *generally* J. GUINAN, *supra* note 56.

²⁰⁵ The renewal right vested in the work's author without regard to whether she had been the initial copyright proprietor. Although state law might determine the identity of the initial copyright proprietor, see *supra* note 204, federal copyright law governed the issue of the identity of a work's author.

²⁰⁶ See *generally* J. GUINAN, *supra* note 56.

²⁰⁷ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). The first federal copyright statute gave the renewal right to an author's "assigns." Act of May 31, 1790, 1 Stat. 124. Subsequent statutes, however, including the 1909 Act, omitted "assigns" in order to permit the author to renegotiate the terms for the work's exploitation. See H.R. REP. No. 2222, 60th Cong., 2d Sess. 14 (1909). In *Fisher*, Justice Frankfurter, writing for the majority, nonetheless concluded: "[N]either the language nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior

Early in the pre-legislative dialogue, authors and composers proposed a single copyright term, measured by the author's life. They also, however, proposed resurrecting the reversionary feature of the renewal term.²⁰⁸ Publishers and motion picture studios favored a single term precisely because it would eliminate any reversion.²⁰⁹

In 1965, representatives of authors, composers, book and music publishers, and motion picture studios negotiated a solution by redefining works made for hire²¹⁰ and excluding works made for hire from the provisions enabling an author to recapture rights in her works. Case law had elaborated the 1909 Act's works made for hire provision into a multi-factor test for determining when an employer who paid someone else to create a work would be deemed the author and entitled to the copyright. The old test began with rebuttable presumptions and proceeded to consideration of an assortment of factors deemed probative of employers' and employees' intentions.²¹¹ The new definition distinguished between works prepared by employees within the scope of their employment and works prepared on commission. Works prepared by employees were automatically works made for hire and copyright vested in the employer. Although an employer could, in writing, assign her copyright interest to the employee, the work would remain a work made for hire. Employers and employees could not, by contract, provide that the work would not be made for hire. Correlatively, the intention of employer and employee as to whether the work were to be one made for hire would be irrelevant. Employers, and their successors in interest, would no longer face employees' belated claims to copyright ownership.²¹² Courts and commentators have recently

to 1909, under which authors were free to assign their renewal interests if they were so disposed, was intended to be altered." 318 U.S. at 656.

²⁰⁸ See, e.g., CLR PART 2, *supra* note 54, at 93 (remarks of Irwin Karp, Authors League of America); CLR PART 3, *supra* note 54, at 285-87, 293-94 (remarks of Irwin Karp, Authors League of America).

²⁰⁹ See, e.g., CLR PART 4, *supra* note 54, at 34 (remarks of Horace Manges, American Book Publishers Council); CLR PART 3, *supra* note 54, at 283 (remarks of Julian Abeles, Music Publishers' Protective Association); CLR PART 2, *supra* note 54, at 87-88 (remarks of Joseph Dubin, Universal Pictures Co.); *id.* at 104 (remarks of Thomas Robinson, Motion Picture Association of America).

²¹⁰ See *supra* note 56. For a general discussion of works made for hire under both the old and the new statutes, see Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L. SCH. L. REV. 209 (1976).

²¹¹ See B. VARMER, *supra* note 56, at 128-30. Whether a work was made for hire turned on the intention of the parties and the degree to which the purported employer initiated and reserved the power to supervise it. See, e.g., *Meltzer v. Zoller*, 520 F. Supp. 847, 856 (D.N.J. 1981). Evidence of common industry practice was highly persuasive. See *id.* A parallel body of case law existed under state common law copyright involving unpublished works of authorship. See I M. NIMMER, *supra* note 15, at § 5.03[B].

²¹² See, e.g., *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), *cert. denied*.

found the question whether a work was created by an "employee," as defined in the 1976 Act, a complex one.²¹³ But the content of the pre-legislative dialogue²¹⁴ and the context in which it occurred²¹⁵ indicate that by using the term "employee" the parties meant to limit works made for hire under this branch of the definition to works created by a salaried worker in a long-term position.

Commissioned works received different treatment. A commissioned work could be a work for hire only if it belonged to one of several enumerated categories and only if the commissioner and contractor agreed in writing that the work would be deemed made for hire. This two-pronged definition replaced the fluid common law of rebuttable presumptions with a more certain provision backed up with a statute of frauds. The limitation of commissioned works to specifically enumerated categories, and the choice of those categories, can be traced in the legislative history to two competing concerns. Authors' representatives worried that freelance authors lacked the bargaining power to reject contractual clauses designating works as made for hire.²¹⁶ Publishers and motion picture studios, on the other hand, were concerned about the multiple obstacles that the reversion provisions could pose to the exploitation of a particular class of works that were normally created by independent contractors paid a flat fee, but that common industry practice had long deemed works for hire.²¹⁷ The groups compromised by limiting commissioned works for hire to the specific classes

409 U.S. 997 (1972). The renewal provisions of the 1909 Act led to many cases filed litigating whether a work had been made for hire. *See, e.g.*, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *see generally* Angel & Tannenbaum, *supra* note 210, at 216-20.

²¹³ *See, e.g.*, *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 551-53 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); 1 M. NIMMER, *supra* note 15, at § 5.03[B]; *infra* notes 266-77 and accompanying text.

²¹⁴ *See* CLR PART 3, *supra* note 54, at 267 (remarks of E. Gabriel Perle, Time, Inc.); CLR PART 5, *supra* note 52, at 144-46 (remarks of Barbara Ringer, U.S. Copyright Office); *see also* sources cited *supra* notes 55-57.

²¹⁵ In 1965, when the parties reached this compromise, courts had not yet extended the scope of works made for hire to include commissioned works. That particular line of cases developed in the decade to follow. *See* Angel & Tannenbaum, *supra* note 210, at 228-32; *infra* text accompanying notes 272-75.

²¹⁶ *See, e.g.*, CLR PART 5, *supra* note 52, at 146-48 (remarks of Irwin Karp, Authors League of America); *id.* at 150 (remarks of Harry Rosenfield, Ad Hoc Committee on Educational Institutions and Organizations); *id.* at 151 (remarks of Leon Kellman, American Guild of Authors and Composers).

²¹⁷ *See, e.g.*, CLR PART 3, *supra* note 54, at 290-92 (remarks of Bella Linden, American Textbook Publishers' Institute); *id.* at 297 (colloquy); CLR PART 4, *supra* note 54, at 248-50 (written comments of American Book Publishers Council); CLR PART 5, *supra* note 52, at 146-52 (colloquy); *id.* at 155-56 (remarks of Irwin Karp, Authors League of America). Eliminating the role of industry practice in the determination may have achieved some unintended results. *See* DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT Soc'y 17, 32-34 (1984).

of works, typically created by multiple authors, that publishers and motion picture studios had cited in objecting to earlier proposals to limit works made for hire to works created by employees.²¹⁸

The design of the "reversion" provision involved further compromise. Under the courts' construction of the 1909 Act, reversion occurred automatically upon the expiration of the initial 28-year copyright term, but authors could assign their renewal expectancies in advance.²¹⁹ Failure to register for a renewal term within a year caused the copyrighted work to enter the public domain.²²⁰ Authors' representatives sought to replace the renewal provisions with either an outright limitation on the duration of any transfer²²¹ or an inalienable automatic reversion.²²² Publishers and motion picture companies opposed both proposals.²²³ The Register advanced a number of alternative proposals that satisfied no one.²²⁴ After protracted negotiations, industry representatives met one another half-way. Subject to the revised definition of works made for hire,²²⁵ which were not subject to termination, the parties agreed on a provision permitting authors to terminate transfers.²²⁶ Unlike the 1909

²¹⁸ See, e.g., CLR PART 3, *supra* note 54, at 297 (colloquy); CLR PART 2, *supra* note 54, at 357-59 (written comments of Motion Picture Association of America).

²¹⁹ See B. RINGER, RENEWAL OF COPYRIGHT 166 (1960), *reprinted in* SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Comm. Print 1960).

²²⁰ See *supra* note 56 and sources cited therein. The renewal term vested in the author, if living, and in designated statutory beneficiaries if the author had died. In practice, book publishers and motion picture companies (but not popular music publishers, see *infra* note 226) required authors to assign their renewal expectancy at the same time they assigned the initial term of their copyright. Publishers and motion picture studios did not typically pursue alternative statutory beneficiaries to obtain assignments of their contingent renewal expectancies. If the author survived the initial term, the publisher or motion picture company would own the copyright for both terms, a total of 56 years. If the author died before the initial term expired, the renewal term would vest in the statutory beneficiary after 28 years, divesting the publisher or motion picture company of any rights. Failure to file for renewal caused forfeiture of copyright protection. See generally B. RINGER, *supra* note 219, at 105.

²²¹ See, e.g., CLR PART 2, *supra* note 54, at 238-39 (written comments of American Guild of Authors and Composers); *id.* at 248, 258-59 (written comments of Authors League of America; 20-year term); *id.* at 319 (written comments of Irwin Karp).

²²² See, e.g., *id.* at 413 (written comments of Writers Guild of America).

²²³ See, e.g., *id.* at 104-05 (remarks of Joseph Dubin, Universal Pictures); CLR PART 3, *supra* note 54, at 281-83 (remarks of Horace Manges, Joint Copyright Committee of the American Book Publishers Council and the American Textbook Publisher Institute); *id.* at 292 (remarks of A.H. Wasserstrom).

²²⁴ See *supra* notes 56-57.

²²⁵ See *supra* notes 210-18 and accompanying text.

²²⁶ See H.R. 4347, 89th Cong., 1st Sess. § 203 (1965) (earlier version of 17 U.S.C. § 203). The parties envisioned that the termination of transfer provisions would, unlike renewal, preserve the author's option to terminate notwithstanding any contract. Also unlike renewal, termination would not occur automatically and would not divest the proprietor of a derivative work of the right to continue exploiting it. The parties did contemplate that any intermediaries' rights would revert to the author on termination. See,

Act's renewal provisions and the proposals of authors' representatives, termination was not automatic and, in fact, involved a complicated and cumbersome procedure. Also, unlike the 1909 Act's renewal provisions, the author's right to terminate would be inalienable, as the authors' representatives had requested. On the question of when the author could terminate, the parties split the difference. Authors had initially suggested a 20-year period, but settled for a five-year, use-it-or-lose-it window, commencing 35 years after the transfer.²²⁷ A parallel provision was drafted allowing the author to recapture the windfall nineteen-year extension of renewal term in subsisting copyrights.²²⁸

The parties also included in their compromise the Register's

e.g., CLR PART 5, *supra* note 52, at 222 (written comments of Julian Abeles); CLR PART 3, *supra* note 54, at 281-82 (remarks of Horace Manges, American Book Publishers Council); *id.* at 318-19 (written comments of Julian Abeles). *See also* Abrahms, *supra* note 37, at 228-32 (citing additional evidence). It is not surprising that book publishers, music publishers, and motion picture studios agreed to the compromise package despite this construction; they were all somewhat better off under the compromise package than under then-current law. Popular music publishers, for example, had been operating for nearly 20 years under a uniform popular songwriter contract negotiated with the American Guild of Authors and Composers that standardized royalty division and limited assignment of copyright to either the initial or renewal term. *See* CLR PART 5, *supra* note 52, at 154 (remarks of Phillip Wattenberg, Music Publishers Association); CLR PART 3, *supra* note 54, at 297 (remarks of Phillip Wattenberg). Thus, any period exceeding 28 years before authors could recapture their copyrights represented an increase in exploitation time for music publishers. They agreed on a period of 35 years. 17 U.S.C. § 203(3) (1982). The motion picture studios' position under the derivative works exception improved substantially compared to then-current law. *See* Abrahms, *supra* note 37, at 230-31; Melniker & Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y.L. SCH. L. REV. 589, 615-17 (1977). Furthermore, book publishers received the benefit of a definition of works made for hire tailored to fit their needs.

²²⁷ H.R. 4347, 89th Cong., 1st Sess. § 203(a)(2) (1965) (earlier version of 17 U.S.C. § 203(a)(3)). *See* REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 71-76. *See generally* Melniker & Melniker, *supra* note 226. Barbara Ringer, the former Register of Copyrights who actually drafted the provision, recently testified that she understood it to subject the interest of all intermediaries to the author's termination. *Civil and Criminal Enforcement*, *supra* note 37, at 90-92.

²²⁸ H.R. 4347, 89th Cong., 1st Sess. § 304(c) (1965) (earlier version of 17 U.S.C. § 304(c) (1982)). *See* REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 95-96. Interestingly enough, the idea of reversion of the extended renewal term in subsisting copyrights provoked much less controversy than the proposals for reversion generally. Perhaps publishers and motion picture companies, who invoked freedom of contract arguments in opposing reversion, were sensitive to the fact that in buying the initial and renewal terms of subsisting copyrights, they paid for no more than 56 years. *But see* CLR PART 5, *supra* note 52, at 178 (remarks of John Schulman, Consultant on Copyright to Christian Science Church) (arguing that assignments made since Register prepared 1961 Report contemplated the possibility of extended renewal term and fixed the consideration on that basis); CLR PART 2, *supra* note 54, at 279 (written comments of Joseph Dubin, Universal Pictures) (arguing that assignments contemplating extensions of the renewal term should be given effect); *id.* at 353, 360-61 (written comments of Motion Picture Association of America) (reversion of renewal term allows author to demand a windfall profit).

proposal to permit the proprietor of a derivative work to continue exploiting it after termination of the grant.²²⁹ The proposal had originated with the motion picture industry's objection that reversion would prevent the showing of films unless producers negotiated new licenses, and that the right to prevent the further exploitation of expensive, valuable properties would permit the owners of reversion interests to demand unreasonable terms.²³⁰ The derivative works exception substantially mitigated the motion picture industry's opposition to reversion. Music publishers, however, were less easily mollified because they viewed the exception as benefitting "everyone acquiring rights under a copyright other than the publisher who, in the case of a musical or literary work, is the one who has stimulated such demand therefor."²³¹ Indeed, the vehemence of publishers' opposition to reversion, even when modified by the derivative works exception, indicates that they envisioned that reversion or termination would divest publishers and other intermediaries of any interest whatsoever in the copyrighted work.²³² Yet, because of the authors' concessions,²³³ music and book publishers as well as the motion picture industry were, in the context of common industry practice, substantially better off under the compromise provision than they were under the analogous provisions of the 1909 Act.²³⁴ Authors and composers received in return the assurance that their rights of termination could not be alienated in advance. In that regard, they too were better off than under the 1909 Act.²³⁵

C. Interpreting the Bargains

The most striking impression that emerges from a consideration of the substantive content of these negotiations is the degree to which they interrelate. The terms of compromise on one provision were intertwined with ongoing negotiations over several others, and later set the parameters of dispute for still others. Thus, each of the statute's many provisions is best understood in the context of what had already been conceded and what remained to be settled at the

²²⁹ H.R. 4347, 89th Cong., 1st Sess. § 304(c)(3) (1965) (earlier version of 17 U.S.C. § 304(c)(6)(A) (1982)).

²³⁰ See CLR PART 2, *supra* note 54, at 360-61 (written comments of Motion Picture Association of America). See generally Melniker & Melniker, *supra* note 226, at 611-18; Abrahams, *supra* note 37, at 230-32.

²³¹ CLR PART 3, *supra* note 54, at 319 (written comments of Julian Abeles).

²³² See *supra* note 226.

²³³ See *supra* text accompanying notes 210-28.

²³⁴ See *supra* note 226; Melniker & Melniker, *supra* note 226, at 610-18.

²³⁵ See 1975 House Hearings, *supra* note 9, at 1889 (testimony of Barbara Ringer, Register of Copyrights) (every change from current law with respect to ownership is in authors' favor).

time that the negotiating parties agreed to its terms. The parties agreed on the Act's structure and approach quite early, but predicated their agreement upon finding future compromises for other provisions. Later agreements were subtly and less subtly defined by earlier ones.

Courts have traditionally approached copyright cases with few preconceptions or biases. They have viewed the balancing of interests required in framing copyright legislation as a quintessentially congressional preserve.²³⁶ Congress, for its part, chose to balance these interests by seeking and then enacting a network of negotiated compromises. If courts were to interpret the statute by determining whether they could give those compromises effect, they would necessarily need to consider what the parties to the compromises believed their agreements meant. The resulting construction would, if nothing more, work Congress's will. Perhaps courts, commentators, or indeed Congress itself would thereafter conclude that the legislative process underlying the 1976 Act balances competing interests in an inappropriate or undesirable fashion. Courts might plausibly respond by reinterpreting the 1976 Act to preserve as much as possible the balances reached by the law that preceded it.²³⁷ Alternatively, they might conclude that the bargaining process itself suggests useful paradigms for interpretation. Some of the bargains codified in the statute may merit enforcement according to the intent of the bargaining interest groups. Other bargains may invite a different approach. I would argue that the compromises embodied in the statute are of two different varieties, and the two sorts of bargains merit different treatment. One kind of bargain involves copyright ownership; the other addresses the nature and scope of copyright rights. The keynote of the statute's ownership provisions is a commitment to facilitation of transfer and exploitation of copy-

²³⁶ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852, 860 (5th Cir. 1979) ("Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, . . . including its copyright power, and the courts' role in judging whether Congress has exceeded its Article I powers is limited."), *cert. denied*, 445 U.S. 917 (1980).

²³⁷ Professor Dan Rosen, building upon the work of Guido Calabresi, has suggested that the velocity of technological development necessitates the use of common law methodology to update the 1976 Copyright Act. See Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769 (1984). Using similar methodology to revive principles the legislature revised or discarded is another commonly encountered variation. Although I would argue that both forms of judicial nullification are inappropriate, I concede that a legislative process of the sort that I have described may present an unusually tempting opportunity for the practice.

rights by removing uncertainties over copyright ownership.²³⁸ The statute of frauds provisions in the definition of works made for hire and the restrictions surrounding the right of termination are only some of the statutory provisions aimed at reducing clouds on the titles of copyright that could impede exploitation.²³⁹ The ownership package commends itself as a particularly attractive candidate for enforcement as the bargainers intended. The deal does not address the balance of interests between copyright owners and users; instead, it determines who owns the copyright. The parties crafted the package to fit the realities of an assortment of markets for copyrighted works in the various industries that buy and sell them. Arguably, the collected industry representatives were the only body with the expertise to design such a compromise. And, once the bargain has been enacted, judicial revamping of copyright ownership provisions threatens to undermine the certainties that the compromises sought to supply.²⁴⁰

The compromises that involve the scope of copyright rights pose a more difficult problem. The 1976 Act's structural expansiveness is balanced by few general limiting principles and a host of rigid, stingy, specific exemptions. This design for carrying copyright into the future poses intrinsic conflicts once the future is at hand. Unless the few general limiting principles are interpreted at least as broadly as the grant of rights, copyright in works employing new media will translate into expansive rights without exceptions.²⁴¹

²³⁸ A corollary is the statute's efforts to concentrate copyright ownership in the hands of those deemed most likely to exploit them.

²³⁹ Other such provisions include the more restrictive definition of joint works, *see* 17 U.S.C. § 101 (1982), and the provisions permitting divisibility of ownership, *see* 17 U.S.C. § 201(d).

²⁴⁰ To the extent that issues of copyright ownership depend on case-by-case common law analysis, the benefits will probably redound to the party with the greatest funds to pursue litigation. Thus, a flexible judicial approach to ownership issues would be likely to shift the balance struck in the ownership compromise package in a consistent direction: away from individual authors.

²⁴¹ The statute's two general limiting principles, described *supra* notes 169-201 and accompanying text, are the fair use doctrine codified at 17 U.S.C. § 107 and the distinction between idea and expression codified at 17 U.S.C. § 102(b). Because they are the sole general limiting principles in a statute structured to resolve unanticipated or unresolved problems in the copyright owner's favor, they arguably require interpretation with particular attention to their functional significance within the statute's overall structure. *See, e.g.,* Francione, *supra* note 37, at 570-98. The tensions between an impulse to effectuate the intent of the parties and concern for the public policy implications of enforcing a statute drafted by private interest groups, *see, e.g.,* Macey, *supra* note 69, at 264-65, may be greatest where the statute's overall structure and approach demonstrate that future, unanticipated interests lacked representation in the bargaining process. *See supra* notes 170-97 and accompanying text. I will argue in a future article that the 1976 Act's structural expansiveness requires courts to interpret the statute's few limiting principles with concomitant expansiveness in order to preserve the balance that the statute seeks to achieve.

Whether or not the parties who actually negotiated the content of the 1976 Copyright statute intended that the distinction between idea and expression and the privilege of fair use be interpreted expansively, the statute's structure requires it in order for the statute to function effectively.

Others may read the evidence differently, or rely on the record of compromise to discredit completely the courts' resort to legislative history in copyright cases. But, taking a hard look at the legislative process to ascertain what balance its participants believed that they had struck seems a necessary antecedent to such an evaluation.

V

THE 1976 ACT IN THE COURTS

"Rather, . . . we believe and hold that Congress intended the prior law in such situations to remain unchanged."

—Judge Wilfred Feinberg²⁴²

In the years since the 1976 Act took effect, courts and commentators have shown an abiding fondness for the court-embroidered provisions of the superseded 1909 Act. Many courts have concluded, with little analysis, that the new statute codified the case law decided under the old one.²⁴³ Others have ignored the provisions of the 1976 Act, and referred, without explanation, only to prior cases.²⁴⁴ Still others, often without explicit reliance on prior case law, have used common law reasoning to reintroduce into the 1976 Act legal doctrine it purports to leave behind.²⁴⁵

Courts' preference for old cases over the provisions of the complicated new statute has produced a gradual distortion of the compromises embodied in the new law. Courts' treatment of fair use and of questions related to ownership, discussed earlier, provide good examples of this distortion.

The Supreme Court recently considered the fair use doctrine in *Harper & Row Publishers, Inc. v. Nation Enterprises*²⁴⁶ and relied upon

²⁴² *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

²⁴³ *See, e.g.*, *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985) (1976 and 1909 versions of § 103(a) not materially different), *cert. denied*, 474 U.S. 1061 (1986); *Cortner v. Israel*, 732 F.2d 267 (2d Cir. 1984); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 n.2 (5th Cir. 1981) ("the legislative history indicates the revision was not intended to change the scope of copyright protection under the previous law"); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 92-93 (N.D. Ill. 1982) (1976 Act "largely a codification of prior law").

²⁴⁴ *See, e.g.*, *Topolos v. Caldewey*, 698 F.2d 991, 994-95 (9th Cir. 1983); *Rotardier v. Entertainment Co. Music Group*, 518 F. Supp. 919, 921 (S.D.N.Y. 1981).

²⁴⁵ *See, e.g.*, *Gracen v. The Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

²⁴⁶ 471 U.S. 539 (1985). The *Nation* magazine printed an article describing the then unpublished memoirs of President Gerald Ford, and illustrated its article with a large

1909 Act case law that the new statute had left behind to reshape the fair use privilege. The Court looked to the language in the House Committee Report purporting to intend to restate the doctrine of fair use without change, and on other, less apposite legislative history,²⁴⁷ to read the pre-empted doctrine of common law copyright back into the statute.²⁴⁸ Yet, there is little question that insofar as Congress may be deemed to have intended anything at all, it intended to make rights in unpublished works subject to the limitations set forth in the statute, including fair use, and to pre-empt state law protection in favor of a single, uniform system.²⁴⁹ The remarks in the Committee Reports regarding Congress's intent to restate fair use without change should be understood as a counterweight to language demanded by the educational lobbies that seemed to expand fair use's scope.²⁵⁰ By misinterpreting the Committee Report's statement as preserving common law's inhospitality to fair use, the Court drew upon state common law copyright decisions to revive the dual system that the statute purported to abolish.²⁵¹

Even more disturbing, the Court used a set of fair use presumptions that truncates the statutory inquiry. "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copy-

number of short excerpts. Harper & Row, the publisher of the memoirs, sued the Nation for copyright infringement. The Nation argued that its use of excerpts was within the fair use privilege. The Supreme Court disagreed. The decision has been criticized on a variety of grounds. See, e.g., Francione, *supra* note 37; *The Supreme Court, 1984 Term: Leading Cases*, 99 HARV. L. REV. 120, 292-302 (1985).

²⁴⁷ Justice O'Connor, writing for the majority, found evidence of congressional intent to preserve a special immunity from fair use for unpublished works in two sources. See 471 U.S. at 552-54. The first was language in the 1961 Register's Report. That language was written in support of the Register's early proposal to preserve common law copyright for undissemated works. The proposal proved extremely unpopular and was soon abandoned. Justice O'Connor's second source was language in the Senate Report, intended to accompany the Senate fair use provision, but written before the negotiating parties reached their last-minute compromise. The House Report, written after the compromise and reflecting its terms, omits the language, although it refers to it. See *supra* note 133. Congress adopted the House's version of the fair use provision rather than the Senate's. See H.R. CONF. REP. NO. 1733, *supra* note 71, at 70, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5811.

²⁴⁸ Common law copyright, discussed earlier, was a state law regime that offered unpublished works perpetual copyright protection that was not subject to the privileges and limitations of federal statutory copyright. See *supra* notes 178-82 and accompanying text.

²⁴⁹ See, e.g., H.R. REP. NO. 1476, *supra* note 16, at 129-33, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5745-49; REGISTER'S SUPPLEMENTARY REPORT, *supra* note 11, at 86. See generally Kernochan, *supra* note 37, at 4-6.

²⁵⁰ See *supra* notes 194-201 and accompanying text.

²⁵¹ See *Harper & Row*, 471 U.S. at 551.

right."²⁵² Noncommercial uses, in contrast, are presumptively fair.²⁵³ These twin presumptions, which in theory simply shift the burden of proof but in practice tend to dictate the result of the fair use inquiry,²⁵⁴ were first announced by the Supreme Court in 1984 in *Sony Corp. of America v. Universal City Studios, Inc.*²⁵⁵ They are the Court's own invention: it relied on no prior cases to derive them.²⁵⁶ But their flavor resembles that of the 1909 Act's for-profit limitation on the performing right, which the 1976 Act explicitly abolished.²⁵⁷ And, as articulated, they may render all non-profit performances presumptively fair uses.²⁵⁸ During the revision process, various witnesses proposed a provision making all non-profit uses presumptively fair.²⁵⁹ The compromise provision that Congress enacted instead contained no such presumption until the Court read one in.

Authors may be disturbed to discover that they received less from their bargain than they thought. But the Court's twin presumptions are disturbing in more fundamental ways. As discussed earlier,²⁶⁰ all concerned viewed the fair use inquiry as inherently flexible and fact specific. The legislative history refers to it throughout as an "equitable rule of reason."²⁶¹ Concededly, such an ad hoc

²⁵² *Id.* at 562 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

²⁵³ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

²⁵⁴ If a use is commercial, the defendant, to prevail, must prove that her use will not harm the market for the copyrighted work. Alternatively, if the use is non-commercial, the plaintiff must prove that the defendant's use will harm the market for the copyrighted work in order to prevail. In practice, both plaintiffs and defendants have found the burden of proof on this issue impossible to carry. *See, e.g.*, *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 640 F. Supp. 386 (D. Minn. 1986).

²⁵⁵ 464 U.S. 417 (1984).

²⁵⁶ Indeed, prior to the 1976 Act, almost all fair use case law involved commercial uses. This fact figured significantly in the controversy between copyright owners and educational organizations over the appropriate scope of fair use in educational contexts. *See 1973 Senate Hearings, supra* note 87, at 193 (remarks of Richard Schoeck, Modern Language Association).

²⁵⁷ A common, although probably indefensible, interpretation of the 1909 Act, disputed by the Register of Copyrights and never tested in the courts, permitted non-profit copying as well as non-profit performance. *See, e.g.*, 1965 *House Hearings, supra* note 8, at 1506 (testimony of Ralph Dwan, Minnesota Mining and Manufacturing Co.); 1967 *Senate Hearings, supra* note 52, at 1044-46 (testimony of Harry Rosenfield, Ad Hoc Committee of Educational Organizations and Institutions).

²⁵⁸ *See Louisiana Attorney General's Opinion*, No. 84-436, 1985 Copyright L. Dec. (CCH) 25,833. *But see Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985) (nonprofit public performance of unpublished works not fair use because fair use does not apply to unpublished works).

²⁵⁹ *See, e.g.*, 1975 *House Hearings, supra* note 9, at 131 (testimony of Irwin Goldblum, Justice Department); *id.* at 277-78 (testimony of James Harris, National Educational Association); 1965 *House Hearings, supra* note 8, at 416; REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 21.

²⁶⁰ *See supra* note 197 and accompanying text.

²⁶¹ *See, e.g.*, REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 35, at 29; H.R.

attitude poses difficulties. Relying on courts to make equitable, fact-specific determinations inevitably involves judicial assessments of the value of the allegedly infringing works, despite the long copyright tradition hostile to such assessments in other contexts.²⁶² This, in turn has led to application of the privilege in a content-based fashion that left counter-cultural users holding the short end of the stick.²⁶³ That tendency in the law has been troubling, and one virtue of the twin presumptions is that their mechanical nature may reduce the opportunity for biased evaluation. Such a cure, however, is likely worse than the disease. The rigid presumptions²⁶⁴ are unworkable. A copyright scheme needs flexibility, and the 1976 Act reposes most of that flexibility in its fair use provision.²⁶⁵ The Court's reformulation of fair use has restricted its availability for commercial uses, removed its flexibility and tilted the balance between owners and users to the copyright owners' advantage.

Recent decisions concerning ownership have, if anything, been less faithful to the statute's legislative history and more inclined to hearken back to earlier law. In *Aldon Accessories Ltd. v. Spiegel, Inc.*,²⁶⁶ the Court of Appeals for the Second Circuit faced a conflict between the 1976 Act's definition of works made for hire²⁶⁷ and its own pre-

REP. No. 1476, *supra* note 16, at 65, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5679.

²⁶² See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Clemons, Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3, 10 (1985).

²⁶³ Compare, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) with, e.g., *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

²⁶⁴ See, e.g., *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987); *Radji v. Khakbaz*, 607 F. Supp. 1296, 1302 (D.D.C. 1985), *judgement amended in part* by No. Civ. A. 84-0641 (D.D.C. May 15, 1987).

²⁶⁵ Because the rigidity of the dual presumptions makes them unworkable, lower courts are already developing disingenuous evasions. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Haberman v. Hustler Magazine*, 626 F. Supp. 201 (D. Mass. 1986).

²⁶⁶ 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). The case involved a copyright infringement suit by a wholesale dealer in figurines against a retail catalogue dealer. The plaintiff had commissioned unicorn figures from companies in Japan and Taiwan. Neither the foreign companies nor their employees were employees of plaintiff. and unicorn figurines are within none of the specially enumerated categories in that portion of the definition of works made for hire applicable to commissioned works. Plaintiff nonetheless registered copyrights in the figures as works made for hire. The defendant sold substantially similar figurines through its catalogues. Plaintiff sued, and defendant challenged plaintiff's ownership of copyright in the figurines.

²⁶⁷ A "work made for hire" is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual

viously created definition. It resolved the conflict by cleaving to earlier doctrine and mangling the statutory language to fit. The court interpreted the 1976 Act's definition of works made for hire to cover three situations. Under the first branch of the definition, a work was made for hire if created by a regular employee. Under the second branch, a work was made for hire if specially commissioned, within the listed categories, and designated a work for hire by a written instrument. Finally, under the *first* branch of the definition, a work was made for hire if it was specially commissioned, rather than created by an employee, and the commissioning party actively supervised the contractor's work.²⁶⁸ The court relied on a line of cases decided between 1966 and 1975 that held that parties who commissioned works could be employers within the meaning of the 1909 Act's provision covering works made for hire.²⁶⁹ The court's interpretation strains the statutory language, and renders all but meaningless the requirement of a written instrument and the limitation to specific enumerated works in the second branch of the definition.

Why did the court adopt this construction?²⁷⁰ Because, according to the court:

Nothing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law applying to the concepts of 'employee' and 'scope of employment' . . . Had Congress intended . . . to narrow the type of employment relationships within the work for hire doctrine to include only 'regular' employees, it is unlikely that there would have been no discussion of this change in the legislative history.²⁷¹

work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1982). The subsection defines a "supplementary work" to include forwards, editorial notes and illustrations used as an adjunct to work prepared by another author. *Id.*

²⁶⁸ See *Aldon Accessories*, 738 F.2d at 551-53.

²⁶⁹ See *id.* at 552.

²⁷⁰ Professors Latman, Gorman, and Ginsburg have suggested that the decision is a prime example of a hard case making bad law. Failure to hold the work one made for hire might have caused a forfeiture of the copyright under the 1976 Act's national origin provisions. See A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES* 242 n.5 (2d ed. 1985).

²⁷¹ *Aldon Accessories*, 738 F.2d at 552. See also *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) ("it is clear that section 201(b) . . . expresses the legislative intent not to overturn the line of cases which, in favor of more rational decisions in the copyright area, eschew the more traditional distinctions between an employee and an independent contractor"). In *Peregrine*, the court further obliterated the distinction between works created by employees and specially commissioned works by finding that the work's creator was an independent contractor, and then holding the work to be made for hire under the first branch of the definition. *Id.*

This misreads the evidence. The provision itself was drafted in 1965. The substance of its treatment in the House Committee Report upon which the Second Circuit relied was drafted in 1966.²⁷² Yet the line of cases finding employment relationships in situations in which works were commissioned began in 1966.²⁷³ It is therefore not surprising that the early legislative history omits mention of any change in the meaning of the term "employee," although plenty of discussion indicates that everyone involved understood the term to mean someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely.²⁷⁴ There is no indication that anyone involved in copyright revision later became aware of the line of cases expanding the work made for hire doctrine.²⁷⁵ Indeed, because the work made for hire definition was part of a settled compromise package, it received little mention. Because the Second Circuit's reinterpretation of the work made for hire doctrine requires a fact-specific determination of the exercise of actual control, it is even less predictable than the 1909 Act test.²⁷⁶ *Aldon Accessories* undermines the statutory effort to make copyright ownership more certain. Other courts, however, have found the Second Circuit's reasoning persuasive.²⁷⁷

Something similar happened in *Mills Music v. Snyder*.²⁷⁸ At issue was whether a composer who terminated a transfer to a publisher was entitled to the royalties that the proprietor of a derivative work agreed to pay for the derivative work's exploitation. As discussed earlier,²⁷⁹ publishers and composers indicated several times during

²⁷² See H.R. REP. NO. 2237, *supra* note 108, at 114-16 (1966). The 1976 Reports contain a shortened version of the 1966 discussion. See H.R. REP. NO. 1476, *supra* note 16, at 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5736-37.

²⁷³ See Angel & Tannenbaum, *supra* note 210, at 229.

²⁷⁴ See, e.g., B. VARMER, *supra* note 56, at 130 ("all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission"); CLR PART 3, *supra* note 54, at 257-75 (remarks of various witnesses).

²⁷⁵ Nor was the court's assumption that Congress would flag any change from prior law in its Committee reports a sound one. Other changes that the 1976 Act indisputably made in preexisting law also went unremarked. The automatic vesting of copyright upon fixation, for example, escapes explicit mention.

²⁷⁶ *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 333-34 (5th Cir. 1987) ("The rule of *Aldon Accessories* makes business arrangements exceedingly difficult.')

²⁷⁷ See, e.g., *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 107 S. Ct. 434 (1986); *Community for Creative Non-violence v. Reid*, 652 F. Supp. 1453 (D.D.C. 1987); *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326 (N.D. Ill. 1986). *But see Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 331-34 (5th Cir. 1987) (rejecting rule of *Aldon Accessories*).

²⁷⁸ 469 U.S. 153 (1985). *Mills Music* was a skirmish over rights in the song "Who's Sorry Now?" The composer assigned copyright in the song to a music publisher who licensed various records in return for royalties. After termination of the composer's grant to the publisher, the publisher claimed a continuing right to collect the royalties payable by the recording companies for sales of recordings of the song.

²⁷⁹ See *supra* notes 226-34 and accompanying text.

negotiations over the termination provisions that they believed that an author's termination would divest publishers and other intermediaries of any interest whatsoever in the copyrighted work.²⁸⁰ Publishers agreed to the provision because of other concessions they received in the compromise package. In *Mills Music*, the Court reviewed much of the provision's history. The Court nonetheless imputed to Congress a purpose to prevent authors from divesting their assignees of proceeds from the exploitation of derivative works by third parties, effectively reversing what the parties expected their compromise to accomplish.²⁸¹ Thus, an author who terminates a transfer burdened by the transferee's assignment of the right to create derivative works may receive very little back. With this interpretation, the Court did to the right of termination essentially the same thing as it had done to the 1909 Act's renewal provision 42 years earlier.²⁸² With termination, as with renewal, the author's recapture expectancy is essentially alienable. In industries such as music publishing where authors and composers typically assign to the publisher the right to license any further uses, the statutory right to terminate will have little value. As with the renewal term, the author will have assigned most of what is valuable in her work to people from whom she will be unable to recapture it.

Alone, each of these cases may work only a small distortion. Taken together, however, they have fundamentally altered the delicate balance of compromises that run throughout the 1976 Act. To the extent that they signal a trend, they raise a threat of systemic distortion of the statute. Congress could, of course, rush in to repair the damage. Members of Congress have introduced bills to overrule *Aldon Accessories*²⁸³ and *Mills Music*.²⁸⁴ Alternatively, courts

²⁸⁰ Professor Nimmer argued that the author's grant to publishers should survive termination insofar as the publisher has licensed derivative works, but supported his argument with rather peculiar logic. According to Professor Nimmer, if the author's assignment to an intermediary was in fact more favorable to the author than the intermediary's assignment to the proprietor of the derivative work, then the author would receive less after terminating the transfer than she received before termination. See 3 M. NIMMER, *supra* note 15, § 11.03[B][3] at 11-18.5. Professor Nimmer apparently discounted the fact that, unlike renewal, termination is voluntary. An author would have no reason to engage in the complicated procedure for terminating her transfer if she stood to lose by doing so. Nimmer did note that his interpretation, which the Supreme Court agreed with in *Mills Music*, would produce an anomaly in the music publishing context. See *id.* at 11-18.2 n.81. Record companies who avail themselves of the statute's compulsory license to make phonorecords must, after termination, pay the statutory royalties to the terminating author rather than the music publisher. Record companies who instead "negotiate" a voluntary license on essentially the same terms will, after termination, continue to pay royalties to the music publisher.

²⁸¹ 469 U.S. at 170-76.

²⁸² See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943); *supra* note 207 and accompanying text.

²⁸³ See S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986).

could begin to construe the 1976 Act in light of the statutory scheme as a whole and the interrelated negotiations that produced it.

CONCLUSION

I have alluded in this article to the legal fiction of congressional intent, which assumes that statutes are written by members of Congress, in language intended by members of Congress to embody specific, substantive choices that members of Congress have made. Viewed through that prism, the 1976 Copyright Act is particularly elusive. An analysis of the statute's legislative history demonstrates why this is so. Members of Congress revised the copyright law by encouraging negotiations between interests affected by copyright, by trusting those negotiations to produce substantive compromises, and by ultimately enacting those compromises into law.

This process yielded a statute far more favorable to copyright proprietors than its predecessor, containing structural barriers to impede future generations' exploitation of copyrighted works. The legislative process may have struck an unwise balance, but it, nonetheless, is a balance that members of Congress and myriad industry representatives worked many years to achieve. It is also a balance around which the represented industries have since structured their relationships. Courts, in their confusion over the statutory language, have undermined this balance. They have dismantled the statute's delicate compromises, not systematically, but with unpredictable randomness. As courts distort each bargain, it becomes more difficult to discern the rationale of other interdependent provisions.

I have suggested that in interpreting the 1976 Copyright Act, courts should approach statutory ambiguities by trying to ascertain the nature of the compromise that an ambiguous provision represents in the context of the ongoing negotiations. Instead, a number of courts have resorted in their confusion to familiar principles of prior law. Perhaps it is unrealistic to expect overworked federal courts to wade through the plethora of evidence in search of the meaning of various compromises.²⁸⁵ But a number of courts and commentators are already sifting through the statute's legislative history with an exceedingly fine sieve.²⁸⁶ Moreover, the essence of

²⁸⁴ See H.R. 3163, 99th Cong., 1st Sess. (1985).

²⁸⁵ See Macey, *supra* note 69, at 239 ("Judges interpret statutes, they are not investigative reporters."). Nonetheless, should the courts demonstrate receptiveness to such analysis, a cottage industry of scholars and litigants would probably spring up to illuminate the question of statutory meaning for them.

²⁸⁶ See, e.g., *Mills Music v. Snyder*, 469 U.S. 153 (1985); *id.* at 176-81 (White, J.,

the various negotiations appear in the most basic of the legislative documents: the Register's reports and the Congressional committee reports to which many courts and commentators already refer.²⁸⁷ What is needed, then, may be no more than a shift in emphasis, a reorientation in attitude, for courts to begin to look at the statute's provisions in the context of the negotiations that developed them.

dissenting); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 463-81 (1984) (Blackmun, J., dissenting); Abrahms, *supra* note 37, at 204-32; Samuelson, *Contu Revisited: The Case Against Copyright Protection for Computer Programs in Machine Readable Form*, 1984 DUKE L.J. 663, 692-705 (1984).

²⁸⁷ See, e.g., sources cited *supra* note 39.