

THREE

COPYRIGHT AND COMPROMISE

If history bores you, you should skip this chapter. My purpose here is to present a very abbreviated history of United States copyright lawmaking in the twentieth century.¹ The story shows the evolution of our copyright legislative process, and demonstrates why it tends to produce perverse statutes. It also makes clear how daunting a task it would be to attempt to reform it.

This is a story about private parties, vested interests, and the inexorable pace of technological change. Throughout this century, members of Congress have introduced innumerable copyright bills, held hearings on many, reported some, and enacted few. Congress last enacted a general overhaul of the copyright law a quarter-century ago, in 1976. Since then, Congress has been inundated with proposals to revise copyright law in light of new technology.

The pressures put by new technology on the current copyright statute have sparked disputes over whether the current copyright statute can adjust to the climate of rapid technological change. When such disputes arise, interested parties on all sides tend to raise familiar arguments. One camp, typically, claims that current technology differs profoundly from prior developments and calls into question the assumptions on which our copyright laws are based. Another camp insists that copyright law has always faced the problem of technological change and accommodated it with remarkable success. The current challenge, the argument continues, is not qualitatively different from previous challenges. The copyright statute is equal to the task, and needs no major change. (The argument is more a rhetorical device than an article of faith, so it is not unusual to see the proponents of one side taking the opposite view depending on what proposal is on the table.²)

Although the dispute is commonly framed in terms of the historical elasticity of the copyright law, the law's ability to stretch itself around new

technology has been less than inspiring. Any given copyright law will be more hospitable to some sorts of technological change than to others. Interests who find themselves, usually more by reason of accident than design, in a favorable legal position will naturally resist proposals to tinker with it. Revising the law to make room for new developments, then, has often been a difficult feat to pull off. The legislative process that Congress has come to rely on for copyright revision has exacerbated the problem.

A century ago, Congress confronted the dilemma of updating and simplifying a body of law that seemed too complicated and arcane for legislative revision. To solve that problem, Congress and the Copyright Office settled on a scheme for statutory drafting that featured meetings and negotiations among representatives of industries with interests in copyright. That scheme dominated copyright revision during the legislative process that led to the enactment of the 1909 Copyright Act.³ Congress and the Copyright Office continued to rely on meetings and negotiations among interested parties for subsequent efforts at copyright revision. The efforts during the 1920s and 1930s to amend the copyright law to permit adherence to the Berne Convention for the Protection of Literary and Artistic Works, an international treaty mandating automatic copyright protection without any requirements for copyright notice or registration, rested upon interindustry negotiations and collapsed when those negotiations collapsed. The twenty-one-year effort that culminated in the enactment of the 1976 Copyright Act again depended upon officially sponsored meetings among those with vested interests in copyright. The copyright amendments that finally enabled the United States to join the Berne Convention in 1989 involved a similar process. The 1992 Audio Home Recording Act resulted from a protracted, multiparty negotiation among composers; music publishers; record companies; performers; and the manufacturers of tapes, tape recorders, and other home electronic equipment.⁴ The efforts to write copyright amendments that make specific provision for digital media relied heavily on interindustry negotiations and stalled whenever those negotiations stalled. Indeed, the informal understanding among copyright scholars and practitioners is that copyright revision is, as a practical matter, impossible except through such a process.

The process Congress has relied on for copyright revision, however, has shaped the law in disturbing ways. The interindustry negotiations that resulted in the 1909 Copyright Act sought to revise a body of law based on an old model in order to enable it to embrace a variety of new media.

Industries for whom the old law worked well sought to retain their advantages; industries that found the old law inadequate sought profound changes in the way the copyright statute treated them. Affected interests compromised their disputes by treating different industries in disparate ways. The draft bill that emerged from the conferences among industry representatives defined particular copyright rights with reference to the type of work in which copyright was claimed, and the statute enacted in 1909 retained the draft bill's essential strategy. Authors of particular classes of works were granted specific, enumerated rights; rights differed among the classes of copyrightable works. Thus, the 1909 act gave the proprietor of the copyright in a dramatic work the exclusive right to present the work publicly, the proprietor of the copyright in a lecture the exclusive right to deliver the work in public for profit, the proprietor of the copyright in a musical composition the exclusive right to perform the work publicly for profit except on coin-operated machines, and the proprietor of the copyright in a book no performance or delivery right whatsoever.

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

The process leading to the 1998 enactment of the Digital Millennium Copyright Act extended the familiar multilateral, interindustry negotiation to the point of self-parody. Copyright owners secured new rights defined in language designed to prevent the discovery of loopholes, and granted a diverse roster of powerful players narrow, detailed, and incomprehensibly drawn exceptions.

A comparison of the immediate futures of these laws reveals that they failed the future in similar ways. Narrow provisions became inapplicable or

irrelevant as technology developed, while those interests absent from the meetings of industry representatives encountered significant legal barriers to their activities. The inflexibility of specific provisions distorted the balance that the statute's drafters envisioned when it was enacted, and interested groups came running to Congress to plead for quick fixes. Broad rights and broad exceptions consistently swallowed up their specific counterparts.

An exploration of how the process of drafting copyright statutes through negotiations among industry representatives became entrenched, and what that process has cost us in our efforts to deal rationally with technology, demonstrates how little has changed in the past century. The new technologies have grown more complex, and the number of affected interests has multiplied, but the essence of the disputes and the rhetoric in which they are cast are much the same.

1900–1909: THE FIRST CONFERENCES

Until the copyright revision that culminated in the 1909 act, the legislative process accompanying copyright enactments differed little from the process yielding most statutes: interested parties sent petitions to Congress. The majority of bills were drafted by representatives of affected interests, who then requested members of Congress to introduce the bills, wrote petitions to Congress in their support, and testified in their favor during hearings of the House and Senate Patent Committees, which had jurisdiction over patent, trademark, and copyright bills. By 1900, the body of copyright law was a pastiche of inconsistent amendments grafted on a basic structure that conflated (and sometimes confused) copyrights, patents, and trademarks. Efforts toward general statutory revision foundered as a "result of difficulties in obtaining a quorum of the Patents Committee to give attention to this subject."⁵

Beginning in 1901, Thorvald Solberg, the recently appointed first Register of Copyrights,⁶ pleaded repeatedly with Congress to appoint a special commission to revise the copyright law. Members of the Senate Patent Committee, however, were hostile to the idea of a commission. The Librarian of Congress, Herbert Putnam, suggested that Congress instead pass a resolution authorizing the Library of Congress to convene a conference of experts and interested parties to consider a codification of the copyright laws. The members of the Senate Patent Committee concluded that it

would be improper for Congress to authorize such a conference, but suggested that they would be delighted if the Librarian were to call an unauthorized conference on his own motion.

The Librarian of Congress followed the Patent Committee's suggestion and, in 1905, invited representatives of authors, dramatists, painters, sculptors, architects, composers, photographers, publishers of various sorts of works, libraries, and printers' unions to a series of meetings in New York City. The invitees represented the beneficiaries of the rights granted by existing copyright statutes. The Librarian did not invite representatives from the newer interests that had not yet received statutory recognition; the motion picture industry, the piano roll industry, and the "talking machine" (phonograph) industry received no invitations. No invitee commented on their absence.

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

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

None of the bills reached a vote, and, in the following year (1908), a proponent of each of the four camps introduced a bill reflecting its position. At the joint hearings held on the four bills, testimony was as divisive as it had been two years earlier. At the end of the hearings, a representative of popular songwriters suggested that the songwriters might sit down with the piano roll and talking machine manufacturers and the music publishers' association in order to agree on a compromise solution. Representative Frank Currier (R-N.H.), the chairman of the House Committee, urged the parties to adopt such a plan, and a spokesman for the piano roll industry disclosed that he had, in fact, begun to explore negotiations with his opponents earlier in the day. Representative Currier assured the witnesses that, if they could reach agreement, the bill would pass. The Senate Committee chairman echoed his enthusiasm for the plan and adjourned the hearings.

The copyright bill introduced in February of 1909 included a solution that embodied the agreement of the affected parties. The relevant provision differed from prior proposals; it established a compulsory license for mechanical reproductions of music and entirely exempted the performance of musical compositions on coin-operated devices. The bill also incorporated a side agreement or two that the private parties had reached along the way.⁷ It was enacted within the month.

1910–1912: THE CONFERENCES REPRISED

At the same time the committees were struggling with the revision bill, the Kalem Company hired a writer to read General Lew Wallace's *Ben Hur*, and write a scenario for a motion picture, which it then produced (complete with chariot race). Kalem advertised the picture as "Positively the Most Superb Moving Picture Spectacle ever Produced in America in Sixteen Magnificent Scenes." Kalem had not, of course, bothered to secure a license from Wallace or his publisher. The motion picture industry had been operating without concern for the copyright laws. A few motion pictures had been registered for copyright as "photographs," but the industry was paying no more attention to the copyrights in works it used for its raw material than had the piano roll and talking machine industries before it. The copyright in *Ben Hur* belonged to Harper Brothers Publishers, and Harper Brothers slapped the Kalem Company with a copyright infringement suit.

In 1911, the United States Supreme Court held that the exhibition of the movie infringed the copyright in the novel.⁸ The Kalem Company settled the suit for \$25,000. The motion picture industry woke up and got in touch with its congressmen.

Motion pictures had barely been mentioned in the hearings on the 1909 act; the motion picture industry had not been invited to the original conferences, and had not bothered to attend the congressional hearings. After *Kalem Co. v. Harper Brothers*, however, the motion picture industry faced the prospect of liability under a statute that had been drafted without its interests in mind. It prepared a bill to amend the copyright statute to limit the motion picture industry's exposure in copyright infringement actions and asked Rep. Edward Townsend (D-N.J.)⁹ to introduce the bill in Congress.¹⁰

Townsend introduced the movie industry bill in January of 1912; the House Patent Committee scheduled it for hearings that same month. The committee made no initial effort to notify interested parties of the pending bill. A representative of the live-theater industry, however, learned of the hearings and showed up at them without invitation. The hearings that followed threatened to become a replay of the talking machine dispute. Most of the witnesses who testified before the committee were the same people who testified in 1906 and 1908. Although some of them represented different interests this time around, their arguments and counterarguments had a familiar ring. As was the case in the earlier hearings, opponents of the legislation testified that its supporters were conspirators in thrall to a dastardly trust.

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

1914–1940: NEW PLAYERS JOIN THE GAME

The lesson an industry observer might have expected to learn from the preceding saga of copyright legislation was that interested parties were well advised to work out their differences before involving Congress. And, indeed, that was precisely what affected industries attempted to do with all subsequent efforts at copyright revision. Seeking interindustry consensus, however, became significantly more complicated in the years that followed.

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

Despite the enactment of the Townsend amendment, motion picture producers grew increasingly uncomfortable with the formalities of a copyright statute written without attention to their needs. Representatives of the motion picture industry met with writers' representatives in New York and agreed to convene private copyright conferences, along the model of those that produced the 1909 act, to work out a consensus on copyright revision. Representatives of writers, book and periodical publishers, printers, labor unions, librarians, and motion picture producers met in conferences over a number of years and hammered out the details of a copyright revision bill. Motion picture counsel completed a draft of the bill, and Rep. Frederick William Dallinger (R-Mass.) introduced it in 1924. Participants in the conferences, however, had not sought the advice of broadcasters or the talking machine industry and had sought, but not received, the advice of composers and music publishers. Nor had the representatives of motion picture producers consulted the theater owners who exhibited their films. When the supporters of the Dallinger bill arrived in front of the House Patent

Committee, they discovered that the industries they failed to invite to their conferences were pursuing their own agenda.

Both motion picture theaters and radio stations used popular music in their programs. Apparently, theater and station owners gave copyright infringement little thought until ASCAP showed up on their doorsteps demanding royalties. When ASCAP went to court and got injunctions, radio stations and motion picture theater owners went to Congress to seek ASCAP's abolition. Members of Congress introduced various bills to restrict ASCAP's activities, to exempt radio stations and theater owners from liability for infringement, or to narrow the right to perform musical compositions publicly for profit. The Patent Committee scheduled hearings on pending legislation, and the two legislative agendas collided in the House Committee hearing room.¹¹

In hearings before the House Patent Committee, numerous witnesses testified that the copyright law was inadequate and needed revision. They disagreed sharply, however, on the form that revision should take. Most of the witnesses endorsed one of a half-dozen bills pending before the committee and testified solemnly that adoption of any of the other bills would bring the progress of science and the useful arts to a screeching halt. Reps. Sol Bloom (D-N.Y.) and Fritz Lanham (D-Tex.) expressed their frustration with the testimony, and Bloom inquired whether any solution to the various disputes would be feasible. An author of the Dallinger bill suggested that the lawyers for the interests affected by copyright have another try at the conference approach over the summer. House Committee members endorsed the suggestion, with the proviso that the list of invitees be broader than before. Rep. Randolph Perkins (R-N.J.) pointedly suggested the importance of including broadcasters, while Representative Bloom proposed that members of the House Committee also attend. After some bickering among witnesses about starting points for discussion, Perkins persuaded them to give the idea of further conferences serious consideration. Bloom successfully moved the appointment of a subcommittee to oversee the effort.

The committee appointed Sol Bloom to head a five-person subcommittee. The meetings began the following April (1925) and continued for nearly a year. The list of invitees was initially expansive. In an early meeting, however, representatives of ASCAP had a rancorous exchange with representatives of the National Association of Broadcasters, and the broadcasters withdrew in a huff.¹²

After numerous meetings, representatives of almost all of the participating industries agreed on the text of a bill. The centerpiece of the bill would have enabled the United States to adhere to the Berne Convention. The language and structure of the bill reflected its compromise nature. Individual clauses had been created through several series of bilateral negotiations and fit together awkwardly. It also lacked any accommodation for the absent broadcasters' concerns. Nonetheless, the bill, introduced by Rep. Albert Vestal (R-Ind.) as the Vestal bill in the 69th Congress, had a long list of endorsements. The broadcasting industry, of course, opposed the bill bitterly and allied with the talking machine industry and the theater owners to block it. Simultaneously, they pursued legislation to permit businesses to perform or broadcast music without a license.

The Vestal bill languished in Congress for several years, accumulating opposition from libraries, periodical publishers, academics, and a splinter group of theatrical producers, as well as broadcasters, motion picture producers, and the talking machine industry. In 1930, supporters of the Vestal bill intensified their efforts toward enactment. During the 71st Congress, the House Patent Committee held further hearings on the Vestal bill. Authors' representatives met with representatives of organizations opposed to the bill throughout the night during the hearings and reached further compromises on disputed provisions. Witnesses thus explained to the House Committee that they had opposed the bill during the previous day's testimony, but were now willing to endorse it. Members of the committee urged that further negotiations proceed with dispatch. Representative Lanham suggested that one dispute be settled on the spot, in the hearing room and during the testimony.¹³ As a result of the hasty negotiations, the House Committee reported the Vestal bill favorably, observing that "practically all of the industries and all the authors have united in support of this revision."

"Practically all the industries," of course, was not quite the same as all of the industries. Industries that had gotten little satisfaction from the conferences persuaded members of Congress to press their proposals on the floor of the House. The House of Representatives voted in favor of the Vestal bill only after adopting floor amendments restricting ASCAP's activities and permitting anyone to play phonograph records or radio broadcasts in public so long as the performances were nonprofit. The amendments, however, failed to mollify the bill's opponents. When the House referred the bill to the Senate, representatives of broadcasters, radio and phonograph manufacturers, and motion picture theater owners demanded

that the Senate hold hearings to receive testimony in opposition to the bill. After listening to the testimony, the committee settled on a series of amendments and reported a by now complex, and internally inconsistent, Vestal bill to the Senate floor, where it got caught in a filibuster on another matter.

In the following Congress, the House Committee started over. The new committee chairman, Democrat William Sirovich of New York City, had been both a physician and a playwright before becoming a politician, and believed he could cut through the obstacles preventing copyright revision. Sirovich scheduled extended hearings and met privately with industry representatives. He then introduced a bill that embodied his notion of a fair compromise. In the face of opposition from the motion picture theater owners, map publishers, and broadcasters, he revised the bill to incorporate their suggestions. Motion picture producers and distributors and ASCAP denounced the changes. Chairman Sirovich rushed the bill to the House floor under a special rule, but the opposition of other members of the House Patent Committee killed the bill before it could be put to a vote.

Meanwhile, private negotiations began to collapse in the face of the Depression economy. Organizations that made concessions in the spirit of compromise in 1926, 1928, or 1930 were no longer satisfied with their bargains. At the suggestion of a representative of organized labor, the Senate Committee on Foreign Relations asked the State Department to organize an informal committee of State Department, Copyright Office, and Commerce Department representatives to oversee further private negotiations. The interdepartmental committee held a series of conferences with representatives of affected interests. They drafted a bill that proved to be acceptable to broadcasters and to the other interests that had opposed the Vestal bill. Writers, composers, publishers, motion picture producers, and organized labor, however, found the bill completely unacceptable and promptly got off the bandwagon. Strong support from the administration enabled the bill to pass the Senate, but strong opposition from interested parties caused it to perish in the House.

With copyright revision stalled in Congress, a private foundation attempted to restart it. In 1939, the National Committee on International Intellectual Cooperation called its own copyright conferences. After sixteen months of meetings, it was unable to arrive at a bill that everyone would support. The committee drafted a bill nonetheless. The bill went nowhere. After twenty years of private negotiations, the Second World War intervened, and efforts to revise the copyright statute died.

SHORTCHANGING THE FUTURE

Throughout the various conferences held between 1905 and 1940, interests that were absent from the bargaining table were shortchanged in the compromises that emerged. The Librarian of Congress's conferences in 1905 and 1906 excluded the piano roll and talking machine interests; the bill that emerged disadvantaged them. The motion picture industry attended none of the negotiations that resulted in the 1909 act and found the statute a significant hindrance. The 1912 negotiations between motion picture and theater industries to frame the Townsend amendment yielded a compromise that handicapped authors and publishers of nondramatic works, who did not participate. The conferences in the 1920s that led to the Dallinger bill included no representatives of the broadcasting industry; the Dallinger bill gave publishers and composers rights at the broadcasters' expense. The broadcasters walked out of the conferences that produced the Vestal bill; the Vestal bill addressed none of the broadcasters' concerns.

At first glance, this observation seems intuitively obvious. Parties who are negotiating would seem to have no incentive to safeguard the interests of their absent competitors. On further consideration, however, the persistent shortchanging of absent interests seems more startling. The battles that preceded the enactment of the 1909 act should have demonstrated to the participants that interests excluded from negotiations could effectively block legislation. Many of the participants in the later conferences had been privy to the 1906 and 1908 hearings. Even had the threat been dismissed or forgotten, the controversy that surrounded the Dallinger bill should surely have persuaded conference participants to make some accommodation for absent parties in connection with the Vestal bill. Yet, the compromises that were made emerged only after face-to-face bargaining, either within the conferences or at the last minute in response to congressional pressure.

The parties had an interest in drafting legislation that Congress would enact. That interest should have persuaded them to incorporate language that absent groups would find acceptable. The pressures of the negotiation process, however, made it difficult to accommodate groups who were not participating in the bargaining. The division of rights among competing interests became increasingly complex and interdependent. The compromises that emerged from the conference approach were rarely merely bilateral. Authors conditioned concessions to motion picture producers on their receipt of concessions from organized labor who in turn demanded

something from publishers. In the ensuing complex web of interrelated concessions, the hypothetical demands of absent parties got lost.

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

Indeed, the interests that had not yet come into being when the negotiations took place were the quintessential excluded parties. They posed a potential competitive threat to all current stakeholders yet they couldn't lobby against legislation. As one might expect, then, they were the parties most likely to find that the negotiated compromises operated to their disadvantage. The industries that chafed most under the provisions of the 1909 act, for example, were the motion picture and broadcast industries: the former barely begun and the latter not yet imagined at the time the Librarian of Congress called his conference in 1905.

The motion picture and broadcast industries found the 1909 act particularly inhospitable because it required emergent industries to adapt themselves to ill-fitting molds. The drafters of the 1909 act had crafted the language to settle particular, specific interindustry disputes.¹⁴ The extent to which the 1909 act's category-specific language encompassed new technology was difficult to predict. Although the specificity of terms initially provided security to the affected industries, the growth of new forms and methods made the language seem increasingly ambiguous. The development of the mimeograph machine, which allowed the production of many copies of text using a wax stencil rather than metal type, for example, created doubts about the reach of a provision requiring all books to "be printed from type set within the limits of the United States, either by hand or by the aid of any kind of type-setting machine, or from plates made within the limits of the United States from type set therein."¹⁵ When the word roll, a piano roll with lyrics printed alongside the perforations that produced the music, superseded the simple piano roll, it was unclear whether the compulsory license for mechanical reproductions of music permitted the addition of printed lyrics.

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

Determining the scope of copyright protection for motion pictures, for example, required courts to decide such questions as whether the exhibition of a motion picture constituted "publication" within the meaning of the 1909 act. Was a motion picture, specifically enumerated in subsections (l) and (m) of section 5, also a "dramatic or dramatico-musical composition" as specified in subsection 5(d), or, if not, could it still be deemed a "drama" for the purposes of subsection 1(d)? If so, was exhibiting the film a "performance"? Should projecting the frames of a motion picture be characterized as making a "copy" of the motion picture or as "dramatizing" it? Radio broadcasting posed similar problems. Was the broadcast of music to receiving sets in individuals' homes a public performance? Was broadcasting at no charge to listeners a performance for profit? Was it a public performance for profit to install a radio receiving set and loudspeakers in hotel guest rooms?¹⁶

1950–1961: RETURNING TO CONFERENCE

By the end of the Second World War, industries had been operating within the confines of the 1909 act for a third of a century. Everybody criticized the law as outmoded; it had, after all, been drawn to accommodate the requirements of particular media before the advent of radio, jukeboxes, sound motion pictures, Muzak®, and television. The affected industries accommodated the arcane law through combinations of trade practice, collectively bargained form contracts, and practical contortions. Where the copyright statute failed to accommodate the realities faced by affected industries, the industries devised expedients, exploited loopholes, and negotiated agreements that superseded statutory provisions. The broadcast industry formed its own performing rights society to compete with ASCAP. The recording industry developed a form license that incorporated the basic concept of a compulsory license for mechanical reproduction, but at more favorable

terms, and used it instead of the license conferred by the statute. The motion picture industry established an ASCAP-like operation to deal with unauthorized exhibition of films. An enterprising group of talking machine manufacturers used the copyright exemption for the performance of musical compositions on coin-operated devices to launch the jukebox industry, and marketed jukeboxes to establishments that wished to play music but not to pay royalties. Each accommodation, however, was soon perceived as an entitlement and became one more obstacle to agreement.¹⁷

The subject matter of copyright remained frozen in the form it had taken in 1912. More recently developed works were copyrightable only to the extent they could be analogized to the statutory list of works subject to copyright, and received rights whose scope was limited by the category in which they best fit. Decorative lamp bases and children's toys, for example, could be registered as "works of art" or "reproductions of a work of art." Motion pictures and television programs recorded on film could be copyrighted as unpublished motion picture photoplays. Live or videotaped television programs, radio programs, and phonograph records were deemed uncopyrightable. The copyright businesses had developed a practice of dividing up copyright rights and administering them separately. Composers of musical works, for example, controlled their rights to perform music publicly for profit, and licensed those rights through ASCAP. The rights to reproduce the music in sheet music, phonograph records, or motion pictures, however, was controlled by music publishing companies, who were the copyright owners of record. The copyright law allowed for none of this: it treated copyright as a single, unitary right that could be owned by only one person at any given time.¹⁸ New technological uses waited in the wings. Cable television, xerographic photocopying, and digital computers were all invented in the 1940s.¹⁹ It was difficult to figure out what provisions of the copyright law would apply to the new technologies and what effects the technologies would have on the copyright law.

To revive the process of comprehensive copyright revision, Congress returned to a suggestion that it had rejected summarily fifty years before. In 1956, it appropriated funds for the appointment of a special committee of copyright experts.²⁰ The Register of Copyrights, Arthur Fisher, initially conceived a three-year revision process that would depart significantly from the familiar conferences. Fisher envisioned a committee of copyright experts acting in a purely advisory capacity, while the Copyright Office's research division performed comprehensive studies of prior revision efforts, copy-

right laws of other nations, and each of the major substantive issues involved in copyright revision. The committee's job would be to offer comments and suggestions, but not to make policy. Fisher hoped to keep the policy-making process insulated within the Copyright Office to avoid the partisan wrangling that infected prior legislation.

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

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

In 1960, shortly before the Copyright Office completed the Register's Report to Congress, outlining recommendations for a revision bill, Register Fisher died. His successor, Register Abraham Kaminstein, abruptly shifted gears. While Fisher appeared to have viewed the history of interindustry compromise as a weakness of prior revision efforts, Kaminstein seemed to read the record differently. He argued that such compromise was the keystone of achieving copyright revision and that the goal of enacting a modern copyright statute was worth herculean efforts to encourage compromise among interested parties.

Register Kaminstein began working toward conciliation and narrowly averted a crisis that threatened to derail the revision program. The substance of the Register's Report had been poorly received by the Bar, a number of whose members insisted that they would prefer the current outmoded statute to one following the Register's recommendations. Kaminstein announced that the Copyright Office was willing to abandon unpopular proposals. He expanded the membership of the panel of experts and arranged meetings with interested parties to encourage them to compro-

mise with one another. The result was, in essence, a return to the conference process. Six years of study had produced the Register's Report. Another five years of conferences produced a bill that reflected the consensus of the conference participants and bore little resemblance to the Register's recommendations. It took an additional eleven years in Congress for the interested parties to compromise on extraneous issues and late-breaking problems. When the parties finally compromised on nearly every provision in the bill, Congress would enact the 1976 Copyright Act.²¹

PRIVATE PARTIES AND VESTED INTERESTS

The stormy history of past revision efforts led the Copyright Office to conclude that the only copyright bill that would pass was one built on a network of negotiated compromises. The Copyright Office concentrated much of its energy on identifying affected interests and including their representatives in the negotiations. But, of course, it wasn't possible to invite every affected interest. Some interests lacked organization and had no identifiable representatives. In the 1905 conferences, the Library of Congress had tried unsuccessfully to recruit representatives of composers to participate. Music publishers purported to speak for composers and were the only representatives available. In the conferences convened in the 1960s, painters and sculptors did not attend and the Copyright Office's efforts to seek them out proved unsuccessful. Choreographers, theatrical directors, and computer programmers sent no representatives because they had no representatives to send. Other interests that would have profound effect on copyright did not yet exist at the time of the conferences. Just as there had been no commercial broadcasters to invite to the conferences in 1905, there were no videocassette manufacturers, direct satellite broadcasters, digital audio technicians, personal computer users, motion picture colorizers, online database subscribers, or Internet service providers to invite in 1960.

Nor could the rest of us be there. The amorphous "public" comprises members whose relation to copyright and copyrighted works varies with the circumstances. Many of us are consumers of copyrighted songs and also consumers of parodies of copyrighted songs, watchers of broadcast television and subscribers to cable television, patrons of motion picture theaters and owners of videotape recorders, purchasers and borrowers and tapers of copyrighted sound recordings. Although a few organizations showed up at

the conferences purporting to represent the “public” with respect to narrow issues, the citizenry’s interest in copyright and copyrighted works was too varied and complex to be amenable to interest-group championship. Moreover, the public’s interests were not somehow approximated by the push and shove among opposing industry representatives. To say that the affected industries represented diverse and opposing interests is not to say that all relevant interests were represented.

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

Perhaps the most patent example of the partisan perspective that dominated the negotiations is illustrated in the treatment of the issue of private use, an issue that became increasingly vexing in the years after the 1976 act took effect. Presumably, all industry representatives made private use of copyrighted works in their individual capacities. Yet, the issue of the appropriate scope of permissible private use of copyrighted works received little explicit attention during the revision process. Representatives were too busy wrangling over commercial and institutional uses to talk about the behavior of individuals in their homes. The aggregate agendas developed in the conferences of private parties reflected systematic, if unintentional, bias against absent interests. The fact that private use had no defenders and received no explicit treatment in the revision conferences, therefore, had substantive results on the legality of private use under the revision bill.

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

The nature of this process introduces particular difficulties into the enterprise of statutory interpretation. This type of drafting process makes it exceedingly difficult to speak of legislative intent if by legislative intent one means the substantive intent of members of Congress. Even if one avoids that dilemma by ascribing to Congress an intent to enact the substance of the deals forged in conferences, one nonetheless may encounter difficulty in identifying any overall purpose pervading the text of the statute. The compromises that evolve through the conference process can be multilateral and interrelated, but may not incorporate any common vision or strategy. Courts must apply this legislation to parties, works, and situations that never arose during the conference process, and to industries that could not be present.²²

Moreover, the complexity and specificity of multiparty compromises exacerbates the problem. If a compromise is negotiated between monolithic interests, between, for example, all artists and all art users, we can find roughly defined representatives in the negotiating process for the interests that develop in the future. Applying a compromise negotiated among encyclopedia publishers, popular music composers, motion picture producers, novelists, and dramatists, however, to a situation involving the importers of unicorn figurines²³ can be substantially more troublesome. This reveals the difficulty of jettisoning any effort to find coherence in such a statute and attempting to interpret it as if it were a contract. If the industry to which a court is trying to apply the statute was neither represented in negotiations nor in privity with someone who was there, it is difficult to assess how the metaphorical contract allocates the risks of ambiguity.

As it happens, however, the conferences that led to the 1976 act did finally settle on a common strategy and did allocate the risks of ambiguity. Indeed, industry representatives explained the strategy to Congress in unusually explicit terms. The bills that became the 1976 act possessed a coherence that previous revision legislation lacked, although that coherence emerged as a by-product of the efforts to achieve interindustry consensus. Register Kaminstein suggested early on that the key to general revision would be to draft a copyright bill that benefited each of the competing interests. In that, the conferences succeeded. The bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained.

1961–1976: BROAD RIGHTS AND NARROW EXCEPTIONS

In 1961, two months after Register Kaminstein filed the controversial Register's Report, he convened a meeting of an augmented panel to discuss copyright revision.²⁴ Kaminstein invited the original twenty-nine panelists, chairmen of bar association committees, delegations from a dozen federal agencies and departments, and representatives of several interests that had until then been excluded. Kaminstein announced that the purpose of the meeting was for the assembled government and industry representatives to use the recommendations made in the Register's Report as the foundation for the development of interindustry consensus. The meeting was the first of a series of meetings and with each meeting the number of interests represented on the panel increased. Between panel meetings, the panelists met with one another in search of compromises, and the Copyright Office urged additional meetings and negotiations among affected interests. During these discussions, the Copyright Office and industry representatives hammered out the substance of a revision bill.

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

For example, the performance right developed through the conferences into something much broader than the Register had initially proposed, with much narrower exceptions. The 1909 act gave the owner of the copyright in a musical work the exclusive right to perform the work publicly for profit, subject to the jukebox exemption. A 1952 amendment extended the right of public performance for profit to lectures, sermons, and other non-dramatic literary works. Unlike copyright owners in musical works, owners of copyrights in dramatic works had had exclusive rights all over public performances, whether for profit or not, since 1856, while motion picture copyright owners had no explicit public performance right at all. The Register's 1961 Report recommended that musical and nondramatic literary works continue to have a public performance for profit right and that motion pictures be given a public performance right with no for-profit

qualification. Representatives of authors and composers, however, demanded control over nonprofit as well as for-profit performances. Joined by motion picture producers, they simultaneously pressed the Register to define the public performance right more broadly. The Copyright Office drafted a provision granting copyright owners a general exclusive right to perform the work publicly, subject to express exceptions allowing educational and religious performances, charitable benefits, and retransmissions of television and radio broadcasts without permission.

The response from the panelists was guardedly positive; they shifted their emphasis to requesting that the exceptions be radically narrowed. Representatives of industries that performed copyrighted works were willing to go along so long as the exemptions and privileges set forth in the bill continued to shield their activities. Industry representatives got together in meetings sponsored by the Copyright Office or subcommittees of the bar associations and tried to come to terms on the scope of exceptions to the performance right.

In 1964, the Copyright Office circulated a draft bill with a more expansive definition of public performance and further restrictions and conditions on specifically worded exemptions and privileges. Panelists insisted that the exemptions and privileges were still too broad, general, and ambiguous. Claimants of privileges and exemptions complained that the language of the bill was still unclear. Another round of meetings produced an even more conditional and restrictively worded series of exemptions and privileges. By the time the 1965 bill was ready for congressional hearings, the broadly defined public performance right had become encumbered with specifically worded exceptions permitting limited public performances for classroom teaching, educational television transmissions within educational institutions, religious services, charitable benefits, cable retransmissions at no charge, transmission to private hotel rooms, and reception of broadcasts in public places. By the time Congress enacted a revision bill in 1976, these exceptions and privileges had grown still more numerous, more narrowly worded, and more detailed. For example, the 1965 revision bill declared that noncommercial cable transmissions of broadcast programming required no permission.²⁵ By 1976, the noncommercial cable television exemption had been replaced by a detailed system of statutory licenses spelled out in nine pages of impenetrable prose.²⁶

That pattern of evolution pervaded the revision bill. Copyright owners wanted the broadest possible rights with the narrowest possible exceptions.

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

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

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

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

For these reasons the bill reflects our belief that authors' rights should be stated in the statute in broad terms and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.²⁷

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

work publicly, and the right to display the work publicly. It then subjected the exclusive rights to a variety of narrowly drawn exceptions.

Not all of the disputes were resolved through the prelegislative process. When Congress held its first hearings on the revision bill in the tenth year of the revision program, several controversies remained, and more disputes arose as the rapid pace of technological change created new players and new problems. Significantly, however, none of the unresolved controversies concerned the overall structure and approach of the bill. Almost all of the disputes involved specific details of particular privileges and exemptions. Members of Congress declined, for the most part, to respond to the controversies by attempting to arrive at policy solutions of their own devising. Instead, Congress involved itself in the mediation process, urging opposing interests to meet, cajoling them to reach agreement, and sometimes sitting down with them and demanding that they compromise. During the eleven additional years that it took to produce a bill that every industry representative would be willing to support, the solutions to inter-industry disputes became progressively more complicated and detailed. From the inclusive group conferences, negotiations evolved into interlocking bilateral and tri-lateral deals. The deals themselves worked to the advantage of the interests party to them and to the comparative disadvantage of others. The longer the negotiations on a particular dispute continued, the narrower and more specific was the resulting solution.

NEGOTIATED STATUTES AND TECHNOLOGICAL POLICY

In 1976 Congress finally enacted the modern copyright statute it had labored over so long, and the Senate Judiciary Committee optimistically dissolved its Subcommittee on Patents, Trademarks and Copyrights. For those familiar with the struggles to apply the 1909 act to developing technology, however, the 1976 act should have seemed designed to fail the future in predictable ways. Broadly phrased general provisions have inherent flexibility. Narrow, specific provisions do not. Most of the 1976 act's limitations on copyright owners' expansive rights were cast in narrow, specific language. Yet, in order to answer the questions that the future will present, a statute needs flexible language embodying general principles.

New players that technological change will introduce into the game have a particularly compelling need for flexible statutory provisions. The

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

A process that relies upon negotiated bargains among industry representatives, however, is ill-suited to arrive at general, flexible limitations. The dynamics of interindustry negotiations tend to encourage fact-specific solutions to interindustry disputes. The participants' frustration with the rapid aging of narrowly defined rights inspired them to collaborate in drafting rights more broadly, but no comparable tendency emerged to inject breadth or flexibility into the provisions limiting those rights. The only general limitations reflected in the current copyright statute were devised by courts in the nineteenth century, before Congress turned to a revision strategy resting upon meetings among affected interests. Although these provisions have survived the press of technological change better than the narrow and specific limitations that pervade the 1976 act, they have not been equal to the task of providing the flexibility necessary to respond to the developments that have arrived with the future.²⁸

In the years since the 1976 act took effect, the legislative process engendered a variety of amendments designed to respond to particular challenges. Arriving at enactable language required protracted bargaining among diverse industries. Disputes were resolved by crafting ever more specific wording, to ensure that the statutory language could not be read to privilege unanticipated uses. The laws that have emerged have had an extraordinarily short shelf life. Many of them were obsolete before their effective date.

The limited statutory license permitting cable television broadcasts in return for the payment of statutory royalties into a fund to be divided among copyright owners, for instance, was phrased too narrowly to cover home satellite dish television. After being sued for copyright infringement, satellite carriers demanded a license of their own. The major affected copyright-owner interests—movie studios and music publishers—had little to lose from agreeing to extend the cable license to satellites. Although they opposed statutory licenses in principle, there were no feasible alternative models in operation for funneling royalties to the myriad copyright owners whose rights were implicated in each broadcast signal. A satellite license offered them revenue that was otherwise uncollectable as a practical matter.

Network broadcasters and cable companies, however, were resistant. While they had fought bitterly over the details of the cable license, they were united in this instance in their opposition to extending concessions to a new industry likely to compete with both of them. Neither broadcasters nor cable system operators owned copyrights in the underlying programming, but they were able to use their seats at the bargaining table to block the expansion of the cable license to satellite TV. In 1988, Congress enacted the Satellite Home Viewer Act,²⁹ granting satellite carriers a new and more restrictive license to transmit television signals to home satellite dishes for private home viewing. The statutory license fee was calculated differently for satellites than the comparable cable license, and resulted in sharply higher fees. Network and cable representatives insisted upon a further, crucial limitation: satellite transmission of network and network affiliate signals would be permitted *only* for subscribers who could not receive such signals via either conventional broadcast or cable subscription.³⁰ In the 1990s, satellite carriers sought to lure disaffected customers from cable by offering them both their local broadcast stations and premium satellite signals. What stopped them wasn't technological barriers but legal ones, inserted into the copyright act at the behest of satellite's competition. Seeking to press their advantage, network broadcasters filed copyright infringement suits against satellite carriers, claiming that the satellite companies were supplying network signals to subscribers not entitled to receive them. Bills to reform the satellite license to provide parity with cable attracted substantial congressional support, but foundered on the opposition of cable and broadcast interests.³¹ Finally, in 1999, Congress enacted a narrow set of provisions modestly reducing satellite license fees and enabling satellite carriers eventually to provide local signals to subscribers on the same terms available to cable so long as the satellite carriers comply with technical and legal restrictions designed to require them to behave as if they were cable operators running cable infrastructure.³² The amendments did not disturb the other disparities.

In 1992, Congress enacted the Audio Home Recording Act (AHRA),³³ a law seeking to address the potential problem posed by digital reproduction of sound recordings. Digital reproduction posed a potent threat, record companies argued, because it permitted the recording of countless perfect copies. Everyone in possession of a digital copy could create many more. Digital tape recorders had become common equipment in professional recording studios, and consumer models had recently been intro-

duced to the Japanese market. Composers and record companies sought to prevent the manufacture or importation of digital recorders for the consumer market, complaining that they could facilitate widespread piracy. Protracted negotiations among record companies, composers, music publishers, performers, and consumer electronics manufacturers yielded a complex agreement ultimately enacted as the AHRA. In return for technical and monetary concessions, copyright owners agreed that they would abandon both their attempts to prevent the sale of digital recording devices and their controversial and unenforceable claims against consumers for private copying of recorded music. The law contains an explicit provision prohibiting suit against consumers for creating noncommercial digital or analog copies of musical recordings.³⁴ In return, device manufacturers agreed to pay a royalty on every digital recording device or digital tape sold. The royalties were to be distributed among composers, music publishers, record companies, and performers, according to a formula that was both complex and maddeningly vague.³⁵ Manufacturers also agreed to a provision requiring every digital audio recording device to be equipped with technological copy controls. The controls were to permit an unlimited number of first-generation copies from an original or commercial digital recording, but were to prevent any copying of copies. The rationale for the provisions was that the device and tape tax would compensate rights holders for unauthorized first-generation copies, but not for serial copies. The required technological fix, in essence, disabled consumer digital recording devices from implementing their superiority to analog devices. Perhaps that is part of the reason that digital tape recorders and digital tape failed to sell very well.

Another part of the reason, though, was that computers soon developed sound cards capable of playing high-fidelity sound over computer speakers. Computer hardware manufacturers had demanded an exemption from the AHRA's provisions. The definition of devices subject to the AHRA had been carefully and narrowly drafted to ensure that computers need not incorporate serial copy management systems. Computer disks were not subject to the tape tax. The statute required the Commerce Department to keep a careful eye on the situation and to set up a procedure to verify compliance with the statute's technical provisions. The department has never done so. The royalty provisions of the AHRA have generated insignificant funds. The serial copyright management technology may have doomed the market for the devices, which in any event are hardly on the consumer electronic

product radar screen. The most common methods of consumer digital recording, those involving computers, are exempt from the act's royalty and serial copy management system requirements. The only part of the law that still casts a large shadow is the one permitting consumers to make non-commercial digital or analog copies of musical recordings without fear of copyright infringement liability. At the time, that concession seemed cheap. The U.S. Supreme Court's opinion in the famous *Betamax* case, *Sony v. Universal Studios*,³⁶ indicated that private consumer copying of recorded or broadcast content was in many cases privileged under the statute's fair use provisions. To the extent that consumer copying was actionable, moreover, enforcement would have seemed at least unpopular and overreaching, and very possibly impossible, since it would have required copyright owners to monitor consumers' private behavior and sue them for acts committed in the privacy of their homes. Not so many years afterwards, however, the growth of the Internet has made that provision the most important thing that copyright owners would take back if they could. Perhaps they can.

If negotiated copyright statutes turn out to be so unworkable, why is it that Congress continues to rely on private interests to work out the text of bills? One reason may be that, until recently, copyright issues seemed to be the province of a very narrow slice of the citizenry, hardly worth the cost of bringing oneself up to speed. The negotiation process delegates everything to people who are, after all, the real copyright experts, and allows Congress to exploit their accumulated expertise. The participants are the people who will have to order their day-to-day business relations with one another around the provisions of the legislation. They can bring their perspective on the real world in which they interact to bear on the law with which they will have to live.

The process permits a give-and-take among a wide field of players whose competing interests are exceedingly complex. The universe of current stakeholders does not divide easily into monolithic camps. There may be no simple, overarching principles that can easily define how all of these actors should order their interactions with one another. Putting all of them into a room and asking them not to come out until they have agreed to be bound by the same rules may be the most efficient approach to formulating law that will work well enough for each of them, although not necessarily for the rest of us.

The process also makes copyright revision politically feasible. If one could overcome the difficulties in educating members of Congress in a

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

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

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

It would seem naive to suggest that Congress simply reclaim its legislative responsibilities and write a revised copyright statute embodying general principles instead of negotiated deals. Current stakeholders have controlled the playing board for nearly a century, and would doubtless prefer to keep it that way. Although they squabble with one another over specifics, they have managed to unite in fierce opposition to copyright revision bills drafted without their participation. The 1990s saw an astonishing increase in copyright-related campaign contributions—making it increasingly unlikely that Congress would support a movement to divest copyright stakeholders of responsibility for drafting copyright legislation.

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

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

Negotiations among current stakeholders tend to produce laws that resolve existing interindustry disputes with detailed and specific statutory language, which rapidly grows obsolete. Such laws consign the disputes of the future to resolution under models biased in favor of the status quo. A copyright law cannot make sensible provision for the growth of technology unless it incorporates both the flexibility to make adjustments and the general principles to guide courts in the directions those adjustments should take. The negotiation process that has dominated copyright revision throughout this century, however, is ill adapted to generate that flexibility. It cannot, therefore, be expected to produce statutes that improve with age.

NOTES

1. This chapter is adapted from a much longer article, *Copyright Legislation and Technological Change*, published in 1989 in the *Oregon Law Review* at 68 *Oregon Law Review* 275. Readers in search of detailed citations can find them in the footnotes to that article.

2. On September 4, 1997, for example, the Recording Industry Association of America testified before the Senate Judiciary Committee that extant copyright law was “flexible enough to handle the ever changing technology of the Internet.” The Senate should therefore resist calls to limit the infringement liability of Internet service providers for infringing acts committed by their subscribers. See *Copyright Infringement Liability of Online and Internet Service Providers, Hearing Before the Senate Judiciary Committee*, 105th Cong., 1st sess. (September 4, 1997) (testimony of Cary Sherman, Recording Industry Association of America). Two weeks later, the Recording Industry Association of America explained to the House Subcommittee on Courts and Intellectual Property that Internet piracy of American recordings made it imperative to adopt amendments designed to prevent any circumvention

of copyright protection systems, and to do so quickly. See *Hearing on H.R. 2281 and H.R. 2180 Before the Subcommittee on Courts and Civil Liberties of the House Judiciary Committee*, 105th Cong., 1st sess. (September 17, 1997) (testimony of Johnny Cash and Hilary Rosen, Recording Industry Association of America).

3. 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) [Hereinafter 1909 Act].

4. Audio Home Recording Act of 1992, Public L. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–1010). The act required, for the first time, that digital recording devices be equipped with technology to prevent the recording of second-generation copies, imposed a royalty tax on the sale of blank digital tapes and recording devices, and permitted (first-generation) consumer audiotaping without infringement liability. The audio recording device prohibition was sufficiently controversial that, after the introduction of legislation in 1987, four years of negotiations among record companies, hardware manufacturers, songwriters, music publishers, and performing rights societies were required to reach agreement on the form and specifications of a limited prohibition. See H.R. Rep. 873 pt. 1, 102d Cong., 2d sess. 14-18 (1992); Gary S. Lutzker, *Note, DAT's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes*, 11 Cardozo Arts & Entertainment Law Review 145 (1992). During the legislative process, the prohibition was narrowed and narrowed again to ensure that it would not be construed to apply to devices other than home audio recording devices. As enacted, it was balanced by a provision preventing the imposition of copyright liability for noncommercial copying of audio recordings, or for manufacturing, importing, or selling audio recorders. See 17 U.S.C. § 1008.

5. The material in this section is drawn from *Library of Congress, Copyright in Congress, 1789–1904* (1976 reprint of 1905 ed.), as well as annual fiscal year reports filed by the Register of Copyrights, the congressional hearings and bill texts reprinted in the multivolume E. F. Brylawski and A. Goldman, *Legislative History of the 1909 Copyright Act* (Fred B. Rothman, 1976), and the Congressional Record.

6. The office of Register of Copyrights was established in order to centralize the responsibility for registering copyrights (hence the name). The Copyright Office, headed by the Register, is a department of the Library of Congress, and is thus part of the legislative branch. The first Register, Thorvald Solberg, was paid an annual salary of \$3,000, and supervised twenty-nine clerks. The current Register, Mary Beth Peters, presides over a far larger operation. The office still registers copyrights (although registration is no longer required), and maintains a publicly searchable catalogue of registered works. It also provides expert advice to Congress about pending copyright legislation and the current operation of the copyright law, advises the executive branch in connection with international copyright treaties, and administers the complex statutory licenses for cable systems, record producers, noncom-

mercial broadcasters, satellite carriers, manufacturers or importers of digital audio recorders and tape, and the cablecast and webcast of digital audio transmissions.

7. Authors' representatives and representatives of the printers' union, for example, reached an agreement over which works would lose their copyrights if they were printed using type set outside of the United States. Books written in foreign languages could be typeset abroad, but works written in English were required to be printed from type set in the United States. That agreement was incorporated into section 15 of the 1909 act.

8. *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911).

9. During the early 1910s, the motion picture industry was concentrated in New Jersey, Philadelphia, and New York City. Congressmen representing districts in which motion picture producers were located spearheaded the industry's efforts to amend the copyright statute in the House of Representatives.

10. Most of the information in this section appears in the congressional hearings held on the Townsend amendment. See *Townsend Copyright Amendment: Complete File of Arguments on H.R. 15,263 and H.R. 20,596 Before the House Committee on Patents*, 62d Cong., 2d sess. (1912); *Townsend Copyright Amendment: Hearing on H.R. 22,350 Before the House Committee on Patents*, 62d Cong., 2d sess. (1912). See also H.R.Rep. No. 756, 62d Cong., 2d sess. (1912).

11. Again, I have drawn most of my information from the House and Senate Hearings. See *Copyrights: Hearings on H.R. 6250 and H.R. 9137 Before the House Committee on Patents*, 68th Cong., 1st sess. (1924); *Copyrights: Hearings on H.R. 11,258 Before the House Committee on Patents*, 68th Cong., 2d sess. 475-79 (1925); *To Amend the Copyright Act: Hearings on S. 2328 and H.R. 10,353 Before the Joint Committee on Patents*, 69th Cong., 1st sess. 236-39 (1926); *Copyright: Hearings on H.R. 10,434 Before the House Committee on Patents*, 69th Cong., 1st sess. 15-17 (1926); *General Revision of the Copyright Law: Hearings on H.R. 6990 Before the House Committee on Patents*, 71st Cong., 2d sess. (1930); *General Revision of the Copyright Law: Hearings on H.R. 12,549 Before the Senate Committee on Patents*, 71st Cong., 3d sess. (1931); *General Revision of the Cong.*, 1st sess. (1932); *International Copyright Union: Hearings on S. 1928 Before the Senate Committee on Foreign Relations*, 73d Cong., 2d sess. (1934); *Revision of the Copyright Laws: Hearings before the House Committee on Patents*, 74th Cong., 2d sess. 221-60 (1936). See also A. Goldman, *The History of U.S.A. Copyright Law Revision From 1901 to 1954*, reprinted in *Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary*, 86th Cong., 1st sess., *Copyright Law Revision* (Committee Print 1960).

12. Nathan Burkan, representing ASCAP, declared that composers would never give in to the demands of broadcasters. Paul Klugh, executive chairman of the National Association of Broadcasters, insisted that Burkan's remarks were inappropriate and demanded that he retract them. Burkan refused. The broadcasters responded by boycotting all subsequent meetings. See *Copyright Hearings on H.R. 10434 Before the House Subcommittee on Patents*, 69th Cong., 1st sess. 193-94 (1926).

13. When William Warner, of the National Publishers' Association, alluded to a disagreement between authors and periodical publishers over the ownership and scope of serialization rights, Representative Lanham suggested that Warner interrupt his testimony in order to permit authors to express their views and then negotiate an immediate resolution. See *General Revision of the Copyright Law: Hearings on H.R. 6990 Before the House Committee on Patents*, 71st Cong., 2d sess. 155 (1930).

14. The 1909 act's strategy for reconciling competing demands among industry representatives was to specify rights and remedies within subject matter categories. The conferences began in 1905 with each organization's articulation of its wish list. Each of the affected interests sought to retain the advantages it enjoyed under current law, while eliminating features that worked to its detriment. Where wishes appeared irreconcilable, the parties suggested differentiation of provisions along subject matter lines. The solutions to many disputes were provisions detailing the particular rights attaching to particular categories of works, the particular actions that constituted infringement of those rights, and the particular remedies available for those infringements. The bill introduced in 1906 followed this strategy. For example, the original bill varied the term of copyright among different classes of works, from twenty-eight years for prints and labels to life of the author plus fifty years after death for musical compositions. In addition, it placed a ten-year limit on the exercise of the exclusive dramatization right in a book. In tinkering with the bill, the House and Senate committees removed some of the distinctions but added others. Thus, Congress replaced the variable copyright terms with a uniform renewable term of twenty-eight years. On the other hand, the 1906 bill treated the performance rights in musical compositions and dramatic compositions similarly. The bill that Congress enacted gave the rights different scope and established different remedies for their infringement.

15. 1909 Act § 15. Congress amended the section in 1926 to prevent the forfeiture of copyrights in mimeographed books. See Act of July 3, 1926, 44 Stat. 818.

16. See, e.g., *Patterson v. Century Prod.*, 93 F.2d 489 (2d Cir.1937); *Tiffany Prods. v. Dewing*, 50 F.2d 911 (D.Md.1931); *Metro Goldwyn Mayer Distrib. v. Bijou Theatre*, 3 F.Supp. 66 (D.Ma.1933); *Jerome H. Remick & Co. v. American Auto. Accessories*, 5 F.2d 411 (6th Cir.1925); *Jerome H. Remick & Co. v. General Elec.*, 4 F.2d 160 (S.D.N.Y.1924); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F.2d 776 (D.N.J.1923); *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931).

17. The broadcasters' performing rights association, Broadcast Music, Inc., was established in 1939 as a performing rights society owned entirely by broadcasters. Like ASCAP, it licensed its entire repertory of compositions for a flat fee. The music publishers' solution to the compulsory license was the Harry Fox Agency. The Fox Agency operates as an arm of the National Music Publishers Association, and offers a form license to record companies in lieu of the statutory compulsory license. The Fox license is less onerous for record companies because it allows one-stop shopping and permits them to remit royalties less frequently. The popularity of juke-

boxes frustrated composers' attempts to repeal what came to be called the "jukebox exemption" until 1976, when Congress replaced it with a statutory compulsory license carrying a nominal annual royalty. In 1989, the jukebox license was superseded by a provision encouraging representatives of jukebox operators to negotiate with representatives of composers and music publishers on a collective license and making copyright office arbitration available to resolve disputes. *See* 17 U.S.C. § 116. By that time, however, jukeboxes were no longer ubiquitous.

18. *See* Abraham L. Kamenstein, *Divisibility of Copyrights*, reprinted in *Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary*, 86th Cong., 1st sess., Copyright Law Revision Study Number 11 (1960). The law was even more complicated because it required that every published work bear a copyright notice naming the copyright owner. The practice in periodical publishing involved a complicated series of conveyances of the copyrights in individual articles in a periodical from author to publisher and back again, with detours for licensees of subsidiary rights, in order to enable the periodical publisher to own the copyright for purposes of initial publication while permitting the author of the article to retain all other rights. *See* *ibid.*

19. Rural appliance merchants deployed early cable television systems to enlarge the local market for television by improving reception. The first documented cable television transmission took place in 1948. By 1952, fourteen thousand households were cable subscribers.

John Mauchley and J. Presper Eckert used vacuum tubes to build the ENIAC computer in 1946. They went on to build UNIVAC, the first commercial mainframe computer, in 1951.

The precursor to the Xerox photocopier was introduced in 1948, but didn't take off until Xerox marketed an easier to use machine in 1959.

20. In addition to transcripts of the conferences and Congressional hearings, and the texts of documents prepared by the Copyright Office for Congress, I have relied on news reports and ABA section reports during the period. Most of the legislative history of the 1976 Copyright Revision Act is collected in George S. Grossman, *Omnibus Copyright Revision Legislative History* (1976) (microfiche), and indexed in *Kaminstein Legislative History Project, Copyright Act of 1976* (1983).

21. General Revision of Copyright Law, Pub.L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810). *See generally* Jessica Litman, *Copyright Compromise and Legislative History*, 72 *Cornell Law Review* 857 (1987).

22. Courts have struggled to apply the 1976 act to cases involving videocassette recorders, communications satellites, computer software, electronic databases, and the Internet. *See, e.g., Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 (2d Cir. 1998) (electronic database); *Lotus Development Co. v. Borland International*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996) (computer software); *West Publishing v. Mead Data Cent.*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (electronic database); *Hubbard Broadcasting v. Southern*

Satellite Systems, 777 F.2d 393 (8th Cir.1985), *cert. denied*, 479 U.S. 1005 (1986)(satellite TV); *Eastern Microwave v. Doubleday Sports*, 691 F.2d 125 (2d Cir.1982), *cert. denied*, 459 U.S. 1226 (1983)(satellite TV); *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (Internet); *Universal City Studios v. Sony Corp. of Am.*, 480 F.Supp. 429 (C.D. Cal.1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir.1981), *rev'd*, 464 U.S. 417 (1984) (VCRs). The courts' efforts to apply the statute in these cases have been criticized widely. The statutory language, however, gave courts little guidance. The fact-specific provisions of the statute do not contemplate such exotic creatures; the paucity of provisions articulating more general principles has relegated courts to ad hoc decision making.

23. The meaning of the statute's two-part definition of "work made for hire," see 17 U.S.C. § 101, generated a four-way Circuit split until it was resolved by the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). The controversial Second Circuit opinion that sparked the conflict among the circuits was *Aldon Accessories v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). *Aldon Accessories* construed the definition as applied to novelty unicorn figurines.

24. The material in this section is drawn from the sources cited above in note 15.

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

26. See Public Law 94-553 § 111, 90 Stat. 2541, 2550-2558 (1976).

27. *Copyright Law Revision: Hearings on H.R. 4347 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 89th Cong., 1st sess. 32-33 (1965) (testimony of George Cary, Deputy Register of Copyrights).

28. The best known of these general limitations is the controversial doctrine of fair use. Fair use originated as a judicially created, implied limitation on copyright owners' rights. One of its earliest American expressions came in the 1841 case of *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841). Fair use evolved in the case law into a privilege to use a reasonable portion of a copyrighted work for a reasonable purpose, but the privilege eluded precise definition. Defendants commonly invoked the privilege in cases involving parody, biography, or scholarly research.

The 1961 Register's Report suggested that the revision bill give explicit recognition to the fair use doctrine. See *U.S. Library of Congress Copyright Office, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 25* (1961). The proposal proved controversial; conference participants disagreed on the scope of fair use under extant law and also disagreed on the wisdom of reducing their understanding to statutory text. The Copyright Office's efforts to negotiate a compromise before presenting a bill to Congress failed when the issue of fair use became tangled with the issue of educational use.

Representatives of educational institutions requested a statutory exemption for educational use. Authors and publishers refused; they insisted that educators were already abusing the copyright law and should receive no further privileges beyond

those the fair use doctrine already permitted. Educators responded that fair use was too unpredictable a doctrine for them to rely on; moreover, because most fair use cases arose in commercial contexts, they gave little guidance to the doctrine's application in a nonprofit educational setting. The Register and the House Subcommittee's general counsel convened several series of meetings; members of Congress urged further negotiations. Ultimately a compromise emerged, encompassing both the language of a statutory fair use section and the language of the House and Senate Reports to accompany it. The resulting statutory provision combined language from the Register's initial proposal with examples of educational use. The accompanying passages in the House and Senate Reports grew by accretion to include the authors' and publishers' early demand that the goal of the statutory provision was "to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way"; the educators' demand for an extensive discussion of photocopying for classroom use; and the text of letters from representatives of affected interests together with exceedingly detailed guidelines on classroom reproduction that the representatives had negotiated among themselves. See Jessica Litman, *Copyright Legislation and Technological Change*, see note 1 above, at 340–41; Jessica Litman, *Copyright, Compromise and Legislative History*, 72 Cornell Law Review 857, 875–77 (1987).

29. Public L. No. 100-667, 102 Stat. 3489 (1988) (codified as amended at 17 U.S.C. § 119).

30. 17 U.S.C. § 119(2)(B). There's a great deal of dispute about whether the tests to ascertain whether a subscriber could, with an appropriate antenna, receive local network affiliate broadcasts over- or underestimate eligible subscribers. Subscribers who cannot receive broadcast signals but do subscribe to cable can become eligible for satellite television by canceling their cable subscription and sitting in a dark room for ninety days. See *Satellite Home Viewer Improvements Act, Hearing on S. 247 Before the Senate Committee on the Judiciary*, 106th Cong., 1st sess. (1999).

31. See S. 247 Hearing, above in note 30.

32. Intellectual Property and Communications Omnibus Reform Act of 1999 §§ 1001–1012, Public L. 106-113 (1999) (codified at 17 U.S.C. §§ 119, 122). The law restored access to distant network signals for most customers who had received them before October 31, 1999, but only temporarily.

33. Public L. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001–1010).

34. 17 U.S.C. § 1008.

35. Sections 1004–1008 require that the funds be split into different pots of money for the benefit of record companies, performers, composers, and music publishers, and specify the percentage of the total that each group should receive. The statute contains no instructions on the difficult task of apportioning money among different claimants within a class, beyond an exhortation to encourage all claimants to agree among themselves.

36. 464 U.S. 417 (1984).