Copyright Law

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Topics:

- The Future of Copyright Law
- Reform Proposals
- Open Questions

Is copyright for authors? Should it be? Was it ever?

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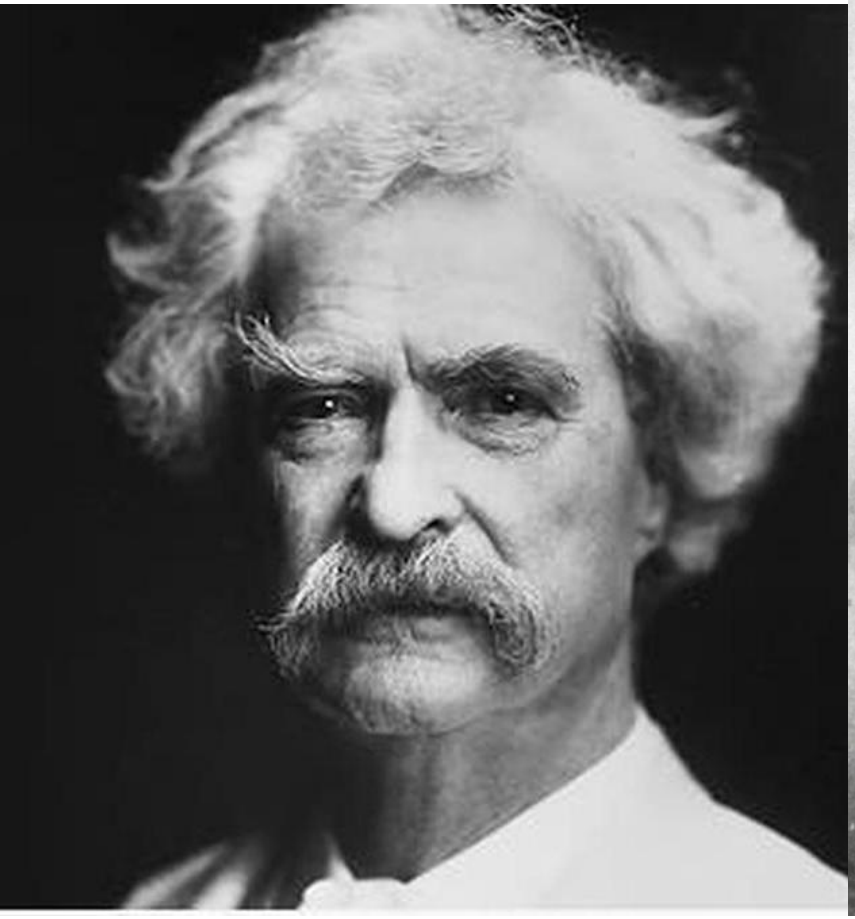


1790 First US copyright act

1909 Second US copyright act (first comprehensive update after a century of amendments) *(119 years later, after "the age of mechanical reproduction" – photography, phonographs, telephones, and early radio)*

1976 Third US copyright act (next comprehensive update) *(67 years later, although the revision process began in Congress in the late 1950s, with the rise of radio and television broadcasting)*

Are we due for another "big" update? It's been almost 45 years, and the statute has never been amended or reorganized comprehensively in light of computing of any sort, or in recognition of "collective" or "social" or "personal" creations not organized in "classic" hierarchical firms.

Process questions (1):

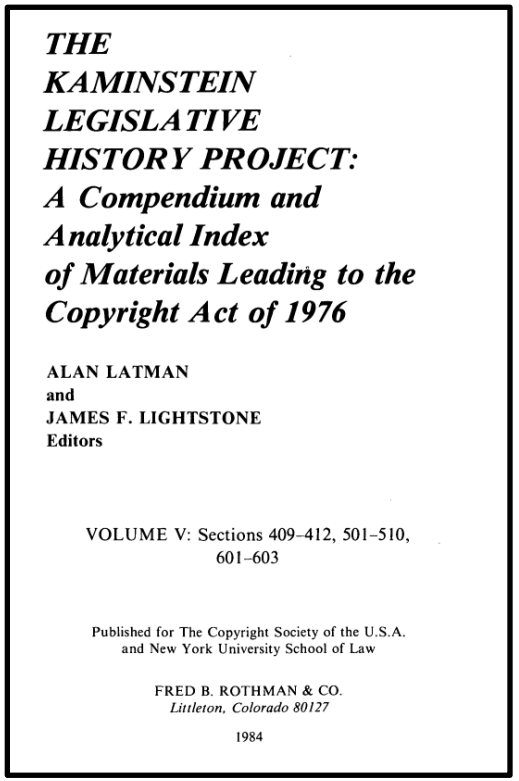
Complexity.

The legislative history of the 1976 revision occupies six printed volumes of testimony and reports.

Copyright legislation – then and since – has mostly been a product of stakeholder negotiations, where the stakeholders were largely producers and distributors of "classic" creative content (music, books, film, television and radio broadcasters).

Those enterprises have big "stakes in the ground" by virtue of building businesses in reliance on the '76 Act.

With the rise of computing and the Internet – plus "consumers," "users," and individual (often amateur) creators – the number and variety of stakeholders has gotten only larger.



Process questions (2):

Who will drive reform? Who will participate?

Copyright is statutory, but:

The role of international copyright governance (treaties, institutions) has grown dramatically since the '76 Act took effect. The US is now officially part of Berne; TRIPs takes Berne standards and embodies them in international trade law; WIPO has become a key forum (battleground?) for developing global © standards; because of the global footprint of US platforms (Google, FB), the EU's © approach reverberates here. *Limits, opportunities.*

What to make of judicial developments in areas left to the courts? E.g.: *Fair use* caselaw has exploded since fair use became statutory.

Process questions (3): Who? (Besides Congress, of course.)

[1] Industry. Which one(s)? Corporate interests? Artists and creators? Who is included, who is omitted?

[2] The Copyright Office. Note: the Copyright Office is part of the Library of Congress (i.e., Article II, not an Article I administrative agency). Convening power, but limited rulemaking or normative power – traditionally.

[3] Activist academics. Especially since Congress "punted" in '76 on © for computer programs, the academic "voice" in © policy has grown and grown. It now also includes strong nonprofit advocacy (librarians, civil libertarians, civil society groups). How influential are they/should they be?

[4] "Classic" law reform orgs. civic-minded leaders of the bench, bar, and academia – the American Law Institute. Is © appropriate for a Restatement?

Substance questions (1):

Subject matter of © - should it be broader than present, as to originality, authorship, fixation? Narrower?

- "Cultural progress" for © increasing means "art" and "creativity." Is that mistaken?
- What about non-traditional art and creation?
- What about collective or communal creation?
- Include or exclude AI technologies, non-human authors?
- What about heavy capital investments and high economic opportunities associated with creating, collecting, curating data?
- Streaming services, cloud-based services don't operate like classic broadcasters, either technologically or economically. Multiple tiers of developers, providers, financiers are now parts of "the creative economy."
- Is it sensible to focus on the "work of authorship" as the basic unit for law, business, culture?

Substance questions (2):

Exclusivities associated with "works" (or other "things")

- Is it sensible to anchor © in exclusive rights of reproduction, distribution, and adaptation?
- In an always-evolving art world, does "substantial similarity" offer coherence?
- Should the US do more to recognize "moral" rights? Offer less/different "protection" to corporations? Governments?
- Industry often ignores the formal structures of copyright and invents its own devices for (i) business purposes and/or (ii) advocacy / rhetorical purposes. How much deference should law reformers give industry advocacy – when industry still accounts for massive amounts of creative content?
    - A "property" in film / video / gaming / other entertainment settings does not equal a "work" in copyright terms
    - The alleged "value gap" in the music streaming setting

Substance questions (3):

Limitations and opportunities for next-generation readers/users/etc.

- How should fair use / fair dealing be situated in the law – if at all?
- What about compulsory / statutory licenses?
- How to classify "ideas" and "facts" and things that ought not to be covered by copyright – or by IP rights at all? "Style"?
- "Functionality" is a huge topic in the IT setting: interoperable systems and technical advances require access to code, formats, structures.
- Copyright could be "pay to play" for all purposes. Blockchain! Who wins? Who loses? More on this later ….
- What about cultural systems of production that rely on informal social norms to "protect" authors/creators and also rights to access? Is copyright always the answer?

The Copyright Claims Board (CCB)

- Authorized by the CASE Act, passed in December 2020. "Copyright Alternative in Small-Claims Enforcement Act"
- Three-member tribunal of "Copyright Claims Officers" (CCOs) in the Copyright Office that will provide an [allegedly] "efficient and user-friendly option to resolve certain copyright disputes that involve less than $30,000 in damages (max of $15,000 per work).
- Defendants can opt out.
- Proceedings are largely in writing, without live testimony.
- Limited rights to appeal.

Recent reforms of note: more small steps

The Music Modernization Act (2018) (which includes the "Musical Works Modernization Act," the "Classics Protection and Access Act," and the "Allocation for Music Producers Act":

1. **Goals:** equity for owners of pre-1972 recordings; simplification of licensing by streaming and downloading services ("digital phonorecord deliveries" providers); increase $$$ from streaming to diverse creators.
2. **Unchanged:** Historical distinction between "right of reproduction" and "right of performance" for musical works (songwriting) is preserved. Why? Largely because existing industry practice has come to rely on it as the foundation for different business empires (Harry Fox v CROs).
3. **Unchanged:** Public performance licensing collectives remain in place (CROs: ASCAP, BMI, SESAC, GMR).
4. **New:** Blanket (public) compulsory license for mechanical reproduction & distribution for songwriting for streaming services, available through (new) Mechanical Licensing Collective (MLC). Adds to private collective management of existing mechanical license available via Harry Fox, in the shadow of Section 115. (Does this apply to download services? Unclear. iTunes may still go through Harry Fox.)
5. **Partly new (the entity, MLC), partly old (the legal obligations):**
    1. Interactive streamer must get *both* MLC mechanical license (reproduction and distribution) *and* public performance license (ASCAP etc.).
    2. Download providers (iTunes etc) need MLC mechanical license (reproduction and distribution) *and* public performance. True before, true now.
    3. Mechanical licensing royalties ("mechanicals") are paid to publishers (© owners) as a % of total streaming revenue, reduced by amounts owed for performance royalties.
6. **New:** Producers, mixers, engineers share % of royalties for uses of sound recordings via existing Sound Exchange collective.

The next frontier: back to *Dastar?*

What if value in intangible "things" is far more associated with branding, status, and author/creator/user identity ("you're playing our song!") rather than with the content of the "thing" (the text of the book, the music in the song, etc.)?

Does the law balance copyright and trademark in the right way? Maybe we will all be trademark lawyers in the future, and copyright will … fade away?

Or … "property" thinking – "It's mine! All mine!" – will consume us all?

What does that look like?

GAME OVER