

CODIFYING COPYRIGHT COMPREHENSIBLY

David Nimmer^{*}

The UCLA Law Review has been proud to present Articles based on the annual tribute to Professor Melville B. Nimmer that takes place at the UCLA School of Law. The Review continues that tradition by publishing an Article by this year's presenter, Professor David Nimmer. In the form of a tribute to the author's father, the Article evaluates each provision of the Copyright Act of 1976 and each amendment to that legislation through the present. The author concludes that the crafting of that enactment started out strong and continued in a positive vein through 1992. Since that time, however, a marked decline in quality has afflicted the drafting of copyright amendments. To correct that downward slide, Professor David Nimmer proposes principles, culled from the wisdom of Professor Melville Nimmer, that will once again imbue copyright legislation with the proper balance to confront the advances of technology.

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INTRODUCTION

A. MBN, The Series

The illustrious lecture series devoted to one of the law's giants, Professor Melville B. Nimmer, has built upon his own path-breaking work as the copyright commentator *par excellence*,¹ First Amendment scholar,² celebrated practitioner,³ civil libertarian,⁴ builder of academic consensus,⁵ devotee of the arts,⁶ and all-purpose legal thinker.⁷ But to

1. See generally Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Pierre N. Leval, *Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997).

2. See generally Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2001); William Van Alstyne, *Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635 (1996); Kathleen Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971 (1995); Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Free Speech*, 37 UCLA L. REV. 925 (1990); Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPYRIGHT SOC'Y 1 (1987).

3. See generally Harriet Pilpel, *Melville B. Nimmer Memorial Lecture: The Magnetic Reach of the First Amendment* (Oct. 6, 1988); Anthony Lewis, *National Security: Muting the 'Vital Criticism'*, 34 UCLA L. REV. 1687 (1987).

4. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1998).

5. See generally Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993).

6. See generally Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1 (2002); Rodney Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173, 230 (1994).

7. See generally Vincent Blasi, *Freedom of Expression and Issues of Character*, 46 UCLA L. REV. 1567 (1999); Ronald Dworkin, *Melville B. Nimmer Memorial Lecture: Abortion, Euthanasia, and the Sanctity of Life* (Nov. 18, 1991).

date, there is one aspect of Professor Nimmer's life that his eponymous series⁸ has slighted: Mel Nimmer as legislator.⁹

The omission will surprise few, particularly those who knew him well. My father¹⁰ was not much of a political animal, Aristotle notwithstanding.¹¹ He was not even keen to participate in the governance of his own beloved home institution, the UCLA School of Law; certainly, he never evinced any larger ambition to seek public office. Mel Nimmer as legislator?

The juxtaposition is not as jarring as one might think. For on one important occasion when Congress was deliberating the Copyright Act of 1976, it heard testimony from Professor Nimmer and engaged him in fruitful colloquy—as had the Copyright Office in its time before that.¹² In addition, from 1975 to 1978, he served as vice-chairman of the National Commission on New Technological Uses of Copyrighted Works (CONTU). That blue-ribbon panel issued a Final Report bringing U.S. copyright law into the computer age. Its handiwork continues to set the stage for cases being litigated and for new legislative initiatives. In fact, properly viewed, the contribution of CONTU to copyright lawmaking is nothing less than epochal.

Though I can never hope to repay the debt that a son owes to his father—particularly to a father whose personal gifts matched his professional stature, as did mine—I can attempt at least a few steps towards balancing the books by paying tribute today to the forgotten Melville Nimmer: the copyright legislator.

B. How to View this Installment

Before embarking on our voyage, a chart is needed to map its ports of call. The overall destination of this Article is an understanding of the Copyright Act of 1976, as well as all its amendments, in order to appreciate where copyright doctrine currently stands.¹³ This discussion is entirely

8. An annual lecture can be conceptualized as a cultural meme with a life of its own. See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 69 (1998). In that spirit, I thank Kristine Werlinich for keeping the flame burning, and for providing me with the dates of past lectures.

9. Nonetheless, one year did come close. See Orrin Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719 (1998).

10. The alternation in what follows among "Professor Nimmer," "Mel Nimmer," "my father," and other terms is strictly for the sake of variety.

11. "Man is by nature a political animal." ARISTOTLE, *THE POLITICS OF ARISTOTLE*, bk. I, ch. II (B. Jowett trans., Oxford Univ. Press 1885).

12. See *infra* notes 94, 97 and accompanying text.

13. This overview is of necessity simplified. The attentive reader will notice that there is some spillover from one section to another of the matters neatly categorized below.

Amerocentric; it remains for colleagues in other nations to inform us whether their experience tracks or diverges from the U.S. example.¹⁴

The next part introduces Mel Nimmer as legislator in the most expansive sense of the term.¹⁵ It focuses on his work as treatise writer, expert outsider reporting to the Copyright Office and Congress, and vice-chairman of CONTU. In the course of reviewing those contributions, it formulates various pearls of wisdom as numbered MBN Postulates.¹⁶ The utility of those aphorisms develops further on.¹⁷

The following part begins the process of analyzing the entire 1976 Act.¹⁸ Granting that various observers will evaluate its myriad provisions differently depending on their political preferences, the discussion attempts to transcend substantive criteria by fixating on formal criteria commanding (hopefully) universal approbation. For instance, the first principle it posits is *coherence*.¹⁹ The axiom at work here is that policy preferences aside, all can agree that a consistent statute is superior to an alternative whose parts fail to cohere.

To illustrate, let us imagine that faction X champions a Copyright Act with an exemption for jukebox performances, whereas faction Y opposes any such exceptional treatment.²⁰ Those two groups differ about the optimal substance for copyright legislation. Now let us imagine that Congress sides with faction X. One hypothetical law—we can call it Λ —to implement that vision could be coherent, transparent, stable, and otherwise formally successful,²¹ whereas an alternative realization—this one will be Ξ —of that same policy might fail each of those criteria. The guiding principle herein is that Λ beats Ξ . Moreover, it is this Article's conceit that X and Y would both accede to that proposition, as would other factions Z or Q, who care little about jukeboxes but have their own substantive agendas.²²

Applying these neutral criteria to copyright enactments yields interesting results. It shows that the 1976 Act, when adopted, included terse provisions of general application that amply meet the various formal criteria

14. See *infra* note 787 for a brief word on Israeli copyright law.

15. See *infra* Part II.

16. See *infra* Part II.D.

17. See *infra* Part V.

18. See *infra* Part III.

19. See *infra* Part III.B.1.a.

20. This example is hypothetical. For the actual treatment of jukeboxes in the copyright sphere, see *infra* Part III.C.3.a (discussing the Copyright Royalty Tribunal Reform Act of 1993).

21. For a catalog of such criteria, see *infra* Part III.D.

22. This hypothetical invocation of Λ and Ξ is entirely abstract. Later, this Article confronts actual examples, applying the lessons learned to real-world amendments. See *infra* Part III.B.2.

of success.²³ But tooth-by-jowl with those provisions were much lengthier provisions of special import that failed the test of formal success.²⁴ When Congress started to amend the 1976 Act, it continued on the same dual tracks right through 1992—brief amendments of general application continued to qualify as formal successes, whereas some stray longer amendments of special import continued to fail those tests.²⁵ But in the past decade, Congress has fallen off that bandwagon—its amendments no longer in the main qualify as formal successes; rather, they routinely consist of bloated provisions that do not meet the various criteria of formal lawmaking success.²⁶

Of particular interest to the discussion are the successive synopses of (1) the features of the 1976 Act as enacted, (2) its amendments through 1992, and (3) its amendments after that year to date. Encapsulated therein is a saga of radical decline over the past decade.

Stage One reveals a schizoid juxtaposition. The smaller portion of the Copyright Act of 1976 at its enactment consisted of National Copyright Legislation (NCL), that is, general principles of nationwide import. The larger part of the enactment, by contrast, consisted of endless regulation of specialized application, primarily of interest to a beltway subculture.²⁷

Stage Two reveals that the first two dozen amendments to the 1976 Act only strengthened its basic character that consisted of an NCL immisicably combined with detailed within-the-beltway regulations. Indeed, during the period from 1976 to 1992, the disparity only heightened—the NCL remained small, whereas the D.C. regulatory aspects became even more distended. As of 1992, the Copyright Act remained a somewhat terse (albeit less brief) statement of general principles crowded out by ever-widening detail.²⁸

Stage Three illuminates that by the time the next two dozen amendments had been implemented, that dichotomy no longer pertained. Instead, the Act as it currently stands is bloated throughout and the fiction of a terse NCL—which is all that people outside of Washington, D.C., needed to know—no longer applies.²⁹

The succeeding part attempts to chart where Congress went wrong.³⁰ It departs from the chronological view of the preceding part to treat as units

23. See *infra* Part III.C.1.b.(2).

24. See *infra* Part III.C.1.b.(1).

25. See *infra* Part III.C.2.

26. See *infra* Part III.C.3.

27. See *infra* Part III.C.1.c *in fine*.

28. See *infra* Part III.C.2.b *in fine*.

29. See *infra* Part III.C.3.b *in fine*.

30. See *infra* Part IV.

various amendments over time that share the same characteristics.³¹ It shows that Congress' attempts to comprehensively regulate given domains has led to a progressive worsening of the process of copyright amendments, until the most recent such amendment.³² But it also demonstrates that the descent is not inevitable—when Congress has taken upon itself the task of correcting a particular judicial ruling with which it is dissatisfied, the result has generally been salutary.³³

Admittedly, the discussion through this point is long. But the Article keeps on going—ironic, inasmuch as the burden of its argument is to complain that Congress could not keep copyright legislation simple. Unfortunately, the subject matter under discussion is so convoluted as to render impossible the desired detail expositing its defects in anything less than pachydermic proportions.

The penultimate part then grapples with how to check the decline from 1992 to the present.³⁴ It recalls the various MBN Postulates, which now serve as the perfect guideposts for restoring the Copyright Act to its former glory. Treating in depth the celebrated *Napster* case³⁵ and recent litigation involving the Digital Millennium Copyright Act,³⁶ it offers guidance to improve future lawmaking, including judicious restraint from passing amendments at every turn,³⁷ and vetting those that are passed through a mechanism approximating CONTU's blue-ribbon methodology.³⁸

Finally, the last part brings together conclusions about how to restore past glory to copyright legislation.³⁹ It culminates in a farewell valedictory, drawing together some of the strands set forth throughout this Article, albeit in a cautionary mode.⁴⁰

II. MEL NIMMER THE COPYRIGHT LEGISLATOR

Congressional representatives pass laws; judges interpret them; scholars write them up—thus do the traditional divisions hold. Except that nobody

31. See, e.g., *infra* Part IV.B (discussing extraneous regulations of chips and hulls added to the Copyright Act).

32. See *infra* Part IV.E.3.

33. See *infra* Part IV.G.1.

34. See *infra* Part V.

35. See *infra* Part V.A.

36. See *infra* Part V.B.

37. See *infra* Part V.C.

38. See *infra* Part V.D.

39. See *infra* Part VI.A.

40. See *infra* Part VI.B.

continues to believe that the lines are so hermetic, at least between the first two domains. Judges engage in their fair share of lawmaking, like it or not, when resolving concrete cases. But when we come to the division between the second and the third domain, a distinction is still possible—it is eminently possible for commentary to analyze developments in the law without those articles themselves becoming law.⁴¹

On the other hand, some commentary is so germinal as to itself assume the force of law through its effects on legislatures and courts. The well-known right to privacy, now blossomed into four distinct branches,⁴² hearkens back to an 1890 article in the *Harvard Law Review* by Samuel Warren and Justice Louis Brandeis.⁴³ Its fourth prong, the right to publicity, derives from a 1954 article in the *Journal of Law and Contemporary Problems* by Professor Nimmer.⁴⁴

A. Copyright Codifier

Even while writing that 1954 article, my father was hard at work on his *magnum opus*,⁴⁵ which was first published as one volume in 1963. Later to grow to four volumes during his lifetime, *Nimmer on Copyright* became the gold standard that courts recognize as “the most authoritative treatise on copyright,”⁴⁶ “renowned,”⁴⁷ “eminent,”⁴⁸ “classic,”⁴⁹ “foremost,”⁵⁰ and “leading”⁵¹—even “the great copyright treatise.”⁵²

41. A non-random example is Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217 (1970). Although that article continues to be cited, see, for example, Gary Jeffrey Jacobsohn, *After the Revolution*, 34 ISR. L. REV. 139, 154 n.47 (2000), it never made it out of committee in the Knesset, and therefore fails to qualify as “law” under even the most charitable interpretation.

42. See DAN B. DOBBS, *THE LAW OF TORTS* 1197–1211 (2000).

43. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

44. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

45. See MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* (1963).

46. *Technicon Med. Info. Sys. Corp. v. Green Bay Packaging, Inc.*, 687 F.2d 1032, 1038 n.11 (7th Cir. 1982); see *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (calling the treatise “noted authority”).

47. *Prod. Contractors, Inc. v. WGN Cont'l Broad. Co.*, 622 F. Supp. 1500, 1503 (N.D. Ill. 1985).

48. *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1099 (S.D.N.Y. 1980); see *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 457 (6th Cir. 2001) (labeling it the “eminent authority on copyright law”); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (labeling it the “preeminent treatise on copyright law”).

49. *Mayer v. Josiah Wedgwood & Sons*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985).

50. *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 (S.D.N.Y. 2002).

51. This term is the most common; databases indicate about fifty hits. See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l Inc.*, 241 F.3d 398, 406 (5th Cir. 2001) (labeling it “the leading treatise on the subject”); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 405 n.3 (1968) (Fortas, J., dissenting) (labeling it “a leading authority in the copyright field”).

During the last fifteen years of the pendency of the 1909 Act and through the first dozen years after the 1976 Act took effect, that treatise stood alone as a comprehensive analysis of all U.S. copyright law. It therefore reached the status of a *summa*, which courts cited not merely for its convenient encapsulation of the holdings of disparate prior cases, but also for its own authorial pronouncements. The result is that Mel Nimmer became, notwithstanding his own private tendencies, an ersatz lawmaker promulgating copyright doctrine.⁵³ But unlike any governmental official, he placed his stamp not simply on the few selected matters that came to him for decision, but across the alpha and omega of copyright doctrine⁵⁴—so much so that a recent case in Chicago referred to “Professor Nimmer’s treatise, cited ubiquitously as authority in copyright cases.”⁵⁵

Consider just a few instantiations. (1) The great metaphysical question in all of copyright law is where the line must be drawn beyond which appropriation becomes “substantial similarity,” and hence actionable conduct. Prior to 1963, courts used that term in a bewildering plethora of senses.⁵⁶ When the treatise came onto the scene, however, Professor Nimmer separated those applications into their appropriate pigeonholes throughout the law of copyright, some belonging to other realms (such as fair use) and others limning the contours of how much copying is required for liability.⁵⁷ As to those, he further divided them into a dichotomy of his own invention, which he dubbed “comprehensive nonliteral similarity” and “fragmented literal similarity.”⁵⁸ As he recognized at the time, “[t]his distinction has received almost no express judicial recognition.”⁵⁹ Yet his own analysis set the standard, as courts began to adopt the treatise formulation. At present, dozens of cases have adopted this treatise terminology, making it as firmly

52. *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 503 (2d Cir. 2002).

53. When he received a Personal Achievement Award at the 1980 UCLA Alumni Awards ceremony, the accompanying booklet described Mel Nimmer as a man “who combines scholarship with an untiring passion for putting things ‘right’ in the ‘real world’ of legislation and legal conflict.” UNIVERSITY OF CAL., L.A., 1980 ALUMNI AWARDS (quoting nominating letter for the award).

54. Courts have cited the treatise so often that they expect it to take a stance on every issue within the copyright ambit. See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (noting that *Nimmer on Copyright* approaches one particular issue with “uncharacteristic ambivalence”).

55. *Pickett v. Prince*, 52 F. Supp. 2d 893, 906 n.17 (N.D. Ill. 1999) (Pallmeyer, J.).

56. See, e.g., Alan Latman, “Probative Similarity” As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990).

57. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2003) [hereinafter NIMMER ON COPYRIGHT]. For more on the confusion in terminology here, see *id.* § 13.05[A].

58. *Id.* § 13.03[A][1]–[2].

59. *Id.* § 13.03[A].

rooted in copyright doctrine as most pronouncements by Congress in Title 17 of the United States Code.⁶⁰

It is the rare case indeed that strays from that framework. Indeed, only two examples come to mind—and their lesson is that courts abandon the Nimmer framework at their peril. The first is *Castle Rock Entertainment, v. Carol Publishing Group, Inc.*,⁶¹ in which the court evaluating a book entitled *The Seinfeld Aptitude Test* declined to “apply the ‘fragmented literal similarity’ test, which focuses upon copying of direct quotations or close paraphrasing, or the ‘comprehensive nonliteral similarity’ test, which examines whether ‘the fundamental essence or structure of one work is duplicated in another.’”⁶² That case received its comeuppance when no less a figure than Judge Posner concluded that its “holding seem[ed] to rest in part, and very dubiously . . . on the court’s judgment that the book was frivolous.”⁶³ Similarly another court evaluating *The Cat NOT in the Hat*—a book in anapestic tetrameter about the O.J. Simpson murder trial—rejected those two categories as exhausting the doctrine of substantial similarity.⁶⁴ Although the Ninth Circuit affirmed that holding,⁶⁵ its distaste for the defendant’s work seemed to have led it into the same trap that Judge Posner condemned.⁶⁶

(2) Although Hollywood stands today in the role of advocating high copyright protection,⁶⁷ that stance is not always congruent with high author’s rights.⁶⁸ One domain in which the struggle between author and studio played

60. Search in Lexis database (August 8, 2003).

61. 150 F.3d 132 (2d Cir. 1998).

62. *Id.* at 140 (quoting 4 NIMMER ON COPYRIGHT, *supra* note 57, § 13.03[A][1], [2]).

63. *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512, 523 (7th Cir. 2002). Admittedly, however, its criticism aims at the Second Circuit’s application of the fair use doctrine, rather than at its application of substantial similarity doctrine. I would submit that the errors go hand in hand.

64. *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1566 (S.D. Cal. 1996).

65. See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 n.4 (9th Cir. 1997) (“The district court correctly portrayed the state of Ninth Circuit law on this issue.”).

66. Again, the action took place over the related notion of the fair use doctrine. The Ninth Circuit condemned the defendants’ parody defense as “pure shtick” and concluded that their “post-hoc characterization of the work is completely unconvincing.” *Id.* at 1403 (quoting district court). But as one commentator has aptly noted, that condemnation “overlooked the fact that *all* literary criticism is a ‘post hoc characterization’ of the work being examined, and that regardless of the authors’ intent, a work can have many different meanings to different people.” Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y 546, 592 (1998).

67. See Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC’Y 513, 529 (1999). It is relevant to note in this context that the name Melville derives from the Celtic for “high protector.” See David Nimmer, *Time and Space*, 38 IDEA 501, 506 n.20 (1998).

68. When the question revolves around application of the work for hire doctrine and construction of how robust implied licenses should be, the studios typically find themselves on the

itself out concerned exploitation of derivative works. Specifically, when the copyright in an underlying work had reverted to an author (or, more frequently, to that author's heirs) and in the interim a motion picture had been produced based upon the underlying work, would the studio's continued exploitation of its movie "in the can" violate the author's newly reclaimed rights? When confronting the parallel question vis-à-vis termination of transfers, Congress answered that question in the negative.⁶⁹ But in the core situation of reversion of renewal rights, the question remained unanswered from the inception of the 1909 Act through its demise. At that Act's twilight, the question was presented to the Second Circuit Court of Appeals. In *Rohauer v. Killiam Shows, Inc.*,⁷⁰ Judge Friendly analogized to that statutory provision to likewise return a negative answer. But in his write-up of that case, Professor Nimmer demurred, construing copyright doctrine to require an affirmative answer in favor of the author.⁷¹

Relying on *Rohauer*, motion picture studios exploited films even after reversion of rights in underlying works for over a decade. But then litigator Mel Nimmer filed a complaint in the Central District of California on behalf of a client named Sheldon Abend, seeking to overthrow *Rohauer's* reign.⁷² Predictably, Judge Hauk⁷³ followed that Second Circuit case as the most relevant authority, and ultimately dismissed the claim. But the Ninth Circuit reversed.⁷⁴ Adopting Professor Nimmer's criticism of *Rohauer*, that tribunal vindicated the underlying author's rights in the reversion scenario.⁷⁵

The conflict between circuits thus ripened for Supreme Court review. Bucking statistics, the Court in this instance affirmed the Ninth Circuit's

opposite side from individual artists. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990).

69. See 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (2000); see also David Nimmer, Abend's *Stepchild*, 43 J. COPYRIGHT SOC'Y 101 (1996).

70. 551 F.2d 484 (2d Cir. 1977).

71. See 1 NIMMER ON COPYRIGHT, *supra* note 57, § 3.07[A][2].

72. See Complaint for Damages and Injunctive Relief for Infringement of Copyright, *Abend v. MCA, Inc.* (C.D. Cal.) (No. 84-2489) (filed Apr. 10, 1984) (on file with author). Tragically, my father's death on November 21, 1985, prevented him from witnessing the ultimate triumph of his theory.

73. See David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1407 (1995) (noting that district court proceedings in *Abend* were before Judge Hauk). Although the case was originally assigned to Judge Wm. Matthew Byrne, it was subsequently reassigned. As a further footnote on my father's life, he was scheduled to testify as an expert witness in the celebrated Daniel Ellsberg trial on the day that Judge Byrne dismissed it for government misconduct. See Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

74. See *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988).

75. See *id.* at 1475.

ruling.⁷⁶ Accordingly, *Stewart v. Abend*⁷⁷ now adopts Mel Nimmer's point of view as governing law nationwide.

(3) A mirror image of the *Rohauer* scenario unfolded with respect to musical compositions. Here, the question is whether a composer can continue to claim copyright protection on a musical work even after consenting to its embodiment in a sound recording. Mel Nimmer analyzed the majority view under the cases to answer that question in the negative.⁷⁸ But then, the Second Circuit saved such authors from the consequences of their actions⁷⁹ by construing the statute to require an affirmative answer.⁸⁰ In writing up Judge Gurfein's opinion, Professor Nimmer evinced considerable sympathy for the policy considerations inclining in that direction. But he steadfastly maintained that the weight of authority had ruled to the contrary.⁸¹

This time, it took eighteen years for the same issue to reach the Ninth Circuit. In *La Cienega Music Co. v. ZZ Top*,⁸² that court again followed Professor Nimmer's lead in construing the 1909 Act.⁸³ However, the reaction to that ruling promptly percolated into the halls of Congress.⁸⁴ As a result, an amendment to the Act⁸⁵ jettisoned the *La Cienega* ruling—and in the process

76. The Ninth Circuit is "the court that routinely—more than any other federal appeals court in the country—gets reversed by the U.S. Supreme Court." Vikram David Amar, *The 9th Circuit Court May Stand Unjustly Accused*, L.A. TIMES, Sept. 11, 2003, at C17.

77. 495 U.S. 207 (1990).

78. See 1 NIMMER ON COPYRIGHT, *supra* note 57, § 4.05[B][2]. As described therein, published works required copyright notices for statutory protection to arise, and such copyright notices to be effective had to attach to visually perceivable works, thus placing sound recordings outside the realm of the possibility of bearing adequate notice. See text accompanying *infra* notes 607–611 for how the courts and Congress ultimately dealt with this issue.

79. The action in question was their consent to release of sound recordings rather than ensuring first publication in the form of sheet music. A valid notice on such sheet music always sufficed to obtain statutory copyright protection.

80. *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976).

81. See 1 NIMMER ON COPYRIGHT, *supra* note 57, § 4.05[B][2].

82. 53 F.3d 950, 953 (9th Cir. 1995).

83. *Id.* ("We decline to follow *Rosette*. First, *Rosette* is the minority rule; our research fails to reveal any other circuit which has followed it. The majority rule, as noted by the district court, has been articulated by Nimmer.")

84. "[*La Cienega*] poses a severe hardship for thousand of songwriters, many of whom I am proud to count as my constituents." 143 CONG. REC. 24,323 (1997) (statement of Rep. Berman).

[I]t was a reading of the technical language of the statute, the effect of which would be to deprive decent, hard-working composers of the right to benefit from their compositions, not because of any real dispute over who owned what, not because of any policy issue, but because of a very narrow technical point.

143 CONG. REC. 24,322 (1997) (statement of Rep. Frank).

85. Act of Nov. 13, 1997, Pub. L. No. 105-80, § 11, 111 Stat. 1529; see *infra* note 409 and accompanying text.

adhered to the original view that Professor Nimmer considered to be the reflection of a superior policy.⁸⁶

One should not infer that geographic rivalry explains these rulings, the western Ninth Circuit holding with the Californian Nimmer against the Second Circuit eastern establishment. Professor Nimmer took aim at western rulings no less than eastern ones, as well as pro-author rulings that subverted his reading of the statute and case law no less than the opposite. An example of both phenomena is evident in his criticism of *Duchess Music Corp. v. Stern*.⁸⁷

To impose the substantial criminal penalties that follow from a conviction based upon a flimsy rationale such as the *Duchess* doctrine acutely stirs what Edmond Cahn used to refer to as the “sense of injustice.” Like the *Duchess* in *Alice in Wonderland*, the *Duchess* majority searched assiduously, and found their “moral,” based upon the most questionable legal reasoning. As the dissenting judge observed in *Jondura Music Publishing Co. v. Melody Recording, Inc.*, one of the decisions utilizing the *Duchess* rationale, subsequent courts have followed “like the children of Hamelin in their erroneous piping.”

In no sense should the foregoing analysis be understood as a plea for the morality of record duplication. But in the hierarchy of moral values, surely higher even than the injunction against record piracy lies the principle of fidelity to law.⁸⁸

That preference for sound process over result-driven analysis may be taken as MBN Postulate #1.⁸⁹

(4) The above matters invoke pronouncements of copyright doctrine, implicating a large array of works. But Professor Nimmer did not limit himself to the broad swath—he commented equally about individual rulings in specific trials, labeling them correct or incorrect as he saw fit.⁹⁰ His critiques

86. He labeled Judge Gurfein’s approach “creative” as well as “most useful to those courts that seek a means to enforce under the current Act the copyright in works protected only by common law copyright prior to 1978.” 1 NIMMER ON COPYRIGHT, *supra* note 57, § 4.05[B][2].

87. 458 F.2d 1305 (9th Cir. 1972).

88. 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.04[E][1] (citations omitted); see LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND: THE ANNOTATED ALICE 120 (M. Gardner ed., 1960) (“‘Tut, tut, child!’ said the Duchess. ‘Everything’s got a moral, if only you can find it.’”).

89. This postulate, see *supra* Part B of the Introduction, together with its successors, see *infra* Part II.D, will help to right the ship of copyright amendments when it later runs into rough seas, see *infra* Part V.

90. “The Eighth Circuit has not addressed the issue of whether the merger and *scenes a faire* analysis affects copyright validity, but Nimmer counsels that these doctrines are best applied as defenses to infringement, rather than challenges to the validity of the copyright itself.” Taylor Corp. v. Four Seasons Greetings LLC, 171 F. Supp. 2d 970, 973 (D. Minn. 2001). Indeed, there have even been cases in which the majority and dissent both quoted the identical sentence from the treatise and disagreed, *inter sese*, about its meaning. See Langman Fabrics v. Graff Californiawear, Inc.,

of individual cases have by now permeated into the rationale of subsequent courts,⁹¹ such that a disavowal by *Nimmer on Copyright*, though not as potent as an appellate reversal, nonetheless raises a gigantic question mark.⁹²

The foregoing examples could be multiplied manyfold.⁹³ But as a snapshot of greater copyright doctrine, they reveal Mel Nimmer not simply as a restater of copyright doctrine, but rather as its formulator. Mel Nimmer the copyright legislator represents no fantasy.

B. 1965 Testimony

It was 1963 when the treatise was first published. Even at that early juncture, Professor Nimmer was a force in the copyright world. It was therefore not surprising that on several occasions the Copyright Office called upon him to offer comments about the bill then in progress.⁹⁴ In the

160 F.3d 106, 115 (2d Cir. 1998) (quoting 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12.11[D]); *id.* at 116 (Jacobs, J., dissenting) (quoting identical sentence).

91. See, e.g., *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 433–34 (8th Cir. 1993) (“[W]e disagree [with *Wolff v. Inst. of Elec. & Elecs. Eng'rs, Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991)]. . . . We agree with Professor Nimmer . . .”).

92. When courts disagree with treatise conclusions, they routinely pay their respects by citing to its contrary conclusion. See, e.g., *Jondora Music Publ'g Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 395 n.9 (3d Cir. 1974) (“Nimmer on Copyright . . . disagrees with this interpretation, but we are not persuaded by that eminent author's argument to the contrary.”); *O'Neill Devs., Inc. v. Galen Kilburn, Inc.*, 524 F. Supp. 710, 714 (N.D. Ga. 1981) (“No matter how clear the express legislative intent, it cannot be given effect where it contradicts the unambiguous statutory text. 2 *Nimmer on Copyright*, ¶ 7.13(B)(3) (1981). The Court rejects the Nimmer view for two reasons.”). The danger is that another court may rehabilitate the treatise rationale, as happened to the case just cited:

One court, when confronted with the conflict between the express terms of § 405(a)(2) and its legislative history, construed “after the omission has been discovered” to mean “after ‘discovery’ of the fact that the existence of a copyright has become an issue.” *O'Neill Developments Inc. v. Galen Kilburn, Inc.*, 524 F. Supp. 710, 714 (N.D. Ga. 1981).

We find this construction to lack support in either the statute or the specifically relevant legislative history. See M. Nimmer, 2 *Nimmer on Copyright*, [§ 7.13[B][3] (1982)].

Beacon Looms, Inc. v. S. Lichtenberg & Co., 552 F. Supp. 1305, 1311 (S.D.N.Y. 1982).

93. Nonetheless, their experience is not utterly without exception. On one issue, the courts have consistently sided against the treatise, such that it may be said that its viewpoint on that particular issue has been rejected. That issue concerns the requisites to qualify as a joint author. Professor Nimmer took the position that “if authors A and B work in collaboration, but A's contribution is limited to plot ideas which standing alone would not be copyrightable, and B weaves the ideas into a completed literary expression, it would seem that A and B are joint authors of the resulting work.” 1 NIMMER ON COPYRIGHT, *supra* note 57, § 6.07. The courts, although paying their respects to the Nimmer formulation, on balance reject it. See, e.g., *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991) (“The issue, apparently open in this Circuit, is troublesome.”).

94. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 371–75 (Comm. Print 1963) (prepared submission by Melville B. Nimmer) [hereinafter COPYRIGHT LAW REVISION PART 2];

same spirit, Congress invited him to offer testimony about the ongoing process of amending the regnant 1909 Act.

1. Prepared Remarks

By August 1965, the topic of revision was already familiar to congressional insiders. The massive *Register's Report on the General Revision of the U.S. Copyright Law* was already five years old,⁹⁵ and the ink by then had just dried on the even more massive *Supplementary Register's Report on the General Revision of the U.S. Copyright Law*.⁹⁶ Hearings on the omnibus revision had commenced as of May 26, 1965.⁹⁷

On Thursday, August 26, 1965, the House Judiciary Subcommittee deliberating the bill reconvened in the Rayburn Office Building for its twentieth day of testimony. After receiving testimony from representatives of the Departments of State and of Commerce,⁹⁸ it heard from Professor Melville B. Nimmer, then en route from his duties as Professor of Law to serve in Geneva (during a leave of absence from UCLA) as a consultant to BIRPI⁹⁹

STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 37–105 (Comm. Print 1964) (roundtable held at the Library of Congress on Jan. 16, 1963, including Melville B. Nimmer of UCLA Law School) [hereinafter COPYRIGHT LAW REVISION PART 3]; STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 313–19 (Comm. Print 1965) (prepared submission by Melville B. Nimmer of UCLA Law School) [hereinafter COPYRIGHT LAW REVISION PART 5].

95. STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT ON THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961), reprinted in 8 NIMMER ON COPYRIGHT, *supra* note 57, app. 14. The report runs 157 pages.

96. STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print 1965), reprinted in 9 NIMMER ON COPYRIGHT, *supra* note 57, app. 15. The report runs 165 pages.

97. *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong.* (1965) [hereinafter *Copyright Law Revision*].

98. See *id.* at 1789 (statement of Philip Tresize, Deputy Assistant Secretary of State); *id.* at 1797 (statement of Robert E. Giles, General Counsel, Department of Commerce).

99. My father loved a good joke. Happily, his life was replete with a full complement. Here's one: BIRPI (pronounced, "beer-pea") stood for "Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle"; in English, it went by the ungainly title of "United International Bureaus for the Protection of Intellectual Property." Then Director-General G.H.C. Bodenhausen continually climbed the wall when uncouth Americans pronounced the agency's name beginning with "burp." So he engaged in an international search to develop a more euphonious moniker. After months of study, the proposal returned: "Intellectual Property Organization," or IPO. Everyone was happy—until it was pointed out that *hipo* (pronounced with a silent "h") means *hiccup* in Spanish. "It was destiny!" my father gloated. That infelicitous proposal

(although few recognize that particular acronym today, it is a predecessor to the WIPO, which serves as secretariat for the world's preeminent copyright treaty, the Berne Convention).¹⁰⁰

He began "by enthusiastically endorsing" the bill then on the table.¹⁰¹ Reminding his listeners that they had already heard extensive analysis of its virtues, he conceded that "it would be an act of supererogation and an imposition on your time for me to remind you of the sound policy reasons underlying many of the major advances contained in the copyright bill before you."¹⁰² But he did proceed to offer general praise for selected advances of the new approach to copyright affairs¹⁰³—its unified federal system as opposed to dual tracks of federal and state protection;¹⁰⁴ the term of life plus fifty years, making U.S. law Berne-compliant;¹⁰⁵ the replacement of an unworkable system of reversion of renewal rights¹⁰⁶ with something hopefully more serviceable, namely termination of transfers;¹⁰⁷ and the granting of rights under copyright law to sound recordings.¹⁰⁸ He then moved to consider in more detail¹⁰⁹ what he considered to be "the five major controversial issues [that] have emerged from the . . . hearings."¹¹⁰

perpetuating references to oral eruptions later yielded to WIPO, which all hands in Geneva insisted be pronounced in English as "w-i-p-o." But coarse Americans had their revenge—they uniformly pronounced it beginning with "wipe."

100. The result of his studies there is Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

101. *Copyright Law Revision*, *supra* note 97, at 1809.

102. *Id.*

103. *Id.*

104. On the "ages of American copyright law," see 1 NIMMER ON COPYRIGHT, *supra* note 57, at OV-6.

105. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 9.02. Professor Nimmer did not live to see it, but the United States finally joined the Berne Convention effective March 1, 1989.

106. "I suggest that, if you put end to end all of the people . . . who lost their copyrights through inadvertence by failure to renew, you would have a great many cases of injustice" *Copyright Law Revision*, *supra* note 97, at 1814.

107. Whether that goal has been fully reached remains pending evaluation even now many years later. See David Nimmer, *Pooh-Poohing Termination Rights* (forthcoming).

108. As early as 1963, my father had urged that Congress afford protection to avoid "at the very least record piracy." COPYRIGHT LAW REVISION PART 3, *supra* note 94, at 78. By 1965, his thoughts had progressed to the extent that he recommended expanding the rights to be accorded to sound recordings to extend to the adaptation right. See COPYRIGHT LAW REVISION PART 5, *supra* note 94, at 317. However, in any event, Congress did not act until 1971—and, at that juncture, it still withheld a performance right. See *infra* Part IV.E. That choice later came back to haunt the law of copyright, requiring no less than three corrective amendments. See *infra* Part IV.E.

109. *Copyright Law Revision*, *supra* note 97, at 1810 ("[T]hough not, I fear, with the thoroughness which I would require of my students.").

110. *Id.* He emphasized that those concerns, even collectively, did not rise to great moment:

I would also differ on some technical points, and some matters of language. I would be happy to elucidate further on this in the question period if you wish. But I would

(1) The first issue might seem less than epochal by today's standards—should the charge be 2¢ or 3¢ per “cover record” made pursuant to the mechanical license?¹¹¹ His conclusion on the subject seems less than inflammatory: “In view of inflationary trends since 1909, the mere fact that 2 cents per record was thought to be a proper fee at that time *prima facie* suggests that 3 cents per record is not excessive today.”¹¹²

(2)–(3) Professor Nimmer condemned two “commercial interests that reap handsomely from the exploitation of copyrighted materials, but who would nevertheless seek a statutory haven from the thrust of the copyright law.”¹¹³ He found the exemptions then in effect as to jukebox owners¹¹⁴ and cable television¹¹⁵ to be “indefensible” and supported their elimination.¹¹⁶ The law in effect today embodies his “self-evident proposition that these industries, no less than other commercial purveyors of copyrighted materials, must pay a fair share of their considerable revenues to those who create that for which the public pays.”¹¹⁷

(4) Though largely in agreement with the previous testimony offered by the Copyright Office, Professor Nimmer parted company with the Register

emphasize that none of these reservations are of any great importance. If the Congress of the United States were to enact a new copyright law in exactly the form found in H.R. 4347, I for one would consider this a magnificent achievement, and an enduring contribution in the attainment of a Great Society.

Id. at 1812.

111. Once the copyright owner of a composition consents to its release on recordings, anyone can issue their own “cover” version of the work by paying a few cents per recording sold. For the details, see 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.04.

112. *Copyright Law Revision*, *supra* note 97, at 1812. Currently, the rate stands at 8.5 cents per record. See 37 C.F.R. § 255.3(d) (2002).

113. *Copyright Law Revision*, *supra* note 97, at 1811.

114. For the history of this provision—including its later elimination as a compulsory license in the train of adherence to the Berne Convention—see *infra* Part III.C.3.a (discussing Copyright Royalty Tribunal Reform Act of 1993).

115. Note that the term then in vogue was “community antenna systems” (CATV). *Copyright Law Revision*, *supra* note 97, at 1811; see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391 (1968). As noted by the lower court in *Fortnightly Corp.*, that “term” is a “misnomer and reflects a fundamental misconception. Defendant’s two systems are not ‘community’ ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff’s copyrighted motion pictures.” *United Artists Television v. Fortnightly Corp.*, 255 F. Supp. 177, 180 (S.D.N.Y. 1966). For the history of this provision, see 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[E]. Note that, in the interim, Congress has added complementary compulsory licenses for satellite carriage of television signals. *Id.* § 8.18[F]–[G].

116. *Copyright Law Revision*, *supra* note 97, at 1811.

117. *Id.* at 1812. In other words, Professor Nimmer condemned the feature of copyright law as then drafted that completely exempted jukeboxes and CATV from liability. Today, those services are subject to royalty obligations pursuant to either negotiated or compulsory licenses. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8.17[C][1], 8.18[E][4].

of Copyrights regarding the manufacturing clause then in effect to benefit domestic typesetters. Unlike the Register, who opposed the clause in principle but bowed to its political reality as "a compromise . . . necessary in order to obtain passage of the law,"¹¹⁸ my father found it "repugnant to prohibit the importation of any copyrighted materials simply because they were not manufactured in the United States."¹¹⁹

(5) Finally, the lion's share of Professor Nimmer's testimony addressed "the question of education and fair use."¹²⁰ That consideration, in turn, led him to consider the progress of technology. His words here are worth setting forth:

[T]he old mimeograph has been largely replaced by accurate, quick, and relatively inexpensive duplication through photocopying and similar methods. How to handle photoduplication, or as it is referred to more generically, reprography, lies at the heart of the teacher duplication problem. These scientific marvels undoubtedly increase the efficiency and effectiveness of modern educational methods. But that in itself does not answer the question as to what segment of society is to bear the cost of this achievement.

If it be true that education will not advance as it might otherwise without the use of a Xerox or similar machine, is it not likewise true that the use of schoolbuses, public address systems, and even air-conditioning systems, also materially advance the effectiveness of modern education? Yet no one maintains that the undoubted primacy of education to the Nation justifies the unilateral appropriation by schools or teachers of these other instruments of modern technology.¹²¹

My father did not limit his ruminations to the immediate scope of the issue presented. Rather, he allowed himself latitude to "suggest that the problem of reprography by teachers is only part of and the forerunner of an

118. *Copyright Law Revision*, *supra* note 97, at 1812.

119. *Id.* at 1812. In this context, he invoked

the academic privilege to ignore expediency in the interests of principle, and the principle seems to me to be clear. If domestic book manufacturers are to be granted this kind of protectionism, it should be found in the tariff, not in the copyright laws. If the issue were baldly faced as a tariff problem rather than obscured within the interstices of the copyright law, I believe that the American public would resoundingly reject this limitation on their access to literary materials.

Id.

120. *Id.* at 1810.

121. *Id.*

infinitely greater problem.”¹²² Taking this issue as a microcosm of larger forces reverberating through the copyright world,¹²³ he gazed into the crystal ball:

It is predictable that within one or two or three decades developments in photoduplication and the like will permit the quality duplication of entire books at a cost which is only a small fraction of the price of printed books. It may similarly be predicted that when that time comes the cost of duplication machines themselves will be so reduced as to be available to anyone who can presently afford to buy a type-writer. When that time comes, if such duplication is not effectively proscribed by the copyright laws, who will be willing to purchase a book when by borrowing one from a library or elsewhere the book can be duplicated for a relative pittance? In such circumstances book publishing may largely disappear, and what then happens to the educational and cultural state of the Nation?¹²⁴

One answer to that question comes in the form of scrutinizing immediate economic results. Redress is needed under this view if (but only if) copyright owners are harmed. Indeed, the extant studies indicated that no harm results from teacher duplication practices. But that view did not sway Mel Nimmer:

Such studies, although replete with statistics, omit what is surely the handwriting on the wall. Long before every man is able to buy his own duplicator we will have reached the time when machines such as Xerox, owned by schools and libraries, will be able to reproduce entire books at a fraction of the cost of printed copies. Who can doubt that when and if that time comes publishers of school textbooks will find their market almost totally obliterated if it is “fair use” for teachers and schools to duplicate entire or even substantial portions of books?¹²⁵

The reader attentive to the recent Napster debate might already have heard the opening strains of a larger symphonic development,¹²⁶ to which

122. *Id.*

123. *See id.* at 1811 (“[I]n a smaller microcosm, the issue of reprography by teachers presents the same threat.”).

124. *Id.* at 1810. In the same spirit, my father commented in this forum:

The day may come when conventional book and periodical publishing will be almost completely supplanted, individually or in combination, by machine copying devices and sophisticated computer operations. When that day arrives we will be faced with a copyright crisis of profound dimensions.

Melville B. Nimmer, *New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. REV. 931, 931 (1968).

125. *Copyright Law Revision*, *supra* note 97, at 1811.

126. The above reference to “extant studies indicat[ing] that no harm results from teacher duplication practices” later yielded to much more elaborate studies in the Napster context, albeit still with mixed results. *See infra* note 696; *infra* Part VI.B.

the discussion below returns at length.¹²⁷ The above ruminations support one side in that debate. But Professor Nimmer's next comments provide fodder for the contrary point of view:

This is not to be understood as a plea for turning the clock back. History tells us that the smashing of machines as a means of avoiding technological displacements is a futile gesture. Moreover, we should not do so even if we could. It is clearly in the interest of society that modern reprography methods be exploited, not suppressed. Yet reprography ushers in what may be called the coming copyright revolution. In Lincoln's phrase: "The dogmas of the quiet past are inadequate to the stormy present." What is required is an equitable and convenient means of licensing reprography duplication. It is probably best that the structuring of any such licensing system be accomplished through the flexibility of private arrangements rather than by the inflexible fiat of statutory command. But it is in any event clear to me that the answer does not lie in the indiscriminate lumping of educational duplication under the banner of "fair use." This would be no less antisocial than it would be to forbid the use of machines which accomplish such duplication.¹²⁸

In the end, my father invoked his favorite metaphor:¹²⁹ "delicate balancing."¹³⁰ The challenge for copyright legislators of all stripes is to measure the contrasting forces with sufficient clarity and prescience to find that correct balance. Suffice it at present to encapsulate MBN Postulate #2: Widescale usage of technology that enables unencumbered copying cannot escape liability. But tempering a tilt too far in one direction, MBN Postulate #3 immediately arises: Technology does not necessarily need to be outlawed as a consequence.

2. Colloquy

After his prepared remarks, my father opened himself for questioning. The results were wide ranging.¹³¹ Representative Poff asked my father to specify his

127. See *infra* Part V.A.

128. Copyright Law Revision, *supra* note 97, at 1811.

129. It has become one of mine as well. See David Nimmer et al., *The Metamorphosis of Contract Into Expand*, 87 CAL. L. REV. 17, 22 (1999). One commentator, by contrast, decries that metaphor. See Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS 1, 7-8 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2002).

130. Copyright Law Revision, *supra* note 97, at 1811.

131. Among the topics that dotted the conversation were the following:

- My father expressed concern that Congress should alter the first-sale doctrine in order to preserve state law contract agreements, such as a covenant not to resell. *Id.* at 1816. Congress did not heed that particular suggestion. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.12[B][1][a].

recommendation as to the preferred licensing procedures that Congress should implement to solve the photocopying dilemma. My father invoked the examples of the music collective rights organizations as precedent,¹³² proposing that libraries pay an annual photoduplication fee¹³³ in exchange for “a license to reproduce, under given conditions, a whole catalog or category of materials.”¹³⁴

Representative Kastenmeier dominated the discussion, noting at the outset that current evidence showed “that books are now being reproduced for less than ordinary printing and binding costs.”¹³⁵ He then asked what were the lessons of history, given past predictions that “the advent of paperbacks would kill all bound books”¹³⁶ and later “that television would kill book manufacturing and reading generally.”¹³⁷ Could it not be the case, he wondered, “that we exaggerate what may happen and that the new technology may merely be an addition to everything else, and not an extinguishment of whatever else exists.”¹³⁸ My father answered by distinguishing those

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- Another comment concerned the provision of law that allowed for copyright forfeiture in the event of nonregistration of an unregistered work following five years. *Copyright Law Revision*, *supra* note 97, at 1817. “My own feeling is that there should not be forfeiture in any event . . . simply because of a failure to comply with a formality which can be a trap for the unwary . . .” *Id.*
 - Last, my father expressed agreement with the disability of the government to create copyrightable works, but its ability to own copyrights on bequest or assignment from an author. *Id.*

132. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.19[A]. His approach here was historical: [J]ust as under the existing law, all that you see about performances as the statute spells it out, in the case of music, is that the copyright owner has the right to control the public performance for profit of his music. Nothing is said about any private arrangements for licensing or the sort, but we know that out of this grew ASCAP and BMI and so on, private organizations which have licensed, collectively licensed, performing rights. *Copyright Law Revision*, *supra* note 97, at 1817–18.

133. *Copyright Law Revision*, *supra* note 97, at 1818 (“Obviously, there are socially useful interests on both sides, and one must find the proper balancing [between private party interests and educators’ need to reproduce], but I don’t find the proper balancing in just calling it fair use.”).

134. *Id.* Indeed, he went further on the subject:

[T]he implication of what I have to say is that the middle solution will evolve, privately, if the users are not handed on a silver platter just an automatic statutory exemption. If they don’t have an automatic statutory exemption, and yet the forces of technology are such that these uses are going to continue, it seems to me that the tension between the creators and the users is such that will force a private arrangement.

I could be wrong, and if this does not occur, then perhaps it will be time for Congress to take a second look at that particular problem and create some kind of compulsory licensing situation, or something of the sort, but I would hate to see that rushed into in advance of the opportunity to work it out on a private basis.

Id.

135. *Id.* at 1812.

136. *Id.* at 1812–13.

137. *Id.* at 1813.

138. *Id.* at 1812–13.

precedents, inasmuch as “paperbacks pay for copyright use, just as much as do hard-cover books. Television pays for copyrighted materials, and so on, so that there was not any open sesame where you had one particular medium that had a complete free hand to exploit without limitations.”¹³⁹

So where should the lines be drawn here, bearing in mind the need to heed a “delicate balancing” of interests? Somewhere along the spectrum, individual acts add up: The acts of an individual teacher in Iowa and another in Vermont do not represent a great threat to copyright owners. But if every teacher throughout the land made a single copy for “personal” use, “then I think you have a very real threat, and one that would lead to or may lead to the consequences I have suggested.”¹⁴⁰ Those remarks foreshadow much of the Napster debate to follow.¹⁴¹

3. Special Commission

As valuable as are all the collective insights set forth above, my father shared one overarching insight with the congressional committee that, in my view, is even more prescient. It arose in response to Representative Kastenmeier’s general invitation “to indicate where you think that changes might be made in the bill, and what changes ought to be made.”¹⁴² In reply, my father remarked that the Constitution allows Congress to protect all

139. *Id.* at 1813.

140. *Id.*

141. See *infra* Part V.A. Another lively aspect of that debate revolves around where the line should be drawn between direct and indirect commercial advantage. See *infra* Part V.A.3. My father’s testimony touched on that matter, too:

I am thinking of *Associated Music v. Debs*, a Second Circuit case, where the phrase “for profit” under the existing law was defined as including any nonprofit uses, if there can be direct or indirect commercial gain, even though no admission charge, and if that money goes to pay off the mortgage, let us say, of the nonprofit organization, this is still for profit under the existing law. And that, it seems to me, goes much too far for desirable social policy. I would disagree with that case holding . . .

Copyright Law Revision, *supra* note 97, at 1819. Of course, that issue leads to its own exegesis. My father distinguished between an educational television station in which the signal goes out to the public, which he felt should be a royalty-bearing event, and a presentation in a church or school that is not for profit. Of course, calling something completely “nonprofit” is difficult to define, as the following illustrates:

It might be argued at the present time that the singing of a church choir in a church is a for-profit performance, because there is some relationship between the amount of money that goes into the collection plate and the fact that the people sing in the church choir. . . . My own feeling is that probably the balance where we are not talking about a widespread audience such as television, but only a live performance in person, as it were, if the money goes strictly for educational charitable purposes, then perhaps it is all right.

Id. at 1820.

142. *Copyright Law Revision*, *supra* note 97, at 1814.

“writings” of authors and that the subject matter of copyright contained in section 102 of the bill scrupulously avoided that term and was ambiguous as to whether it reflected a congressional intention to apply to all constitutional “writings” or only to a subset thereof.¹⁴³ On the one hand, Congress could specify its intended subject matter by simply enumerating in the bill, as it then stood, precisely which categories fell within its intent. The beauty of that approach is that it would achieve specificity. Its corresponding downfall would be to lock into the Copyright Act the perspective of technology then extant (with the concomitant that Congress would need to amend the Act every time technology progressed). To steer between those shoals, my father suggested instituting something he dubbed “a Presidential Copyright Commission.”¹⁴⁴

Putting some meat on the bones, my father sketched his vision as chartering such a commission to focus on whether works in newly developed media fall within the subject matter of copyright and on making an appropriate recommendation to the president. If the president adopted that recommendation, it would become part of the Copyright Act unless Congress rejected it within a set time period.¹⁴⁵

This proposal can be summarized as MBN Postulate #4: A special commission chartered to study in-depth the scope of copyright protection can produce a better result than the rough-and-tumble of the political process. This postulate contains the kernel both of what soon transpired¹⁴⁶ and what is needed today to rehabilitate copyright law.¹⁴⁷

143. *Id.* at 1814–15. On the one hand, “it appears that it is intended to be applied to all writings. Yet looking at the Supplementary Register’s Report, it is at least the intention of the Copyright Office that this not be true, that it not include all writings.” *Id.* at 1815. The significance of the disparity relates to such subject matters as “typography and certain industrial designs and broadcast emissions.” *Id.* (“[I]n my view, broadcasting emissions, being intangible, are not writings in a constitutional sense . . .”).

144. *Id.* For those purposes, my father invoked 28 U.S.C. § 2072. *Id.* Representative Poff responded that a more apt citation would be to the Reorganization Act of 1949. *Id.* at 1816. The former provision, as it then stood, allowed the Supreme Court to prescribe rules of civil procedure, which would not take effect until “reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.” Act of May 10, 1950, Pub. L. No. 81-510, 64 Stat. 156. The latter provides: “It is the intent of Congress that the President should provide appropriate means for broad citizen advice and participation in restructuring and reorganizing the executive branch.” Reorganization Act of 1977, Pub. L. No. 95-17, § 901, 91 Stat. 29, 29 (codified at 5 U.S.C. § 901).

145. *Copyright Law Revision*, *supra* note 97, at 1815–16. This aspect of my father’s testimony won favorable notice from his teacher. See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 111 n.88 (1966).

146. See *infra* Part II.C.

147. See *infra* Part V.D.

4. Personal Postscript

With such a magnificent presentation, one might anticipate that accolades and congratulations would follow. Indeed, they did—my father was surrounded by staffers and colleagues after his testimony, congratulating him on the lucidity and erudition of his presentation. The only sour note came from Professor Nimmer's ten-year-old son, David, who had to reply truthfully when asked his reaction: "Your testimony made me throw up." Indeed, the lad had missed much of the stellar presentation, instead making his own "presentation" to one of the basins contained in the Rayburn Building's bathrooms.¹⁴⁸

C. CONTU

What did Congress do regarding the proposed Presidential Copyright Commission to consider protected subject matter? As history unfolded, it adopted a modified version in short order.

1. Statutory Background

Over a decade elapsed after my father's testimony to Congress before it completed its job of revising the Copyright Act.¹⁴⁹ Finally, on October 19, 1976, Congress passed a new law, effective on January 1, 1978, revamping the entirety of the field, including all the issues confronted above.¹⁵⁰ Yet on one matter, Congress could not reach agreement: Did computer programs constitute copyrightable subject matter; if so, what standards would be applied to their utilization? Unable to reach agreement on that score, it embodied into the law a placeholder for section 117 of the Act:

[T]his title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction

148. Though truthful, the boy's review was perhaps unnecessarily harsh, leading to a karmic chain that exacted its own retribution. Some twenty-seven years later, I gave testimony before the U.S. Senate on the subject of video monitoring, which passed without incident. But just five years after that, I replicated my father's experience by giving testimony to the House of Representatives. Forty-five minutes before taking my seat in the hearing room, my stomach violently rejected the breakfast it had just been offered—and my temperature reached 102°F. Can anyone doubt that sins inflicted on the father come back to haunt the son?

149. The interim saw some bleak times. In 1968, my father observed: "The plain and terribly discouraging fact is that as of this writing, the prospects for enactment of a new copyright law appear very dim indeed." Nimmer, *supra* note 124, at 933. Responsible for the delay were continuing ferment over cable television and apathy in the Senate, in contrast with the conscientious and bipartisan attention that copyright had garnered in the House. *See id.* at 935–37.

150. *See* Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.¹⁵¹

As a result, courts called upon in 1978 to determine whether software could achieve copyright protection had to engage in an archaeological exploration as to whether such protection had been possible before 1978.¹⁵² As to this sole domain,¹⁵³ therefore, anachronistic standards were destined to continue, rather than growing organically as in the balance of the Copyright Act.

2. Chartering a Presidential Commission

That resolution was a deliberate stopgap. For even as it passed the 1976 Act, Congress did so against the backdrop of ongoing study of the issue.¹⁵⁴ Specifically, at the end of 1974, Congress created the “National

151. § 117, 90 Stat. at 2565.

152. See *Tandy Corp. v. Pers. Micro Computers, Inc.*, 524 F. Supp. 171, 174–75 (N.D. Cal. 1981) (applying the pre-1980 repealed version of section 117).

153. Technically, computer programs were not the sole domain as to which Congress legislated this device. It also included almost identical language as to one other minor arena:

This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

Act of Oct. 19, 1976 § 113(b), 90 Stat. at 2560. Unlike the parallel language regarding computers, which was replaced in 1980, that provision continues to govern until this day. See 1 NIMMER ON COPYRIGHT, *supra* note 57, §§ 2.08[D][2][a], .15, .18[B][3]. Nonetheless, its force is highly circumscribed, inasmuch as the major domain to which it applied—blueprints of architectural works—has since been accorded protection in a separate feature of the Copyright Act, meaning that it is now no longer necessary to construe section 113(b) in assessing protection for those works of authorship. See 17 U.S.C. § 102(a)(8) (2000) (added by Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701, 702, 104 Stat. 5089, 5133 (1990)); see also 1 NIMMER ON COPYRIGHT, *supra* note 57, § 2.20.

154. The legislative history states:

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work “in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information.” The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

H. REP. NO. 94-1476, at 116 (1976).

Commission On New Technological Uses Of Copyrighted Works.”¹⁵⁵ Known by the acronym CONTU,¹⁵⁶ it consisted of four appointees “selected from authors and other copyright owners,”¹⁵⁷ four “selected from users of copyright works,”¹⁵⁸ and four nongovernmental members “selected from the public generally, with at least one member selected from among experts in consumer protection affairs.”¹⁵⁹ The Librarian of Congress served as the thirteenth voting member of CONTU.¹⁶⁰

On July 25, 1975, President Ford appointed the requisite number of copyright users,¹⁶¹ authors and owners,¹⁶² and members of the public generally, as commissioners of CONTU.¹⁶³ He designated retired Judge Stanley H. Fuld as chairman and my father as vice-chairman.¹⁶⁴ An expert staff aided the commission.¹⁶⁵

From that time until its final report emerged on July 31, 1978,¹⁶⁶ CONTU worked busily. During its three years of active meetings, it heard testimony from more than one hundred witnesses over the course of twenty-

155. See Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201, 88 Stat. 1873, 1873-74.

156. See generally NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (1979) [hereinafter CONTU FINAL REPORT].

157. Act of Dec. 31, 1974 § 202(a)(1), 88 Stat. at 1874.

158. *Id.* § 202(a)(2).

159. *Id.* § 202(a)(3).

160. *Id.* § 202(a)(4).

161. See CONTU FINAL REPORT, *supra* note 156, at 4. Those appointees were three librarians plus Harvard Law Professor Arthur Miller. See *id.*; see also Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 978, 981 (1993).

162. For the authors and copyright owners, the commissioners were John Hersey as President of the Authors League and senior executives of three book publishing houses—McGraw Hill, Time, Inc., and Ziff-Davis Publishing. See CONTU FINAL REPORT, *supra* note 156, at 4. Though the last is now known for its specialty in the computer industry, at the time it published such titles as *Car & Driver*, *Yachting*, *Popular Photography*, *Stereo Review*, *Modern Bride*, and *Backpacker*. See Ziff-Davis Media, Corporate Timeline, at <http://www.ziffdavis.com/about/index.asp?page=corporatetimeline>.

163. Besides the chairman and vice chairman, the other two representatives of that group were a retired Register of Copyrights and the executive director of Consumers Union. See CONTU FINAL REPORT, *supra* note 156, at 4.

164. See Act of Dec. 31, 1974 § 202(b), 88 Stat. at 1874; see also CONTU FINAL REPORT, *supra* note 156, at 5. Both were drawn from the roster of “the public generally” as opposed to authors or users. See *id.* at 4.

165. See CONTU FINAL REPORT, *supra* note 156, at 111-12. Those who have had subsequent dealings with the Copyright Office, State Department, and the Patent and Trademark Office will recognize the names of CONTU Executive Director Arthur J. Levine, as well as staffers Michael S. Keplinger, Christopher A. Meyer, and Jeffrey S. Winter. *Id.*

166. See *id.* at vi-viii.

one meetings.¹⁶⁷ It also sponsored six serious studies of technological impacts on copyright:

- *Economics of Property Rights as Applied to Computer Software and Data Bases*¹⁶⁸
- *Legal Protection of Computer Software—An Industrial Survey*¹⁶⁹
- *Costs of Owning, Borrowing, and Disposing of Periodical Publications*¹⁷⁰
- *An Analysis of Computer and Photocopying Issues from the Point of View of the General Public and the Ultimate Consumer*¹⁷¹
- *Survey of Publisher Practices and Current Attitudes on Authorized Journal Article Copying and Licensing*¹⁷²
- *Library Photocopying in the United States, with Implications for the Development of a Royalty Payment Mechanism*¹⁷³

3. Substantive Recommendations

At the end of three years, CONTU issued an eighty-page report containing its recommendations and supporting reasons, with another eighty pages of appendices.¹⁷⁴ Of all the technological issues facing the copyright world in 1978, CONTU focused on two, reserving for future consideration by others the questions of home taping¹⁷⁵ and protection for semiconductor chips.¹⁷⁶ The arenas in which CONTU issued its own recommendations related to photocopying and copyright protection for computer programs.

167. For a list of all 105 witnesses, see *id.* at 117–19. For the table of who testified at each meeting, see *id.* at 113–16, recounting testimony at each meeting, except the first and fourteenth.

168. *Id.* at 125.

169. *Id.* at 126.

170. *Id.* at 127.

171. *Id.* at 128.

172. *Id.* at 130.

173. *Id.* at 131.

174. See generally CONTU FINAL REPORT, *supra* note 156.

175. CONTU decided

that it should not take up this subject, since the legislative history clearly shows that Congress intended the mandate to study machine reproduction to apply to photocopying. Additionally, the Commission believed that the issues involved in off-the-air videotaping were essentially matters requiring public policy decisions not related to technology per se, and that these matters were being tested in a pending legal action.

Id. at 79. Then pending before the district court was the Sony Betamax case. *Id.* at 79 n.266 (citing *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979)).

176. That question “was raised by a manufacturer of these devices too late to be dealt with adequately by the Commission.” *Id.* at 79. For the subsequent history of the Semiconductor Chip Protection Act of 1984, see *infra* Part IV.B.1.

a. Photocopying

CONTU devoted serious considerable energy to

[A] problem that had proven especially difficult in the revision of the 1909 Copyright Act: drawing a proper balance between the rights of copyright owners, whose works were easily reproduced through the use of advanced reproduction technologies, and the general interest and needs of members of the public, who more and more were relying on photocopying as an important auxiliary form of access to copyrighted works.¹⁷⁷

After sponsoring various studies relating to the issue,¹⁷⁸ CONTU issued recommendations to publishers and government agencies, and for a continuing five-year review of photocopying practices.¹⁷⁹ As to legislative recommendations, it limited itself to one recommended change in the provisions of the 1976 Act relating solely to "photocopying by organizations that are in the business of making copies."¹⁸⁰ As to that sphere, CONTU recommended adding a provision to the Copyright Act regulating "commercial copiers."¹⁸¹

At the same time, CONTU developed extensive guidelines with respect to photocopying and interlibrary arrangements.¹⁸² It grounded those guidelines in extensive research regarding the extent of library photocopying,¹⁸³ the economics of publishing, the impact on libraries of copying fees,¹⁸⁴ and research into the experience of other nations on the subject.¹⁸⁵

b. Computer Programs

CONTU's major recommendation was in the area of protection for computer programs. Based on its survey of the history over the previous twenty-five years,¹⁸⁶ the commission decided to recommend two changes to the statute.

177. CONTU FINAL REPORT, *supra* note 156, at 47.

178. *Id.*

179. *Id.* at 50-52; see Act of Oct. 19, 1976, Pub. L. No. 94-553, § 108(i), 90 Stat. 2541, 2548 (repealed 1992) (providing for periodic studies of photocopying practices).

180. CONTU FINAL REPORT, *supra* note 156, at 48.

181. *Id.* at 50 (proposing language to be enacted as 17 U.S.C. § 107(b)).

182. *Id.* at 54-55.

183. *Id.* at 55-56.

184. *Id.* at 65-75.

185. *Id.* at 75-78.

186. Some of the general ruminations go back even further:

From the Renaissance through the Industrial Revolution to the present, technological developments have consistently extended society's power to control natural phenomena and to shape its own destiny. The rapid developments in communications and information technology of the past three decades have immeasurably expanded and extended the power of human communication.

Id. at 9.

The first proposal was to add a definition of “computer program” to section 101 of the statute, which sets forth the general definitions of the Act.¹⁸⁷ In particular, the proposal was to define that term as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”¹⁸⁸

The second proposal was to replace the placeholder section 117 quoted above with a newly minted provision. The exact language proposed by CONTU ran as follows:

§ 117. *Limitations on exclusive rights: computer programs*

Notwithstanding the provisions of § 106, it is not an infringement for the rightful possessor of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program *provided*:

- (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
- (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.¹⁸⁹

c. Additional Voices

A solid majority supported the foregoing recommendations. However, right from the start, Commissioner John Hersey expressed a different point of view.¹⁹⁰ As President of the Authors League of America, Commissioner Hersey came from the “authors and other copyright owners” contingent.¹⁹¹ In addition, one of the appointees to the “copyright users” bloc, Commissioner William S. Dix, also shared his doubts, but died before CONTU issued its

187. *Id.* at 12.

188. *Id.*

189. *Id.*

190. In her dissent, Commissioner Karpatkin recounted early views of her fellow commissioner, Commissioner Hersey. *Id.* at 37.

191. Significantly, the other three appointees to that slot were from publishing houses. See *id.* at 4; see also *supra* note 162 and accompanying text.

Final Report.¹⁹² Finally, two of the representatives of "the public" likewise harbored sympathies for the Hersey approach. One was Commissioner Karpatkin, the executive directive of Consumers Union, who issued her own dissent.¹⁹³ The other was my father, who issued a brief opinion concurring in the majority's recommendations.¹⁹⁴

The dissent of Commissioner Hersey takes the position that computer programs fail to constitute "writings" in the constitutional sense and thus are not eligible for protection under the copyright clause.¹⁹⁵ It eloquently argues that the majority has fallen prey to "distortion by shoehorn" on various technical points,¹⁹⁶ has relied on evidence that falls far short of proving the case,¹⁹⁷ and has threatened concentration of economic power.¹⁹⁸ At base, however, the illustrious author relied on a different conceptual framework for his approach to copyright. His eloquent views are set forth in the margin.¹⁹⁹ Its conclusion, though, is too irresistible to relegate there:

192. CONTU FINAL REPORT, *supra* note 156, at 37.

193. *Id.* at 37-46.

194. *Id.* at 26-27.

195. *Id.* at 28.

196. *Id.* at 31-34.

197. *Id.* at 34.

198. *Id.* at 35-36. Perhaps Commissioner Hersey foresaw future phenomena from Bill Gates to the AOL/Time Warner merger, when stating "[t]he country has lately seen an alarming trend toward the concentration of economic power in all the communications industries." *Id.* at 36.

199. Here is the essence of his viewpoint:

The aim of all writing, be it for art or use, is communication. Up to this time, as we have seen, copyright has always protected the means of expression of various forms of "writing" which were perceived, in every case, by the human sense for which they were intended: written words by the human eye, music by the ear, paintings by the eye, and so on. Here, for the first time, the protection of copyright would be offered to a "communication" with a machine.

This pollution of copyrighted "writings" with units of mechanical work would affect not only creators but also the general public. Placed beside such traditional end products as books, plays, motion pictures, television shows, dance, and music, under the aegis of copyright, what end products of computer programs would we find?

The overwhelming majority of program applications are mechanical and industrial: the monitoring of an assembly line in a factory; the microprocessors in an automobile; the aiming device of a weapons system; the coordination of approach patterns at an airport. An entire branch of the program industry is devoted to systems software—new techniques for more efficient uses of machines, for more efficient industrial processing.

Progress is progress, and we can guess that we must have all these products of human ingenuity to keep one jump ahead of entropy. It may reasonably be argued, as the Commission report does, that they reduce the load of human labor. But a definite danger to the quality of life must come with a blurring and merging of human and mechanical communication.

A society that accepts in any degree such equivalences of human beings and machines must become impoverished in the long run in those aspects of the human spirit which can never be fully quantified and which machines may be able in some distant future to linguistically “understand” but will never be able to experience, never be able to bring to life, never be able therefore to communicate. Those aspects include courage, love, integrity, trust, the touch of flesh, the fire of intuition, the yearning and aspirations of what poets so vaguely but so persistently call the soul—that bundle of qualities we think of as being embraced by the word humanity. This concern is by no means irrelevant to the issue of whether computer programs should be copyrighted. It is the heart of the matter.²⁰⁰

As a result, Commissioner Hersey agreed with his fellow commissioners that an amendment to the Copyright Act should follow in the wake of CONTU. However, his proposal lay at the opposite pole from the majority’s: He suggested amending the Copyright Act “to make it explicit that copyright protection does not extend to a computer program in the form in which it is capable of being used to control computer operations.”²⁰¹ We will return to that Hersey Corollary below.²⁰²

As one step in its education, this Commission has had the benefit of a book written by one of our witnesses, Professor Joseph Weizenbaum of the Massachusetts Institute of Technology, entitled *Computer Power and Human Reason*—a work which is both intricately technical and profoundly humanistic. Something that Professor Weizenbaum keeps emphasizing over and over again is the extent to which computer scientists, especially those who have worked on so-called artificial intelligence—“and large segments of the general public as well”—have come to accept the propositions “that men and computers are merely two different species or a more abstract genus called ‘information processing systems,’” that reason is nothing more than logic, and “that life is what is computable and only that.”

Id. at 36–37.

200. *Id.* at 37.

201. *Id.* The majority, without mentioning his name, offers its own rebuttal to Commissioner Hersey’s dissent:

At the same time, any dehumanizing effects which might be attributable to the increasing impact of computer uses upon society are utterly unrelated to the mode of protection employed to safeguard program language. It is clear that the uses to which computers are put depend entirely upon the intent of their users and not at all upon the mechanisms designed to protect programs. To say that copyright for programs somehow is responsible for social problems ostensibly caused by computer uses is akin to arguing against copyrights for the worst of television shows or against patent protection for components of gas-guzzling cars on the grounds that such works are detrimental to American culture.

Id. at 26; see *infra* Part V.D. We return to “the worst of television shows” in Part VI.B.

202. See *infra* Part V.D. That corollary interacts with the various MBN Postulates offered above.

At the end of the day, Vice-Chairman Nimmer concurred "in the Commission's opinion and in its recommendation regarding software."²⁰³ However, he added brief words to "share in a number of the doubts and concerns expressed in Commissioner Hersey's thoughtful dissenting opinion."²⁰⁴ In particular, he shared the concern that "open-ended copyright protection for all computer software" by applying copyright protection so broadly threatened to extend the Copyright Clause past its constitutional breaking point.²⁰⁵ "Still, at this time, knowing what we now know about the nature of the computer industry, its needs, and its potential for great contributions to the public welfare, I am prepared, on balance, to support the Commission's conclusions and recommendations."²⁰⁶

My father went further in suggesting "a possible line of demarcation which would distinguish between protectible and nonprotectible software in a manner more consistent with limiting such protection to the conventional copyright arena."²⁰⁷ Without interfering with the contemporaneous recommendation of CONTU, he drew the distinction between purely utilitarian works, such as "programs which control the heating and air-conditioning in a building, or which determine the flow of fuel in an engine, or which control traffic signals" as being potentially beyond the scope of copyright protection.²⁰⁸ On the other hand, he concluded that protection would be desirable for "those computer programs which produce works which themselves qualify for copyright protection"—examples being a program meant to run a copyrightable database compilation or a program designed for a computer game.²⁰⁹ "This suggestion is made not because I recommend its immediate implementation, but rather because it may prove useful in the years to come if the Commission's recommendation for protection of all software should prove unduly restrictive."²¹⁰ That recommendation to cabin copyright protection for computer software, which we can call MBN

203. CONTU FINAL REPORT, *supra* note 156, at 26.

204. *Id.*

205. *Id.*

206. *Id.* at 26–27.

207. *Id.* at 27.

208. *Id.* The majority condemned that distinction as "not consistent with the design of the Act of 1976, which was clearly to protect all works of authorship from the moment of their fixation in any tangible medium of expression. Further, it does not square with copyright practice past and present, which recognizes copyright protection for a work of authorship regardless of the uses to which it may be put." *Id.* at 21. It concluded as follows: "Although the distinction tries to achieve the separation of idea from form of expression, that objective is better realized through the courts exercising their judgment in particular cases." *Id.*

209. *Id.* at 27.

210. *Id.*

Postulate #5, is pregnant with meaning, as we shall see, for limiting the Digital Millennium Copyright Act to its proper domain.²¹¹

4. Resulting Amendment

Congress never incorporated CONTU's recommendations regarding photocopying²¹² into the statute. However, by the time that it finished its reports for the 1976 Act, it already incorporated therein CONTU-inspired guidelines regarding the minimum reach of fair use in the educational context.²¹³ Accordingly, for courts willing to consult legislative history,²¹⁴ these guidelines exert persuasive impact.²¹⁵ Nonetheless, CONTU's concrete proposal to revise section 107 remains unenacted.

Turning to the other major aspect of CONTU's recommendation, Congress proved far more receptive. It accepted CONTU's two recommendations regarding computer programs²¹⁶ almost verbatim, adding the suggested definition to section 101 and the new formulation of section 117.²¹⁷ As to the latter, it made only one substantive change:²¹⁸ In place of CONTU's formulation of the "rightful possessor" of a copy, Congress legislated protection only for the "owner of a copy."²¹⁹ What motivated the substitution? "The legislative history does not explain the reason for the

211. See *infra* Part V.B.

212. See *supra* Part II.C.3.a.

213. The reports for the 1976 Act include guidelines reached by the interested parties regarding the minimum reach of fair use in the educational context. See H.R. REP. NO. 94-1476, at 72 (1976).

214. For an examination of the conundrums applicable here, see generally David Nimmer, *Kisses Sweeter Than Wine*, in COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 445 (2003). One point of view on these guidelines is as follows:

The case for copyright infringement is very weak indeed if the court must rely on the unenacted theater of Committee Reports to find infringement. The fact that Congress saw fit, very likely in the interests of political expediency, to pay unusual deference to the "agreement" of interested parties about what they would like the law to be, even to the point of declaring (but not in the statute) that the parties' agreement was part of the committee's "understanding" of fair use, does not affect the rule of construction that binds this court.

Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1412 (6th Cir. 1996) (Ryan, J., dissenting).

215. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 919 n.5 (2d Cir. 1994); *Marcus v. Rowley*, 695 F.2d 1171, 1178-79 (9th Cir. 1983).

216. See *supra* Part II.C.3.b.

217. Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3028.

218. It also made insignificant cosmetic changes, such as substituting "section" for "\$" and eliminating the italics from "provided." *Id.*

219. *Id.*

change.”²²⁰ Nonetheless, courts draw the reasonable (if apparently tautological) conclusion “that Congress must have meant to require more than ‘rightful possession’ to trigger the section 117 defense.”²²¹

That oft-construed²²² amendment was the first alteration of substance to the 1976 Act.²²³ Litigation involving computer software has now become central to copyright jurisprudence.²²⁴

5. Personal Postscript

One more aspect of CONTU deserves mention—the friendship that developed between my father and his fellow commissioner, novelist John Hersey. I fondly recall being the personal beneficiary of that association, when the Herseys hosted my family at their retreat on Martha’s Vineyard. Though hospitality deserves acknowledgment for its intrinsic merit, in this instance a more thematic element also warrants that mention, as we shall see anon.²²⁵

D. Father Knows Best

We have now culled a good number of watchwords to guide us in the future.²²⁶ To recapitulate, they are as follows:

- MBN Postulate #1 acknowledges that whilst uncompensated copying cannot win moral approval, “surely higher even than the injunction against . . . piracy lies the principle of fidelity to law.”

220. *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999). The pertinent report contains but two brief paragraphs on the subject. See H. REP. NO. 96-1307, at 23-24 (1980). The second paragraph deals solely with the effect on state laws of unfair competition and trade secret law, a matter unrelated to the language change. *Id.* The first paragraph reads in full: “Section 12 embodies the recommendations of the Commission on new Technological Uses of Copyrighted Works with respect to clarifying the law of copyright of computer software.” *Id.* at 23. Of course, that blanket statement fails to account for the discrepancy between CONTU’s language (“rightful possessor”) and Congress’ (“owner”). Floor statements are similarly unilluminating. See, e.g., 126 CONG. REC. 30,365 (statement of Sen. Bayh) (“Finally, Mr. President, this amendment clarifies the 1976 Copyright Act as it is related to the ability to obtain copyrights on computer software. This language reflects that proposed by the Commission on New Technological Uses of Copyrighted Works and is supported by the Copyright Office.”).

221. *DSC Communications Corp.*, 170 F.3d at 1360.

222. A Lexis search on August 12, 2003, found forty-six cases mentioning CONTU.

223. See *infra* Part III.C.2.

224. For citation of cases, see 4 NIMMER ON COPYRIGHT, *supra* note 57, § 13.03[F]. One such case even reached the Supreme Court. See *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff’d by an equally divided court*, 516 U.S. 233 (1996).

225. See *infra* Part VI.B.

226. For the flow of this Article, see *supra* Part B of the Introduction.

- MBN Postulate #2 maintains that “the indiscriminate lumping of . . . duplication under the banner of ‘fair use,’ is unsupportable.”
- MBN Postulate #3 arises in tandem with the foregoing. It recognizes that there is a “no less antisocial” solution at the other end of the spectrum: “The smashing of machines as a means of avoiding technological displacements is a futile gesture.”
- MBN Postulate #4 champions a Presidential Copyright Commission to formulate judicious recommendations for amending copyright law as a way of producing better results than the rough-and-tumble of the political process.
- MBN Postulate #5 is limited to the domain of computer software. It acknowledges that as of 1980, the best solution then available might have been to accord that subject matter copyright protection, but steadfastly reserves the right to revisit that decision in light of future developments. In particular, “it may prove useful in the years to come if [the unfolding of events] should prove unduly restrictive” to draw a distinction: Purely utilitarian programs (controlling, for example, fuel flow or traffic signals) could be placed outside copyright, while protection would be limited to “those computer programs which produce works which themselves qualify for copyright protection.”
- MBN Postulate #6 returns us to the realm of the general. “[T]he flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles” is vastly preferable to “a body of detailed rules reminiscent of the Internal Revenue Code.”²²⁷
- In addition, my father’s friend, acolyte, and teacher deserves to enter the pantheon. The Hersey Corollary respects the sacred nature of human creation, and presumptively opposes assimilating functional processes into the realm of law consecrated to protecting works of authorship.

227. Note that this particular postulate has not yet been introduced. We will meet it presently. See *infra* Part III.C.

Once we see how far the copyright ship has begun to list of late,²²⁸ the stabilizing effect of these propositions in righting the vessel will become apparent.²²⁹

III. EVALUATING LEGISLATION

Having cast Professor Nimmer in the role of legislator, it is meet to inquire how well he discharged his duties. To answer the question, in turn, requires an underlying theory of which legislation qualifies as "good" and which legislation fails to meet that accolade. The inquiry here arises independently of policy choices—it seeks, instead, neutral criteria for success.²³⁰ Gauged by those standards, as we shall see, pseudo-Senator Mel Nimmer offers an invaluable object lesson to those who actually serve in the chambers of Congress today.

A. A Myriad of Choices

Though I spent my law school years at Yale²³¹—in a city heir to more than its share of urban problems—reality in no way sunk to the depths imagined by John Hersey's dystopia of an infinitely crowded New Haven, *My Petition for More Space*.²³² One line from that novel stands out as emblematic of the chaos characterizing that work: "People are shouting all sorts of contradictory advice."²³³ By some wondrous transmutation, that sentence also roughly describes the process by which laws emerge in the United States—in litigation before courts, each side vociferously champions its own interest; in lobbying before legislatures, the same occurs. The challenge for decisionmakers is how to react to that cacophony.

Judges in copyright cases have the text of the Copyright Act to fall back upon. They can mediate the parties' self-interested declarations by the language that Congress has enacted. A disinterested observer can praise or fault the judge's craft by how well it implements the congressional scheme.

228. See *infra* Parts III–IV.

229. See *infra* Parts V–VI.

230. See *supra* Part B of the Introduction. As noted therein, law A implementing a jukebox exemption beats law B aiming for the same target, regardless of one's substantive orientation as to whether such an exemption is a good idea.

231. As my father put it in the preface to the 1978 edition of the treatise, "David, who was weaned on copyright, is now a first year law student at an institution in New Haven." 1 NIMMER ON COPYRIGHT, *supra* note 57, at xv.

232. JOHN HERSEY, *MY PETITION FOR MORE SPACE* (1974). The pen that wrote that work is the same, of course, as the one that issued the CONTU dissent. See *supra* Part II.C.3.c.

233. HERSEY, *supra* note 232, at 72.

Legislators, by contrast, are free to write upon a blank slate. Even in the conscientious discharge of their duties, only their view of “the public interest” constrains the range of decision. Parties directly benefited or hurt by the terms of legislation are entitled to their own views—but from what perspective can the disinterested observer pass judgment?

B. Formal Indicia of Success

An almost infinite number of perspectives can inform one’s evaluation of the success or failure of copyright legislation. Individuals may judge a given era’s copyright enactment as godless because it includes pornography within the scope of protection;²³⁴ as unfair because it singles out sound recordings to deny them full performance rights;²³⁵ as misguided because protection for American typesetters should not clutter up copyright legislation;²³⁶ or as perverse because it exempts the Mafia-run jukebox industry²³⁷ from the payment of performance royalties.²³⁸ Each of those judgments quarrels with Congress’ substantive judgment.²³⁹ Yet those substantive judgments themselves reflect, in each instance, a political accommodation that only Congress has the institutional competence to reach.²⁴⁰ The question is whether one can stand above that fray, to offer policy-neutral evaluations.

234. See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858 (5th Cir. 1979); see also Part VI.B. An alternative perspective is that it is blasphemous because it accords protection to graven images in contravention of Allah’s edicts. See KHALED ABOU EL FADL, *SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 278 (2001); David Nimmer, *Time and Space*, in *COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA*, *supra* note 214, at 169, 178.

235. See *infra* Part IV.E.

236. The matter under discussion is the now defunct manufacturing clause. See *supra* note 119 and accompanying text.

237. No imputation is intended as to the current status. But during the decades before the jukebox compulsory license became a dead letter, see text accompanying *infra* note 406, a constant refrain connected that industry to organized crime, see KERRY SEGRAVE, *JUKEBOXES: AN AMERICAN SOCIAL HISTORY* 124, 164, 219–20, 266–70 (2002) (detailing allegations of organized crime ties in 1938, 1943, 1946, and 1955). On March 31, 1960, the Senate Select Committee on Improper Activities in the Labor or Management Field issued a 150-page Final Report on The Coin-Operated Music, Amusement, and Cigarette Vending Machine Industry detailing “[a]llarming examples of criminal domination,” including the fact that remnants of the Al Capone Syndicate continued to dominate the jukebox industry in Chicago. S. REP. NO. 86-1139, at 773 (1960).

238. See text accompanying *supra* note 117.

239. The critics in each of those instances, in other words, maintain that Congress is wrong in the exercise of its political determination.

240. The following language is representative: “Congress struck a balance. The compromise it reached, depending upon future technological and commercial developments, may or may not prove ideal. But the solution it enacted is clear.” *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 304 (S.D.N.Y. 2000).

1. Criteria

In searching for a neutral vantage point from which to judge Congress' enactments, the challenge is to articulate principles of general application, acceptable to a wide spectrum of onlookers on both sides of each of the foregoing substantive issues and countless others.²⁴¹ This Article proceeds on the basis of four primary axioms of the ingredients that combine to form "good" laws.²⁴² It also keeps other desiderata in reserve for consideration after the full panoply of copyright amendments has been set forth.²⁴³ Those *formal* requisites for success follow.

a. Coherence

The first is that the law should be coherent; its pieces should fit together, so that it inclines in a unified direction. This principle requires that provisions of Title 17 of the United States Code fit together to form a seamless whole. Distinctions drawn in one part of the code should apply to works implicated in another.

Coherence can be viewed as a requirement for consistency in addition to a harmonious interrelationship of parts. The concern extends to all levels. A given amendment fails to be coherent to the extent that its own parts are mutually contradictory, as the most obvious example. But other levels of incoherence are also possible. For instance, the same amendment would fail, even absent internal contradictions, to the extent that it was designed to be incorporated into the Copyright Act as a whole, and contained features that were inconsistent with some of that Act's antecedent elements.

In addition, one must look "up" and "down" to give coherency its full due. To the extent that a given amendment, albeit consistent internally and with the balance of Title 17, nonetheless preserves state laws that undo its operation, it fails the coherency test.²⁴⁴ By the same measure, an internally

241. See *supra* Part B of the Introduction. That is, whereas some may advance good reasons to exclude pornography from protection and others may counter that position, I hope that there can be general agreement that laws should be coherent, instead of excluding obscene materials from protection in some provisions and affording special solicitude to XXX-rated theaters in others, for example. Of course, the disagreement over what qualifies as "coherence" can be every bit as vehement as the substantive arguments that the above formal axioms avoid. The point is not that controversy evaporates from this framework; the point is to try to start from a common vantage point in performing the analysis.

242. See *infra* Part III.B.1.a–d. Once again, law Λ implementing a jukebox exemption beats law Ξ aiming for the same target, regardless of one's substantive orientation whether such an exemption is a good idea. See *supra* Part B of the Introduction. More flesh comes onto those bones *infra* Part III.B.2.

243. See *infra* Part III.B.1.e; see also *infra* Part III.D.

244. This problem plagues the Visual Artists Rights Act of 1990, as recounted *infra* note 395.

consistent amendment fails to the extent that it contravenes the United States Constitution.²⁴⁵ Finally, in an era of trade harmonization,²⁴⁶ the same deficit applies to the extent that Congress violates the discipline of the World Trade Organization.²⁴⁷

b. Transparency

Ideally, the law's features should be relatively transparent, so that an educated layman could grasp what is required to meet its strictures.²⁴⁸ This principle aspires towards comprehensibility. As contrasted with the Internal Revenue Code, it would be salutary for copyright doctrine if actors could conform their conduct to Title 17 of the United States Code without the need to engage a specialist in the field.²⁴⁹

To explicate coherence and transparency together, consider the following hypothetical enactments:

§ A. Any person entitled to copyright protection may secure it by affixing to each authorized copy a notice of copyright consisting of the symbol

©, the date of creation, and the name of the copyright proprietor.²⁵⁰

§ B. Copyright applies to the lyrics of songs but not to their titles.²⁵¹

Each of those provisions is both coherent and transparent. In terms of *coherence*, the boundaries that the statute sets can be grasped consistently with the Act's other provisions. To illustrate by means of a counterfactual, the statute would become incoherent to the extent that it simultaneously set forth inconsistent strictures, such as section A together with another

245. See discussion *infra* note 364 on the Seventh Amendment and *infra* note 382 on the Eleventh Amendment.

246. Among the copyright amendments confronted below that Congress passed to achieve that goal are the Berne Convention Implementation Act of 1988, Architectural Works Copyright Protection Act, Visual Artists Rights Act of 1990, Semiconductor International Protection Extension Act of 1991, Copyright Renewal Act of 1992, NAFTA Implementation Act, and Uruguay Round Agreements Act. See *infra* Part III.C.2–3. In addition, Congress claimed that the Sonny Bono Copyright Term Extension Act was necessary for the sake of international harmonization, even if not for treaty compliance. See *infra* Part III.B.2.

247. See *infra* Part III.B.2 (discussing the Fairness in Music Licensing Act).

248. At this juncture, I should like to thank Professor Antoon Quaadvlieg of the University of Nijmegen, for the kind invitation to join ITeR's conference in Holland on "Sophistication vs. Transparency," which greatly helped to clarify my thinking on these issues.

249. See *infra* Part III.C (quoting Professor Nimmer's comparison of the 1976 Copyright Act to the tax code).

250. This provision is loosely based on sections 10 and 19 of the 1909 Copyright Act. See Act of July 30, 1947, §§ 10, 19, 61 Stat. 652, 656, 658 (current version at 17 U.S.C. § 401 (2000)).

251. This provision is based in part on 17 U.S.C. § 102(a)(2) (2000), but also includes the common law gloss excluding protection for titles. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 2.16.

provision mandating that “no formalities are ever required as a condition for copyright protection” or “copyright attaches irreversibly to all distinctive creations of the mind.”

In addition, each of those provisions is reasonably *transparent*; that is to say, one who reviews those statutory provisions, even without engaging copyright counsel, can obtain a reasonable notion of what the law provides. The qualification of “reasonable” is appended because no corner at all of copyright law is free from its own potential exegesis. Consider, for example, the song title *Let It Snow, Let It Snow, Let It Snow*. By itself, section B would disqualify that phrase from copyright protection. Accordingly, a third party who appropriated that repeated phrase for its own benefit would escape liability. However, even that stripped-down situation is not so simple. The lyrics to the subject song²⁵² read in part as follows:

Oh, the weather outside is frightful,
But the fire is so delightful,
And since we've no place to go,
Let it snow, let it snow, let it snow.

Because section B simultaneously clothes song lyrics with copyright, the foregoing quatrain falls inside the law's protection. As a consequence, a third party will be held liable for copying portions of those lyrics, provided that she crosses the threshold of substantial similarity.²⁵³ Granting for current purposes that copying, “Let it snow, let it snow, let it snow,” is deemed substantially similar, then, on the one hand, plaintiff has established the ingredients for copyright infringement of those protected lyrics. But on the other hand, the copying that took place was of the title itself, which should escape liability. In this fashion, even the seemingly pellucid requirements of section B are less than totally transparent.

Turning to section A, one might argue that it is totally coherent and totally transparent as drafted. The problem is that completely transparent laws seldom comport with any colorable notion of equity—the broader the line, the more likely it is to paint borderline cases undesirably.²⁵⁴ For that

252. See *Shafer v. Commander, Army & Air Force Exch. Serv.*, 667 F. Supp. 414, 418 n.1 (N.D. Tex. 1985).

253. See 4 NIMMER ON COPYRIGHT, *supra* note 57, § 13.03.

254. This pitfall is scarcely unique to areas of specialized application such as copyright; rather, it is ubiquitous. Consider the dialog that unfolded at my house the very night after I composed the above text:

FATHER: Why did you answer the doorbell before we got home? You know the rule: Never let anyone in while we are out.
EIGHT YEAR OLD: Not even our best friend from next door?
MOTHER: “Nobody” means no one!

reason, not even the harshly punitive approach of the 1909 Act²⁵⁵ approached the univocal strictures of hypothetical section B.²⁵⁶ Instead, copyright notice under that enactment applied only to works that were “published”—a vastly complicated and amorphous term that itself required elaborate analysis (including distinguishing a “general” publication from a “limited” publication), which made the statute far less than transparent.²⁵⁷ Moreover, not even that limitation was enough to safeguard legitimate interests—the 1909 Act also provided that notice was not required in the case of inadvertent omission from a small number of copies.²⁵⁸ In these various particulars, the statute deliberately failed the test of transparency in order to achieve the greater goal of justice.

Further appreciation for the interplay between coherence and transparency emerges from consideration of how Congress in 1976 codified the common law fair use doctrine that had developed until that date, by using the following straightforward language:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

TEN YEAR OLD: What if the police are there?

PARENTS: Well, that's different.

EIGHT YEAR OLD: What if you are locked outside and you tell us that you forgot your keys so we should let you in? We still should keep you outside and let “nobody” in?

As these snippets suggest, absurdity is never far when any blanket enactment is under discussion. See Nimmer, *supra* note 214, at 511 n.424 (murderous heir); Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMUL REV. 31, 45 (2000).

255. See *supra* note 250 and accompanying text.

256. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 7.13[A][2].

257. See 1 *id.* § 4.13. The concept of “publication” has been a particularly troublesome one to both copyright and the law in general, leading Judge Frank to decry its unwitting transportation across legal boundaries as “the one-word-one-meaning-only fallacy.” *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956).

258. See Act of July 30, 1947, § 21, 61 Stat. 652, 658 (repealed 1909 Act); Act of Oct. 19, 1976, Pub. L. No. 94-533, § 405(a)(1), 90 Stat. 2541, 2578 (comparable provision in 1976 Act, also later largely repealed); see also 2 NIMMER ON COPYRIGHT, *supra* note 57, § 7.13[A].

- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁵⁹

Those four factors are largely coherent—although the Procrustean bed between “commercial” and “news reporting” does not really pertain to our society²⁶⁰ and the fourth factor has the danger of collapsing into a tautological effect on the potential market by virtue of copying having taken place.²⁶¹ More fundamentally, however, those four factors fail abysmally to provide transparent guidance in advance for actors wishing to comport their behavior with the law.²⁶² As has often been remarked, it is only after litigating a case all the way to the Supreme Court level that one truly knows whether a previous utilization qualified as “fair” or “unfair.”²⁶³

Were transparency the only goal here, then Congress could pass an alternative statute. Consider two possibilities:

§ C A use is “fair” if it qualifies for at least two of the following factors: (1) The use is noncommercial; (2) the use is made of a published, factual work; (3) quantitatively less than 60% of the copyrighted work is copied; and (4) the utilization causes no actual market harm to the copyright owner.

§ D Anyone who wishes to determine whether a use is “fair” may apply to the Board of Fair Use Determinations, which will flip a coin and inform the applicant of the result. That determination shall be deemed binding in all future litigation.

Each of those variants is far more transparent than the actual section 107 codified into the Act. The only problem is that each would lead to massive injustice in concrete cases. Congress has emphatically declined to formulate an advance algorithm that could provide a one-size-fits-all solution to the various conundrums of fair use. Instead, it wishes courts to

259. Act of Oct. 19, 1976 § 107, 90 Stat. at 2546 (codified at 17 U.S.C. § 107). For a later addition to this statutory text, see *infra* Part IV.G.1.

260. As Judge Leval has noted, “the statute somewhat unrealistically paints the world into two corners—the venal commercial and the altruistic instructive.” *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2d Cir. 1987).

261. It has been commented:

A danger of circularity is posed here—a potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff’s work, which use could in turn be defined in terms of the relevant potential market.

4 NIMMER ON COPYRIGHT, *supra* note 57, § 13.05[A][4].

262. See generally David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 263.

263. *Id.* at 287 n.95.

be free²⁶⁴ to adjudicate as justice demands such scenarios, unanticipated when the 1976 Act came into being, as how to treat the use of thumbnail sketches on the Internet of photographs posted on other web sites;²⁶⁵ broadcasting copyrighted photographs used as evidence in the O.J. murder trial;²⁶⁶ reprinting an allegory from a police newsletter to expose departmental racism;²⁶⁷ and retooling a popular image to generate "spirit messages" put on by cadets during the Army/Navy game.²⁶⁸ As much as transparency gains in allowing advance planning of one's affairs, more is lost by sacrificing the ability to achieve justice in each of the foregoing cases as well as countless others.²⁶⁹ For these reasons, Congress has deliberately sacrificed transparency in the interest of equity.

(The foregoing lesson offers a caveat to placing undue emphasis on the *formal* principles exalted throughout this Article. In principle, a coherent, transparent, real, and broad provision beats one lacking those attributes. But when the *substantive* goals of copyright law demand sacrifice of one of those principles, then to insist on formal goodness is to lose sight of the larger goal of the legislation. Lest the caveat be viewed as outshining the basic proposition, however, one must hasten to add that Congress' substantive goals do not routinely require such retreat. Indeed, those instances strike me as rare. Nonetheless, they are noted herein when pertinent.)

c. Reality

The law should provide guidance as to real-world concerns, not airy, speculative, and contingent phenomena. This principle mandates that when Congress passes a law, its application to contemporary activities should be explicit and clear. Though the technology will inevitably continue to progress, hence posing questions of future application, at least there should be no doubt how to treat matters of present application. Thus, to

264. At stake here are values that run much more deeply than copyright's fair use doctrine: Texts that remain open stay alive, relevant, and vibrant. But texts need another form of liberation. They need not only to become independent of the domineering paternalism of their authors, but also of the suffocating authoritarianism of their readers. If there is going to be a dynamic and vigorous process of determination in which the text plays a central role, there must be a continuing state of indeterminacy.

ABOU EL FADL, *supra* note 234, at 264.

265. *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *aff'd in part, rev'd in part*, 280 F.3d 934 (9th Cir. 2002), *revised*, 336 F.3d 811 (9th Cir. 2003).

266. *Kulik Photography v. Cochran*, 975 F. Supp. 812, 812 (E.D. Va. 1997).

267. *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 675 (D. Minn. 1995).

268. *Williams v. Columbia Broad. Sys., Inc.*, 57 F. Supp. 2d 961, 964 (C.D. Cal. 1999).

269. For numerous other strange cases, see the charts in *Nimmer, supra* note 262, at 269–77.

the extent that Congress passed a compulsory license in the twentieth century applicable to jukeboxes, that law passed the reality test, regardless of whether onlookers view it as embodying good or bad policy.²⁷⁰ By contrast, to the extent that Congress wishes to set the parameters today for dream-auditing to be undertaken in the future by invention of the oneirographologisticon,²⁷¹ that activity would fail to pass the reality principle.

d. Breadth

Finally, although some constituents are bound to like any given copyright amendment more than others, its broad strokes should serve the interests of the country as a whole, rather than the parochial interests of a few. This principle posits that Title 17 of the United States Code should regulate affairs across the country. It condemns special-interest legislation undertaken for the benefit of a privileged few rather than along neutral lines for the citizenry as a whole.²⁷² Congress fell afoul of this principle when it tailored special protection for TCI Music, Digital Cable Radio Associates, and Muzak that was not applicable to other individuals and corporations.²⁷³ Although matters of limited import—the rules of the Writers' Guild of America,²⁷⁴ to take one example—are unquestionably significant in the creation of copyrightable expression, their circumscribed nature suits them more to codification by private agreement or by regulation than by statute.

270. We have already seen Professor Nimmer's condemnation. See *supra* note 117 and accompanying text.

271. See David Nimmer, *Back From the Future: A Proleptic Review*, in COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA, *supra* note 214, at 519, 531.

272. Recent copyright laws substitute mandatory and detailed schemes for bilateral agreement among the affected parties, "which means that if the statutes don't get things exactly right (and they don't), people can't transact around the errors." Frank H. Easterbrook, *Who Decides the Extent of Rights in Intellectual Property?*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 409 (Rochelle Cooper Dreyfuss et al. eds., 2001). When laws are general, by contrast, and interested parties are likely to be "on both sides of a class of transactions, they tend to support legislators who favor efficient rules." *Id.* at 408.

273. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[D][1][b] & n.268 (quoting H.R. REP. NO. 105-796, at 81 (1998)); see also *infra* note 561.

274. Before becoming a professor, my father was actually instrumental in that domain as well: "Big changes came for screenwriters in 1960. Melville Nimmer, then general counsel for the WGA [Writers Guild of America], west . . . , instigated the creation of the first separated rights provisions (aside from publication and dramatic stage rights) on behalf of screenwriters." Grace Reiner, *Separation of Rights for Screen and Television Writers*, L.A. LAW., Apr. 2001, at 28, 30.

e. Other Desiderata

Of course, other considerations are also operative.²⁷⁵ For example, laws should mandate activities compliance with which is *possible* rather than ordering actions outside of human control;²⁷⁶ they should be *promulgated* rather than being maintained secretly; they should reflect *deliberate* choices reached upon reasoned consideration rather than random drift as an artifact of sloppy drafting; they should ideally be *prospective* rather than defining activity as illegal after the fact; they should be adopted through a scheme of *public accountability* rather than being slipped unawares into unrelated legislation; and they should demonstrate some *stability* rather than constantly shifting shape.

This Article relegates to secondary consideration those (and other) variant standards.²⁷⁷ Starting with the *possible* and *promulgated* standards, happily all copyright enactments have complied; accordingly, it would be an unilluminating exercise to track compliance over time with those desiderata. The same is largely true of the *prospective* and *deliberate* standards, although slippage from them is noted below where applicable.²⁷⁸ As to *public accountability*, it was also universally followed²⁷⁹—until the infamous events of 1999, recounted below.²⁸⁰ As to *stability*, there is no ready metric for evaluating individual

275. See Andrei Marmor, *The Rule of Law and Its Limits*, 23 J.L. & PHIL. 1 (2004). Commentators adduce a host of desiderata that should govern new copyright legislation. See Jessica Litman, *Revising Copyright Law for the Information Age*, in COPY FIGHTS, *supra* note 129, at 125, 133.

276. Consider the following law: “Everyone over eighteen years of age must fly unaided from Point A to Point B.” The text is clear. It is noncontradictory, and it deals with actual obligations rather than contingent speculations. The only problem with it is that compliance is physically impossible. It is for that reason standing alone a bad law, considered from the perspective of formal criteria. If Congress were to legislate that “copyright forbids others than the copyright proprietor from thinking thoughts derived from the protected expression of others or from allowing to run through their mind a copyrighted melody,” then it would fall afoul of the possibility principle. Happily, Title 17 contains no such prohibitions. See Tom G. Palmer, *Are Patents and Copyrights Morally Justified*, in COPY FIGHTS, *supra* note 129, at 43, 71 (“Would I be justified in taking you to court if I could prove that you had remembered the name of the lead character in the novel?”).

277. See *infra* Part III.D.

278. See *infra* Part III.D.4–5.

279. One could posit, either as an aspect of accountability or as a stand-alone factor, that amendments to the Copyright Act be adopted because they reflect each legislator’s view of optimal copyright policy rather than a reaction to a donation. This *non-bribery* criterion, unlike all the other possibilities considered throughout this Article, would require independent historical research, in this instance correlating campaign contributions against voting records. No such exercise is attempted herein. See *infra* note 294; cf. Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945 (1997).

280. See *infra* Part III.D.2. Accordingly, it is not worthwhile to focus on this criterion over the course of multiple amendments, as the timeline would show universal compliance, with a single blip in 1999.

amendments in terms of how they measure up. Rather, this standard merely states that, over time, there should not be undue ferment to the underlying statutory mixture.²⁸¹

By contrast, the four primary axioms adopted above are particularly useful devices to measure copyright legislation.²⁸² As will be seen below, usage of these four standards reveals an interesting progression about how Congress has exercised its duties in promulgating the current Act and later amending it.²⁸³ To anticipate the conclusion, it points towards a deterioration over the past decade.²⁸⁴

2. Sample Application

Presently, we shall see how each of the above four factors applies to every provision of, and every amendment to, the Copyright Act of 1976.²⁸⁵ Before running through those summaries, it is useful to comment on the method of application.

As a useful case in point, consider the two amendments added to the Copyright Act on October 27, 1998. On that day, Congress adopted both the Sonny Bono Copyright Term Extension Act (Sonny Bono CTEA) and the Fairness in Music Licensing Act of 1998 (FMLA).²⁸⁶ As a substantive matter, both have attracted heavy criticism in scholarly commentary,²⁸⁷ along with countervailing support²⁸⁸ (most obviously in the halls of Congress).

281. See *infra* Part III.D.3.

282. It should not be pretended that a hermetic division separates each standard from every other. As we shall see below, a given feature could reflect lack of *coherence*, or of *stability*, or even of *possibility*.

283. By contrast, were the focus on *promulgation*, for example, the conclusion would be very boring: The 1976 Act was publicly promulgated, as has been every amendment since.

284. Compare *infra* Part III.C.1.c, and III.C.2.b, with *infra* Part III.C.3.b.

285. See *infra* Part III.C.

286. The Supreme Court has labeled the latter amendment "Title II of the CTEA." See *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003). Technically, that characterization is inaccurate; rather, the FMLA was Title II that was bundled together with the Sonny Bono CTEA as Title I to form the Act of October 27, 1998. The relationship between the two provisions is that "restaurateurs held the Sonny Bono Copyright Term Extension Act hostage until they secured passage of this unrelated legislation in their own interest." 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][b] (footnotes omitted).

287. For a criticism of the Sonny Bono CTEA, see, for example, Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996). For criticisms of the FMLA, see Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000); Lessig, *supra* note 1.

288. For a defense of the Sonny Bono CTEA, see, for example, Arthur R. Miller, *Copyright Term Extension: Boon for American Creators and the American Economy*, 45 J. COPYRIGHT SOC'Y USA 319 (1998). For a defense of the FMLA, I have no idea where to look, as I have never seen

Nonetheless, the instant focus is not on *substance*—instead, it concerns whether Congress achieved success gauged by the *formal* criteria posited above. When that metric is used, the Sonny Bono CTEA passes with flying colors, whereas the FMLA falls in ignominious defeat. The lessons from this juxtaposition will stand us in good stead as we confront the various other enactments summarized below.

The reason the Sonny Bono CTEA achieved formal success is that its drafters meticulously went through the Copyright Act and located every instance of copyright duration, to which they methodically added twenty years. Thus, the terminus for protection of various unpublished works moved from December 31, 2027, to December 31, 2047; the deadline for preemption of state law protection for pre-1972 sound recordings advanced from February 15, 2047, to February 15, 2067; those places that the 1976 Act accorded protection for fifty years *post mortem auctoris* were extended to seventy years *pma*; and the structure for termination of a transfer was likewise conceptualized and integrated into the statute using terms consistent with everything that had come before.²⁸⁹ Together with other appropriate amendments,²⁹⁰ no technical glitches remained in the amended Act.²⁹¹ Whether one celebrates or bemoans the phenomenon, the resulting state of affairs following enactment of the Sonny Bono CTEA is perfectly clear. Gauged by purely formal criteria, that amendment is therefore a success.²⁹² It is coherent, both with itself and with greater copyright doctrine in general;²⁹³ it is transparent, in that it leaves no doubt that every avenue of copyright protection for nonlapsed works has been extended for twenty years; it exerts real impact, inasmuch as it immediately secures for continued protection works from the late 1920s, which otherwise already would have lapsed into the public domain;

anyone try to offer a principled defense for it. As was said on the House floor: “What is the public policy purpose? I have been asking that question for 2 years. I have never heard any answer suggested.” 144 CONG. REC. H9951 (daily ed. Oct. 7, 1998) (statement of Rep. Nadler).

289. See 17 U.S.C. § 304(d) (2000).

290. For instance, the amendment changed 75 to 95, 47 to 67, and 100 to 120 where appropriate.

291. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

292. The one piece of the Sonny Bono CTEA that is less than jurisprudentially clear is that entitled “Voluntary Negotiation Regarding Division of Royalties.” *Id.* § 105, 112 Stat. 2529. That provision simply sets forth “the sense of the Congress” rather than binding standards. Nonetheless, its force is sufficiently clear as to put the relevant parties on notice as to how they should comport themselves to avoid being the target of subsequent legislation. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 9.11[B][5]. Even this provision, therefore, escapes the larger defects that will be cataloged below.

293. Had the minority approach in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), prevailed, then the opposite conclusion would have been required: Under that dissenting viewpoint, the failure of the Sonny Bono CTEA to comport with constitutional requirements would have rendered it inconsistent with the larger fabric of the law.

and it exerts broad impact, both nationwide and across all categories of copyrightable works.²⁹⁴

When we turn to the FMLA, however, an entirely different dynamic unfolds. That amendment revamped section 110(5) of the Copyright Act, which Congress inserted in 1976 roughly to codify the ruling of *Twentieth Century Music Corp. v. Aiken*.²⁹⁵ Given that highly divergent interpretations of that provision had emerged over two decades,²⁹⁶ Congress intervened to allow selected restaurateurs to play music in their establishment without fear of running afoul of an adverse interpretation of section 110(5). So far so good; the devil comes in the details.

First, the FMLA stands entirely at odds with the greater process of international harmonization,²⁹⁷ which the 1976 Act initiated and which many subsequent amendments continued.²⁹⁸ Numerous legislators took to the floor of their chambers to denounce this legislation as inconsistent with the treaty obligations of the United States—an interpretation in which various agencies of the federal government concurred.²⁹⁹ Accordingly, the very enterprise of this fairness-in-music legislation was to afford a break to a special-interest group at the expense of the coherence of Title 17 in the greater context of world copyright doctrine. The macule of the Act therefore began at its conception. True to predictions, a TRIPs Dispute Resolution Union panel duly rendered an adverse decision against the United States for having enacted this amendment.³⁰⁰

In addition, the stilted language that Congress adopted to effectuate the bastardized intent of this amendment was equally flawed. One aspect of

294. It may be that most of the affected works from the 1920s rescued by this amendment belong to the entities that lobbied for its enactment. Proof of that proposition would not detract from the formal breadth of application of the Sonny Bono CTEA, although the question would thereupon arise whether a different neutral criterion had been violated, such as *non-bribery*. See *supra* note 279.

295. 422 U.S. 151 (1975).

296. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][c][ii].

297. Consider the following:

Perhaps it is not an overstatement to posit that the Fairness in Music Licensing Act of 1998 undermines the purpose of most of the major copyright initiatives that Congress has spearheaded since Berne adherence in 1989. Indeed, its underlying philosophy is at war with the Sonny Bono Copyright Term Extension Act, the very piece of legislation with which it was consolidated for passage!

Id. § 8.18[C][2][e] (footnotes omitted).

298. For a list, see *supra* note 246.

299. For the citations, see Nimmer, *supra* note 214, at 461–62.

300. United States—Section 110(5) of the U.S. Copyright Act, No. WT/DS160/R (WTO Dispute Settlement Body June 15, 2000). See generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001).

it applies, for instance, to “communication by an establishment of a transmission or retransmission embodying a performance *or display* of a nondramatic musical work.”³⁰¹ When does a restaurant engage in “display” of a musical work? The only answer that comes to mind would unfold in the event of a television broadcast of the staff notation for a musical composition.³⁰² That interpretation is sufficiently quixotic to fall afoul of the *reality* standard (besides hovering on the border of *incoherence*). Its limitation to a food service or drinking establishment “in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose)”³⁰³ smacks of special interest legislation for the benefit of a defined class, thereby offending the *breadth* principle (in addition to the special-interest character noted above).³⁰⁴

Finally, the amendment has serious *transparency* problems: Instead of turning its back on the old section 110(5) because of a perception that courts had misunderstood it,³⁰⁵ Congress expressly kept its language intact.³⁰⁶ The upshot is that even after its effective date of January 25, 1999, the FMLA allows parties to argue in the alternative, thus perpetuating all the anomalies that the amendment was designed to obviate.³⁰⁷ Gauged by our now-familiar four formal criteria, this amendment is therefore a failure.

These considerations are not offered as the final word evaluating the rightness or wrongness of either of the foregoing amendments—those judgments raise questions of substance rather than form. The purpose is only to conclude that, once Congress set for itself the goals of extending copyright duration and affording relief to restaurateurs, there were good ways and bad ways to achieve those results. The foregoing analysis shows that on October 27, 1998, Congress went in one direction as to the former and in the opposite as to the latter.

301. 17 U.S.C. § 110(5)(B) (2000) (emphasis added).

302. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][b]; see *infra* note 560.

303. 17 U.S.C. § 110(5)(B)(ii).

304. In some sense, the reference to 3,750 feet could be taken as restoring the standards derived from *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 157 (1975). That question itself implicates a hot dispute in the jurisprudence. See, e.g., *Broad Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1493–94 & n.13 (7th Cir. 1991). See generally cases cited in 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][c] nn.99.76–99.81.

305. See *infra* Part IV.G.

306. The FMLA adds a new paragraph (B) to section 110(5), and recodifies the original provision as paragraph (A). Fairness in Music Licensing Act of 1988, Pub. L. No. 105-298, § 202(a)(1), 112 Stat. 2830 (amended 1999).

307. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][c][i].

C. Applying these Criteria to the Copyright Act

Given that the crowning achievement of my father's career was the publication of his definitive treatise charting the contours of the 1976 Act,³⁰⁸ it is appropriate to step back and evaluate that enactment as a legislative achievement. When enacted in 1976, the current Act supplanted the then-governing 1909 Copyright Act. As to that predecessor law, its relatively brief length—indeed, the almost laconic manner of its drafting—meant that many a concrete factual situation needed to be resolved by the courts with “an almost complete absence of guidance from the terms of the Copyright Act,” as Mel Nimmer put it.³⁰⁹ The new Act effectuated a sea change as it aimed to avoid the foregoing reproach:

That particular defect has been remedied, but with a vengeance. Where previously the statute had too little to say in many vital copyright areas, it may now be argued that it says too much. I for one regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Code. [One] suspects that many of the more complicated provisions are not so much an expression of anyone's ideal as to how to draft legislation, but are rather the product of hard-fought compromises between conflicting interest groups.³¹⁰

Wise words. But even Professor Nimmer could little realize just how prescient his words would become when, through the course of almost four dozen amendments over the next quarter-century, the Copyright Act would in some regards exceed the tax code as a template for involution. In any event, my father's preference for a common law system that enunciates broad principles for courts to apply to concrete situations over an elaborate skein of legislation aping the Internal Revenue Code qualifies as MBN Postulate #6.

1. At Enactment

The opposition between “flexibility and pristine simplicity” and “a body of detailed rules reminiscent of the Internal Revenue Code” can be viewed from another perspective. For not every provision of the current Act, even at

308. See *supra* Part II.A.

309. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963), *quoted in* 1 NIMMER ON COPYRIGHT, *supra* note 57, at xvii (Preface to the Original Edition).

310. 1 NIMMER ON COPYRIGHT, *supra* note 57, at xiii–xiv (Preface to the 1978 Comprehensive Treaty Revision).

its enactment in 1976, betrayed the latter sensibility. Rather, some of its features are eminently readable—a case in point being section 102(b):

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

The problem with the Act is that, in contrast to that reasonable formulation, other parts of it continue page after unreadable page,³¹¹ the result being that it is difficult to make any sense of what is being enacted, as the cable compulsory license set forth in the margin demonstrates.³¹²

311. See David Nimmer, *Éloge du lisible*, in *LE LISIBLE ET L'ILLISIBLE* [THE LEGIBLE AND THE ILLEGIBLE] 139 (Ysolde Gendreau ed., 2003).

312. It would violate the Eighth Amendment to set forth the entirety of that provision. Consider instead just one of its six paragraphs:

(d) Statutory License For Secondary Transmissions By Cable Systems.

(1) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may from time to time prescribe by regulation. In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such

primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total \$80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which \$80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than \$80,000 but less than \$160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to \$80,000; and (ii) 1 per centum of any gross receipts in excess of \$80,000 but less than \$160,000, regardless of the number of distant signal equivalents, if any.

(2) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Librarian of Congress in the event no controversy over distribution exists, or by a copyright arbitration royalty panel in the event a controversy over such distribution exists.

(3) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

a. Catalog of Provisions

What are we to make of an enactment that juxtaposes “pristine simplicity” against stultifying details in every chapter? To get some sense of the Act as a whole, it is first necessary to divide it into its components. The following table lists each provision³¹³ of the Copyright Act of 1976 as it stood at its enactment. It lists the rough page-length³¹⁴ of each provision, summarizes

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A)[(1)(A)]; and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(4) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Librarian of Congress, in accordance with requirements that the Librarian of Congress shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights, determine whether there exists a controversy concerning the distribution of royalty fees. If the Librarian determines that no such controversy exists, the Librarian shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled to such fees, or to their designated agents. If the Librarian finds the existence of a controversy, the Librarian shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

17 U.S.C. § 111(d) (2000).

313. In general, the table treats each section of the Act. Nonetheless, there are exceptions. For instance, inasmuch as section 110 concatenates together a series of unrelated exemptions, each of its paragraphs are treated separately below. By the same token, section 304(c) is broken out from the remainder of that section, inasmuch as it replicates the matters treated by section 203.

314. Estimates herein are derived from 17 U.S.C.A. §§ 101-810 (West 1977).

how often it has resulted in reported judicial opinions, lists how often I have been called upon for consultation concerning its scope, and then concludes whether that provision, in my estimation, amounts to a provision of nationwide significance, along the lines of the exclusion of ideas from copyright protection in section 102(b); or, by contrast, is of little import beyond a subculture of affected parties who habitually litigate their entitlements within the jurisdiction of the courts of the District of Columbia, as is the cable compulsory license.³¹⁵

TABLE A
PROVISIONS OF 1976 ACT UPON ENACTMENT

Provision	Short Description	Page-Length	Reported Cases	Consultations	Nationally Significant?
§ 101	33 definitions	Each a few lines	Many	Many	Yes
§ 102	Subject matter	1/2	Many	Many	Yes
§ 103	Derivative works	1/3	Many	Many	Yes
§ 104	National origin	2/3	Some	Many	Yes
§ 105	Government works	1/8	Few	Few	Yes
§ 106	Exclusive rights	1/3	Many	Many	Yes
§ 107	Fair use	1/3	Many	Many	Yes
§ 108	Library uses	3	Few	None	No
§ 109	First sale	1/3	Many	Many	Yes
§ 110(1)	Face-to-face education	2/8	None	None	No
§ 110(2)	Education transmission	1/3	None	None	No
§ 110(3)	Religious worship	2/8	None	None	No
§ 110(4)	Nonprofit performance	1/2	None	None	Yes
§ 110(5)	Aiken	1/4	Many	Few	Yes
§ 110(6)	Horticultural fairs	1/4	None	None	No
§ 110(7)	Vending establishments	1/4	None	None	No
§ 110(8)	Performances for blind or deaf	1/4	None	None	No
§ 110(9)	Radio performance for blind	1/4	None	None	No
§ 111	Cable compulsory license	10	Few	None	No

315. See Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985).

Provision	Short Description	Page- Length	Reported Cases	Consultations	Nationally Significant?
§ 112	Ephemeral recordings	2	Few	Few	Yes
§ 113	Limitations in graphic works	1/3	Few	None	No
§ 114	Rights in sound recordings	1	Some	Many	Yes
§ 115	Mechanical license	2	Some	Many	Yes
§ 116	Jukeboxes	4	—	—	Replaced
§ 117	Computer uses	1/4	—	—	Replaced
§ 118	Noncommercial broadcasting license	3	None	None	No
§ 201	Ownership	1	Many	Many	Yes
§ 202	Distinct from physical	1/4	Some	Many	Yes
§ 203 + § 304(c)	Termination of transfers	3 + 4 = 7	Some	Many	Yes
§ 204	Transfers	1/3	Many	Many	Yes
§ 205	Recordation	1	Some	Many	Yes
§ 301	Preemption	3/4	Many	Many	Yes
§ 302	Duration	1	Many	Many	Yes
§ 303	Duration	1/4	Few	Many	Yes
§ 304(a), (b)	Duration	3/4	Many	Many	Yes
§ 401	Notice—Copies	3/4	Many	Many	Yes
§ 402	Notice—Phonorecords	1/2	Some	Few	Yes
§ 403	Notice—Government	1/8	None	Few	No
§ 404	Notice—Collective works	1/4	Few	Some	Yes
§ 405	Omission of notice	3/4	Many	Many	Yes
§ 406	Notice error	3/4	Many	Some	Yes
§ 407	Deposit	2	Few	Some	No
§ 408	Registration	2	Some	Some	Yes
§ 409	Application to register	3/4	Few	Many	No
§ 410	Certificate	1/2	Many	Some	Yes
§ 411	Prerequisite to suit	1/2	Many	Few	Yes
§ 412	Prerequisite to remedies	1/4	Many	Many	Yes
§ 501	Infringement	3/4	Many	Many	Yes

Provision	Short Description	Page- Length	Reported Cases	Consultations	Nationally Significant?
§ 502	Injunctions	1/4	Many	Many	Yes
§ 503	Impoundment	1/3	Some	Some	Yes
§ 504	Damages	1	Many	Many	Yes
§ 505	Costs and fees	1/8	Many	Many	Yes
§ 506	Criminal offenses	3/4	Some	Few	Yes
§ 507	Limitations	1/8	Many	Many	Yes
§ 508	Notification	1/4	None	Few	No
§ 509	Seizure	1/2	Few	Few	Yes
§ 601	Manufacturing clause	3	—	—	Expired
§ 602	Importation	3/4	Some	Some	Yes
§ 603	Border exclusion	1/2	Few	None	No
§ 701	Copyright Office	1/2	None	None	No
§ 702	Regulations	1/8	Few	None	Yes
§ 703	Effective date	1/8	Few	Few	No
§ 704	Retention of articles	3/4	None	None	No
§ 705	Records	1/3	None	None	Yes
§ 706	Copies of records	1/4	None	None	No
§ 707	Forms	1/4	None	None	No
§ 708	Fees	1	None	None	No
§ 709	Delay	1/4	None	None	No
§ 710	Braille rights	1/4	None	None	No
§ 801-810	Copyright Royalty Tribunal	6	—	—	Replaced

NOTES TO TABLE A

- Section 108: The “No” entry in the final column reflects my experience. If there are libraries across the country that are guided by this provision but do not get involved in litigation, then my evaluation would be wrong.
- Sections 110(8)–(9): Insofar as I can ascertain, these provisions exert very little real-world impact. To the extent that, unbeknownst to me, the blind and deaf do order their affairs around this legal exemption, then I am mistaken.
- Section 116: This jukebox compulsory license generated a good deal of litigation following its enactment.³¹⁶ It was revamped several times and ultimately replaced.

316. See, e.g., *MCA, Inc. v. Parks*, 796 F.2d 200, 202 (6th Cir. 1986).

- At present, it is largely a dead letter of the Copyright Act.³¹⁷
- Section 117: This is the provision that Congress originally enacted and then shortly thereafter replaced in accordance with the CONTU report discussed above.³¹⁸
- Section 601: This provision expired on July 1, 1986. Prior to that time, it generated some test cases as to its constitutionality,³¹⁹ but not much in the way of active litigation affecting real-world interests.
- Section 702: Although few cases have arisen construing section 702 itself, its authorization for the Copyright Office to adopt regulations has led to a vast and important body of law contained in Title 37 of the Code of Federal Regulations, which in turn is the source of much litigation.³²⁰
- Section 705: This provision mandates open access to records of the Copyright Office. It is too basic to generate litigation or even consultation; but it informs the entire mind-set of American copyright law. In particular, a distinct feature of U.S. copyright practice is to research the status of registration of a work and recordation of claims to its title in the official governmental records. By contrast, most countries of the world maintain no such official registry.
- Sections 801–810: These provisions were never subject to much direct litigation when in effect, although they did lead to proceedings before the Copyright Royalty Tribunal, which in turn led to reported decisions (analogous to the regulations promulgated under the authority of section 702, discussed above).³²¹ In any event, they have since been streamlined.

317. See text accompanying *infra* note 406.

318. See *supra* Part II.C.4; see also *infra* Part V.D.

319. See, e.g., *Author's League of Am., Inc. v. Oman*, 790 F.2d 220, 221 (2d Cir. 1986).

320. Cases construing the regulations of the Copyright Office are wide ranging. See, e.g., *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982); *Foamation, Inc. v. Wedeward Enters., Inc.*, 947 F. Supp. 1287 (E.D. Wis. 1996).

321. See, e.g., *Asociacion de Compositores y Editores de Musica Latinoamericana v. Copyright Royalty Tribunal*, 851 F.2d 39 (2d Cir. 1988); *National Broad. Co., Inc. v. Copyright Royalty Tribunal*, 848 F.2d 1289 (D.C. Cir. 1988); *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982); *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981); *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531 (D.C. Cir. 1980). See generally Robert Cassler, *Copyright Royalty Tribunal: Balancing the Record*, 41 J. COPYRIGHT SOC'Y 217 (1994).

b. Twin Characteristics

(1) Endless "D.C. Regulations"

The final column in the table lists "Yes" for those portions that exert national significance. It is most instructive to juxtapose those entries against the third column detailing length. The relationship is almost one-to-one: Short provisions exert broad national significance, while long ones fail to do so. Thus, starting at the beginning, section 102³²² compresses into half a page all the subject matter over which copyright protection lies, and further specifies the nonprotectibility of ideas, procedures, processes, etc. Its terseness vouchsafes its importance. By contrast, section 108 constitutes the first entry which is not nationally significant and simultaneously the first provision to run on for multiple pages.

The next long provision is the cable compulsory license set forth in section 111.³²³ Although the affected parties have habitually litigated the amount of their entitlement to funds thereunder,³²⁴ this provision has failed to generate significant case law defining the contours of its component parts, such as what constitutes a "distant signal equivalent"³²⁵ and how the interplay works between American signals and those originating from

322. Actually, although section 101 comes at the beginning, it needs to be treated specially because of its hybrid characteristics. Across four pages, it sets forth in alphabetical order thirty-three separate definitions in unnumbered paragraphs. See 17 U.S.C. § 101 (2000) (page and line estimation based on 17 U.S.C.A. § 101 (West 1997)). To consider three sequential components, it takes eight lines to define "publication," less than a quarter-page to define when performances or displays take place "publicly," and then five lines to define "sound recordings." Each of those defined terms has generated a large volume of reported cases and qualifies as extremely significant. Properly construed, the thirty-three different subdivisions of section 101 bolster the proposition that short provisions exert great significance.

From a procedural viewpoint, the unnumbered nature of the paragraphs in section 101 is unfortunate. Not only does that circumstance make impossible the division of the paragraphs into separate entries for the table (unlike what the table can do for section 110's different numbered paragraphs, for example), but it also leads courts into ambiguity. For instance, a recent case refers to "17 U.S.C. § 101(2)." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 n.4 (9th Cir. 2003). In fact, though, there are currently five separate provisions denominated (2) across the unnumbered paragraphs of section 101, making the court's reference ambiguous (although in context little confusion resulted). See 17 U.S.C. § 101.

323. See *supra* note 312 (setting forth but one of its subsections).

324. From the first year in which such royalties were collected, 1978, through 1983, a challenge has been urged every year except 1981. See *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 174 (2d Cir. 1986). Each Copyright Royalty Tribunal award has been substantially affirmed by "a court increasingly critical of . . . 'boundless litigiousness.'" *Id.* (citation omitted).

325. 17 U.S.C. § 111(f); see 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[E][4][b][ii].

Canada or Mexico.³²⁶ Rather, this section qualifies as the paradigm of internecine battles among “a highly litigious copyright-owner subculture.”³²⁷

A number of the long provisions enacted as part of the Copyright Act of 1976 have since been repealed; as reflected in the table, those are placed outside the instant study. Accordingly, the only remaining provisions of any length are those setting forth the termination-of-transfer doctrine, codified in sections 203 and 304(a) of the Act. These provisions are of signal importance to authors and their heirs, and to licensees and assignees of copyrights.³²⁸ This pair constitutes the sole exception to the rule posited above that long entails unimportant.

As to the converse proposition, it is not necessarily the case that short entails important. Although the nationally significant features of the Act are uniformly short (except for the termination-of-transfer pair just noted), it does not follow that every short provision is itself nationally significant. Instead, the Act as passed incorporated a good number of insignificant, short sections. Representative here are the first few paragraphs of section 110. Each such exemption occupies no more than half a page, some less than four lines.³²⁹ But despite admirable terseness, no great matters of copyright doctrine hinge on construction of the parameters of performances via face-to-face education, education transmission, and religious worship.³³⁰ By contrast, one can posit significance to part of section 110(4) as the provision of law that allows parents to embarrass their children by serenading their birthdays at public venues, without fear of attendant copyright infringement liability.³³¹ Thus do these seemingly simple paragraphs themselves generate complexity.³³²

326. 17 U.S.C. § 111(c)(4); see 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[E][6].

327. Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985). The same, albeit less so, applies to section 118. This provision, which also establishes a compulsory broadcast license, applies in the noncommercial setting. It is shorter than section 111 and has generated fewer battles about divvying up the pot of gold thereby generated. It is like section 111, however, in that it has failed largely to generate significant case law defining the contours of its component parts.

328. See Nimmer, *supra* note 69; David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y 387, 387–88 (2001).

329. The shortest, but a few lines, exempts from liability “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.” 17 U.S.C. § 110(3).

330. See *id.* § 110(4)(B) (setting forth the exemption for “education, religious, or charitable purposes”).

331. See *id.* § 110(4)(A) (setting forth the exemption for public performance of musical work without payment or commercial advantage when there is no direct admission charge). An alternative perspective is that the *de minimis* doctrine immunizes waiters who “sing ‘Happy Birthday’ at a patron’s table.” *Davis v. The Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001).

332. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 52 n.106 (1994) (“[W]hy, if television stores [are] not allowed to play all of their television sets without a license, [do they do] it all the time?”).

(2) Terse "National Copyright Legislation"

The deeper mystery of the 1976 Act is that it is schizoid. Indeed, one could posit that there are actually two enactments simultaneously (but immiscibly) occupying Title 17 of the United States Code. The first we can dub National Copyright Legislation (NCL), that is, an enactment of nationwide impact whose provisions guide both courts and individuals confronting works of expression. The second is a within-the-beltway series of compromises and detailed regulations, endlessly battled over by the already referenced "highly litigious copyright-owner subculture" centered in Washington, D.C.³³³ The two barely even jostle each other; in fact, the latter component could simply drop out of Title 17 with scarcely a ripple being felt in the fifty states.

Of precisely what does this fictive NCL consist? A glance at the "Yes" entries in the table's final column reveals that only slightly more than half of the Act's provisions qualify as nationally significant.³³⁴ If one were to posit litigation leading to reported decisions as the benchmark for significance, the bulk of the Act's verbiage could be dismissed as insignificant. Even a more discriminating evaluation—in which provisions can be recognized as significant notwithstanding a paucity of reported cases thereunder—still discounts over half of the Act's length as failing to reach the threshold for national significance. The residual NCL is hence a much more compact corpus than previously suspected.

Thus, one could safely litigate copyright cases under a much slimmer statute than the traditional Title 17 of the United States Code. Indeed, the largest plurality of cases center on fair use and substantial similarity, matters about which the Act speaks either briefly or not at all.³³⁵ In fact, however, the hacking goes deeper still. For, as just mentioned, significance inheres

333. A few provisions of the Act qualify as neither national nor beltway in scope—although not geared specifically at the Washington, D.C., subculture invoked above, these provisions are so circumscribed as to be of little or no moment. An example would be 17 U.S.C. § 110(6), creating a performance exemption for horticultural fairs; although it might be of crucial significance to a handful of exhibitors in the United States, by no means can it be said to exert nationwide significance.

334. It would be the height of spuriousness to assign a precise figure, given that the choice of where to draw the boundary lines between "provisions" already reflects a value judgment, the column of "consultations" reflects partially the adventitious circumstances of who has come to my door, and the final evaluation reflects, in part, my own subjective evaluation of the broad import that each such provision exerts. See *supra* note 313.

335. One proof that more copyright cases revolve around substantial similarity and fair use than any other issues is the size of the treatise sections discussing those two areas of law. See 4 NIMMER ON COPYRIGHT, *supra* note 57, §§ 13.03, .05. Amazingly, though, there is no particular section of the Copyright Act codifying the former. On further reflection, however, the statutory provision that codifies the latter, section 107, is more of a Rorschach test than an actual tool for analysis. See Nimmer, *supra* note 262, at 287.

disproportionately in short provisions, whereas long provisions almost uniformly fail to qualify. When the significant features of the Act are aggregated, no longer do we have the seventy-two pages of which the 1976 Act consisted at enactment—instead, we are left with but thirty-two pages of applicable text.³³⁶

c. Evaluation

Focusing on the individual features of that National Copyright Legislation, we can gauge how well its features measure up to the desiderata posited above of consistency, transparency, reality, and breadth.³³⁷ The following table summarizes those attributes. To the extent that the entirety of a given section is coherent, for example, it places a check in the pertinent column. To the extent that a portion of that section is incoherent (even though it may contain many other components, for instance, that qualify as coherent), then the table is blank for that entry.³³⁸

TABLE B
EVALUATION OF SIGNIFICANT PROVISIONS OF 1976 ACT

Provision	Recap of Page-Length	Coherent?	Transparent?	Real?	Broad?
§ 101	Few lines		✓	✓	✓
§ 102	1/2	✓	✓	✓	✓
§ 103	1/3	✓	✓	✓	✓
§ 104	2/3	✓	✓	✓	✓
§ 105	1/8	✓	✓	✓	✓
§ 106	1/3	✓	✓	✓	✓
§ 107	1/3	✓		✓	✓
§ 109	1/3	✓	✓	✓	✓

336. One previous commentator looks to the Copyright Act as a whole in attempting to discern whether it reflects a good bargain for the public. See Litman, *supra* note 332, at 39 ("It doesn't seem as if the agreement reflected in the 142 pages is yet in [the public's] interest."). The instant analysis pursues a different tack by attempting to separate out the "national" from the "parochial" portions of the Act.

337. See *supra* Part III.B.1.

338. Accordingly, a check points towards perfection of a given desideratum, a blank points toward imperfection. It is not the case, however, that blank connotes that the subject entry is perfectly bad. Thus, blank for coherence simply indicates that part of the section under consideration fails to qualify as coherent; it does not indicate that every aspect of that section is incoherent.

Similar considerations apply to the other entries in this and the succeeding tables. As to transparency, it has already been remarked that perfection in that regard is almost never the goal of copyright legislation. See *supra* Part III.B.1.b. To the extent that the feature in question is reasonably transparent, it gets a check; otherwise, a blank appears. As to reality, if a portion of the feature is entirely speculative and future-oriented, it gets a blank. As to breadth, if a portion of the feature in question is entirely geared towards individual corporations, it gets a blank.

Provision	Recap of Page-Length	Coherent?	Transparent?	Real?	Broad?
§ 110(4)	1/2	✓	✓	✓	✓
§ 110(5)	1/4	✓		✓	✓
§ 112	2	✓	✓	✓	
§ 114	1	✓	✓	✓	✓
§ 115	2	✓	✓	✓	
§ 201	1		✓	✓	✓
§ 202	1/4	✓	✓	✓	✓
§ 203, 304(c)	7	✓	✓	Sleeper	✓
§ 204	1/3	✓	✓	✓	✓
§ 205	1	✓	✓	✓	✓
§ 301	3/4	✓	✓	✓	✓
§ 302	1	✓	✓	✓	✓
§ 303	1/4	✓	✓	✓	✓
§ 304(a), (b)	3/4	✓	✓	✓	✓
§ 401	3/4	✓	✓	✓	✓
§ 402	1/2	✓	✓	✓	✓
§ 403	1/8	✓	✓	Sleeper	✓
§ 404	1/4	✓	✓	✓	✓
§ 405	3/4		✓	✓	✓
§ 406	3/4	✓	✓	✓	✓
§ 408	2	✓	✓	✓	✓
§ 410	1/2	✓	✓	✓	✓
§ 411	1/2		✓	✓	✓
§ 412	1/4	✓	✓	✓	✓
§ 501	3/4	✓	✓	✓	✓
§ 502	1/4	✓	✓	✓	✓
§ 503	1/3	✓	✓	✓	✓
§ 504	1			✓	✓
§ 505	1/8	✓		✓	✓
§ 506	3/4	✓	✓	✓	✓
§ 507	1/8	✓		✓	✓
§ 509	1/2	✓	✓	✓	✓
§ 602	3/4		✓	✓	✓
§ 702	1/8	✓	✓	✓	✓
§ 705	1/3	✓	✓	✓	✓

NOTES TO TABLE B

Section 101:

At times, the definitions produce anomalies—an example being the use of “pre-existing” in the definition of “collective work,” which is impossible to reconcile with other

- language in the same statutory section.³³⁹ By and large, however, the definitions work.
- Section 107: The nontransparency of fair use as embodied in section 107 has been discussed above.³⁴⁰
- Section 109: I am listing section 109 as coherent, notwithstanding that it has attracted what I consider to be many erroneous rulings.³⁴¹
- Section 110(5): This subsection affords relief to “homestyle” equipment, a term that has required frequent litigation because of its opaque nature.³⁴²
- Section 112: I count this section as significant, notwithstanding a lack of reported decisions thereunder.³⁴³ It exempts ephemeral recordings from liability; given that television stations exist all across the country and can claim entitlement thereunder with no need to pitch their claim to the Copyright Royalty Tribunal (now replaced by copyright arbitration royalty panels), this provision is not of the “beltway” variety. I am also listing it as coherent, notwithstanding the indefensible interpretation placed on it in *Agee v. Paramount Communications, Inc.*³⁴⁴ Nonetheless, I am denying it broad status, given that its invocation is limited to a “transmitting organization”³⁴⁵ as well as governmental and other nonprofit organizations that engage in such authorized transmissions.³⁴⁶ Basically, it creates rights limited to a select few, rather than of general application.
- Section 115: I count this section also as significant. Even though the mechanical compulsory license created thereby is nominally subject to extensive notice and recordation is required in Washington, D.C., and thus would appear to be of the “beltway” variety, in practice it does not work out that way.

339. David Nimmer et al., *Preexisting Confusion in Copyright's Work For Hire Doctrine*, 50 J. COPYRIGHT SOC'Y 399, 405 (2003).

340. See *supra* Part III.B.2.

341. See the critique in Nimmer et al., *supra* note 129, at 34–40, of the line of cases beginning with *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994).

342. See, e.g., *Cass County Music Co. v. Muedini*, 821 F. Supp. 1278, 1282 (E.D. Wis. 1993), *rev'd*, 55 F.3d 263, 269 (7th Cir. 1995) (declining to articulate the “outer limit” of the number of speakers that can still qualify as “homestyle.”). See generally 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[C][2][c][ii].

343. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.06[A].

344. 853 F. Supp. 778, 786 (S.D.N.Y. 1994), *rev'd*, 59 F.3d 317 (2d Cir. 1995); see 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.06[A][5].

345. 17 U.S.C. § 112(a) (2000).

346. *Id.* § 112(b)–(d).

- Instead, consensual licenses typically avoid that practice, thus rendering it significant for that reason.³⁴⁷ In practice, this compulsory license leads simply to contracts between record companies and music publishers.³⁴⁸ For reasons parallel to those above applicable to section 112, it is not listed as exerting broad nationwide impact.
- Section 201: Problems in the coherency of section 201(c) lay buried for decades; they began to surface much later, as ventilated by the majority and dissents in *New York Times Co. v. Tasini*.³⁴⁹
- Section 203: At enactment, this provision seemed very unreal, as it created a right to terminate for works post-1978 after the passage of thirty-five years (that is, starting in 2013).³⁵⁰ But given the ability of serving a notice of termination ten years in advance, the issue became very real starting in 2003,³⁵¹ and even began to induce ferment a few years earlier.³⁵²
- Section 403: The table lists this provision as a “sleeper.” In particular, it does nothing more than to mandate the type of copyright notice necessary to append to works of the United States Government—hardly the type of provision that anyone would ever expect of rising to national significance. Yet when my client sued West Publishing Company some two decades after the Act’s passage,³⁵³ I managed to convince the district court to premise its relief, in part, on precisely this provision.³⁵⁴ Although the Second Circuit affirmed on other grounds, perhaps the lesson is that there is no provision interred so obscurely in the Copyright Act that it might not, at some future time, arise to affect the course of future litigation.³⁵⁵

347. See *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir. 1990).

348. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.04[I] (“In actual practice, the statutory mechanism is rarely invoked in the industry.”).

349. 533 U.S. 483 (2001). The lower court decisions likewise reflect disagreement as to the appropriate construction. See *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997), *rev’d*, 206 F.3d 161 (2d Cir. 2000).

350. See *Nimmer & Menell*, *supra* note 328.

351. See *id.*

352. See *id.* at 390–94 (discussing the Satellite Home Viewer Improvement Act of 1999 and its subsequent repeal by the Work Made for Hire and Copyright Corrections Act of 2000); see *infra* Part III.D.2.

353. *Matthew Bender & Co., Inc., v. West Publ’g Co.*, 240 F.3d 116 (2d Cir. 2001).

354. *Matthew Bender & Co., Inc., v. West Publ’g Co.*, No. 94 Civ. 589 (JSM), 1999 U.S. Dist. LEXIS 19387, at *4–*5 (S.D.N.Y. Dec. 16, 1999). For the full background, see David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 111–13 (2001).

355. See *Matthew Bender & Co.*, 240 F.3d at 123 n.5 (“This Court has found no federal case law applying or interpreting 17 U.S.C. § 403, and commentary on the section is minimal.”); see

- Section 405: Notwithstanding the large volume of jurisprudence generated by the notice provisions contained in the Copyright Act as enacted in 1976,³⁵⁶ and the many cases to rule thereunder that absence of copyright notice relegates the work to the public domain,³⁵⁷ the Act itself nowhere states that simple consequence. Rather, it emerges as a negative pregnant to section 405's provision that absence of notice "does not invalidate the copyright in a work" provided that elaborate circumstances are satisfied.³⁵⁸ That problem in presentation, together with the still unresolved issue whether deliberate omission of a notice can be subject to cure, provided the aforementioned elaborate circumstances are satisfied, lead me to list this provision as lacking sufficient coherence.³⁵⁹
- Section 411: This provision allows suit to proceed after "registration of the copyright claim has been made,"³⁶⁰ but also allows the action to proceed "where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused."³⁶¹ Left unaddressed is whether suit can proceed prior to such refusal, leading courts to come to opposite conclusions regarding the ability to file suit after proper tender to the Copyright Office but before it has acted thereupon.³⁶² That anomaly leads to withholding a passing coherence grade.
- Section 504: This provision has the distinction of including the only portion of the Copyright Act as originally enacted³⁶³ that the Supreme Court has ruled unconstitutional³⁶⁴ (although it is not inconceivable that others may be stricken in the

also JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE § 9.06[2][a.1] (rev. ed. 2000) (noting that until the district court opinion in this case, section 403 had been "entirely untested").

356. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 7.02–12.

357. See, e.g., *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1435 (9th Cir. 1986).

358. 17 U.S.C. § 405(a) (2000).

359. See cases discussed in 2 NIMMER ON COPYRIGHT, *supra* note 57, § 7.13[B][3].

360. 17 U.S.C. § 411(a).

361. *Id.*

362. Compare *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386–87 (5th Cir. 1984) (allowing suit), with *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284 (E.D.N.Y. 2002) (disallowing suit). See *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002).

363. On the unconstitutionality of a later amendment, see *infra* note 382 and accompanying text.

364. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), the Court ruled that the provision fell afoul of the Seventh Amendment. See 4 NIMMER ON COPYRIGHT, *supra* note 57, § 14.04[C][2].

- future).³⁶⁵ By failing to mesh with the larger framework of U.S. constitutional law, that feature suffers a coherency defect.³⁶⁶
- Section 505: This provision generated one of the major circuit splits as to its appropriate application, which required the Supreme Court's resolution.³⁶⁷
- Section 507: This provision has engendered a long-running controversy on how the statute of limitations should treat an ongoing course of violation that straddles the limitations period.³⁶⁸
- Section 602: The inconsistency between sections 602 and 109 has led to a long-running dispute among copyright cases,³⁶⁹ leading ultimately to a Supreme Court decision³⁷⁰—after which, the matter still remains unresolved.³⁷¹

With its vast preponderance of checks, Table B tells a compelling story. The fact that some entries are blank means that Congress failed to convey perfect coherence to each and every feature of the National Copyright Legislation, just as it failed to imbue perfect transparency, perfect congruence with reality, and perfect breadth. But remarkably, it got very close to perfection as to each criterion—the table shows that every column falls only a few shy of unanimous checks. If marks are to be handed out, therefore, the NCL passes with flying colors.

Synopsis. The juxtaposition of all features set forth above exposes the schizoid character of the Copyright Act of 1976 at its enactment. The smaller portion consists of National Copyright Legislation, that is, general principles of nationwide import. A person who wanted to practice copyright law in Los Angeles, publish books in New York, record songs in Nashville, or carve sculptures in Indianapolis could limit her knowledge to the NCL without sacrificing any meaningful appreciation of the copyright scheme governing her conduct. The larger part of the enactment, by contrast, consists of endless

365. A question mark continues to hang over the *ex parte* seizure provisions authorized by some courts pursuant to 17 U.S.C. § 509. See 4 NIMMER ON COPYRIGHT, *supra* note 57, § 14.07[B][2].

366. Formal coherence requires that the subject feature of the Copyright Act mesh with other portions of that enactment, with state law, with treaty obligations, and with constitutional requirements. See *supra* Part III.B.1.a.

367. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); see 4 NIMMER ON COPYRIGHT, *supra* note 57, § 14.10[D][2][b].

368. Compare *Taylor v. Meirick*, 712 F.2d 1112, 1118–19 (7th Cir. 1983) (following theory of “continuing wrong”), with *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994) (rejecting that theory).

369. See *Columbia Broad. Sys., Inc. v. Scorpio Music Distribs. Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983), *aff’d mem.*, 738 F.2d 424 (3d Cir. 1984) (giving primacy to section 602); *Sebastian Int’l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093 (3d Cir. 1988) (rejecting *Scorpio*).

370. See *Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135 (1998).

371. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.12[B][6][c].

regulation requiring specialized application. Only those involved in the administrative intricacies of distributing copyright revenue in Washington, D.C. need to concern themselves with those matters. As described at the outset,³⁷² Congress passed an act in 1976 that embodied opposing twin characteristics.³⁷³

2. Continuity in Character Through Two Dozen Amendments

The lessons learned above about the 1976 Act will stand us in good stead as we review its dozens of amendments. Indeed, the lessons to be garnered are already latent in the 1976 Act itself as initially enacted. First, brief enunciations of general principles are its highest expression.³⁷⁴ Second, stultifying detail, although perhaps of use to a discrete beltway subculture, does not advance the commonweal.³⁷⁵ The former adds luster to the Act; the latter methodology, in which Congress abdicates its role of regulating special interests to those interests themselves, reflects poorly on the legislative process.³⁷⁶

a. Catalog of Amendments

To embark on this project, it is first necessary to collect the data. As will be seen below, there have been two roughly distinct periods of amending the Copyright Act. The interval we will confront momentarily ran from its enactment in 1976 until 1992; during that period, Congress amended the Act twenty-four times. The second period, discussed later, comprises the twenty-four amendments that Congress implemented thereafter to date.³⁷⁷

Table C1 summarizes the first period. It lists each enactment by citation and name³⁷⁸ and estimates the page-length of the principal provisions

372. See *supra* Part III.C.1.b.

373. One of my readers takes issue with the characterization of “*opposing twin characteristics*”: The characteristics of the two types of legislation are different, but not necessarily opposing. The long narrow and complex sections of the Act affect specific industry segments in specific ways. Those sections got to be the way they are because the affected industries are well represented by D.C. lawyers who bargained with one another in an almost “collective bargaining” fashion; and the resulting legislation reads just like a privately negotiated contract—indeed, just like a collective bargaining agreement. It’s likely that you haven’t been consulted about these provisions, and they haven’t generated much litigation, precisely because the D.C. lawyers who do this kind of copyright work understand the sections perfectly (even if I can’t!), and the sections work well, from an administrative point of view.

E-mail from Lionel Sobel to David Nimmer (Oct. 24, 2003) (on file with author).

374. See *supra* Part III.C.1.b.(2).

375. See *supra* Part III.C.1.b.(1). But see *supra* note 373.

376. See *supra* Part III.C.1.c.

377. See *infra* Part III.C.3.

378. Whenever Congress gave its own handiwork a name, that name appears below.

thereby added into Title 17 of the United States Code.³⁷⁹ The balance of its columns match Table A above by setting forth whether the subject amendment has generated litigation resulting in reported judicial decisions, as well as the parallel inquiry whether it has generated consultations with me about its scope and application.

The final column hazards an opinion whether the amendment qualifies as nationally significant. To the extent that an amendment has affected parties, whether gauged through reported decisions or consultations, it deserves that label. However, some amendments to the Copyright Act occurred ancillary to other goals, such as amending the bankruptcy law or the criminal trademark strictures; those circumstances disqualify the subject amendment from being nationally significant for copyright law purposes.

TABLE C1
FIRST TWO DOZEN AMENDMENTS TO 1976 ACT
1978-1992

<i>Name and Citation</i>	<i>Principal Provisions Added to 1976 Act</i>	<i>Approximate Page-Length of Additions</i>	<i>Reported Decisions</i>	<i>Consultations</i>	<i>Nationally Significant?</i>
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2676 (Nov. 6, 1978)	§ 201(e)	1/8	N.A.	N.A.	Part of bankruptcy law
Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3028 (Dec. 12, 1980)	§§ 101, 117	1/3	Many	Many	Yes
Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91, 93 (May 24, 1982)	§506(a) 18 U.S.C. §§ 2318, 2319	1/8 2	N.A.	N.A.	Part of criminal law
An Act To Amend the Manufacturing Clause of the Copyright Law, Pub. L. No. 97-215, 96 Stat. 178 (July 13, 1982)	Interim extension of § 601(a) for 4 years		N.A.	N.A.	Technical

379. It is often difficult to gauge the page-length of amendments, inasmuch as they interlineate text into a preexisting framework, at times necessitating recodification of a lengthy section of the Act, even though only a few words might change in each of several places. Accordingly, the third column sets forth very rough estimates.

<i>Name and Citation</i>	<i>Principal Provisions Added to 1976 Act</i>	<i>Approximate Page-Length of Additions</i>	<i>Reported Decisions</i>	<i>Consultations</i>	<i>Nationally Significant?</i>
Copyright Office Fees Amendment, Pub. L. No. 97-366, 96 Stat. 1759 (Oct. 25, 1982)	§ 110(10) § 708	1/4 1/4	N.A.	N.A.	Technical
Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (Oct. 4, 1984)	§ 109(b)	1/2	Some	Some	Yes
Semiconductor Chip Protection Act of 1984, Pub. L. No. 98- 620, 98 Stat. 3347 (Nov. 8, 1984)	§§ 901-914	15	Few	Few	No
Low Power Cable Television Station Provisions, Pub. L. No. 99-397, 100 Stat. 848 (Aug. 27, 1986)	§ 111	1/2	None	None	No
Extension of Semiconductor Chip Protection Act of 1984, Pub. Law No. 100-159, 101 Stat. 899 (Nov. 9, 1987)	§§ 902, 914	2	N.A.	N.A.	Technical
Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988)	§ 116A § 101	2 1	Many	Many	Yes
An Act To extend for an additional 8-year period certain provisions . . . relating to the rental of sound recordings, Pub. L. No. 100-617, 102 Stat. 3194 (Nov. 5, 1988)	§ 109 note	1/8	N.A.	N.A.	Technical
Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (Nov. 16, 1988)	§ 119	9	Some	None	No
Judicial Improvements and Access to Justice Act, Pub. L. No. 100- 702, 102 Stat. 4642, 4672 (Nov. 19, 1988)	Eliminated § 912(d) regarding jurisdiction in semiconductor chip cases		N.A.	N.A.	Technical
Copyright Fees and Technical Amendments Act of 1989, Pub. L. No. 101- 318, 104 Stat. 287 (July 3, 1990)	§ 708	1/2	N.A.	N.A.	Technical

Name and Citation	Principal Provisions Added to 1976 Act	Approximate Page-Length of Additions	Reported Decisions	Consultations	Nationally Significant?
Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989, Pub. L. No. 101-319, 104 Stat. 290, (July 3, 1990)	§ 701	1/4	N.A.	N.A.	Technical
Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (Nov. 15, 1990)	§ 511	1	Yes	No	Yes
Architectural Works Copyright Protection Act, Pub. Law No. 101-650, 104 Stat. 5133 (Dec. 1, 1990)	§ 120	1/4	Few	Few	Yes
Pub. Law No. 101-650, 104 Stat. 5133 (Dec. 1, 1990)	§ 106A	2	Some	Some	No
	§ 113(d)(1)	1			
Pub. Law No. 101-650, 104 Stat. 5133 (Dec. 1, 1990)	§ 109(b)	2	Few	Many	Yes
Pub. L. No. 102-64, 105 Stat. 320 (June 28, 1991)	§ 914 note	1/8	N.A.	N.A.	Technical
Pub. L. No. 102-307, 106 Stat. 264 (June 26, 1992)	Repealing § 108(i)		N.A.	N.A.	Technical
Pub. L. No. 102-307, 106 Stat. 264 (June 26, 1992)	§ 304(a)	2	Some	Many	Yes
Pub. L. No. 102-492, 106 Stat. 3145 (Oct. 24, 1992)	§ 107	1/8	Some	Many	Yes
Pub. L. No. 102-561, 106 Stat. 4233 (Oct. 28, 1992)	18 U.S.C. § 2319(b)	1/4	N.A.	N.A.	Part of criminal law

NOTES TO TABLE C1

Semiconductor Chip Protection Act of 1984:

This amendment was the first to add a whole new superstructure to the Copyright Act of 1976.³⁸⁰

Berne Convention Implementation Act of 1988:

This amendment was the first to effect miscellaneous short changes throughout the Act. In addition, this Amendment was the first to incorporate numerous provisions, not incorporated anywhere in the United States Code, specifying its method of

380. See *infra* Part IV.B.1.

	implementation. ³⁸¹ Accordingly, the page-length estimate set forth above fails to account for either a large number of tweaks that this amendment interspersed through the Act, or for its uncodified features.
Copyright Remedy Clarification Act:	This amendment had an effect on the real-world rights of various actors in the copyright sphere—until the Supreme Court effectively killed its application via its construction of the Eleventh Amendment. ³⁸²
Architectural Works Copyright Protection Act:	This law was implemented as part of the Judicial Improvements Act of 1990, which concatenated together three separate copyright bills (amidst innumerable noncopyright provisions). Because of their disparate copyright impact, the table treats those three amendments separately (see the succeeding entries for the Visual Artists Rights Act of 1990 and Computer Software Rental Amendment Act of 1990).
Visual Artists Rights Act of 1990:	This amendment, in fairness, has generated a number of reported decisions, thus seemingly making it nationally significant. Nonetheless, many have held it inapplicable to provide protection. ³⁸³ Thus, notwithstanding a handful of cases that have awarded relief thereunder, ³⁸⁴ this amendment is evaluated as not nationally significant.
Copyright Amendments Act of 1992:	This amendment incorporated three titles, of which two have their own entries in the chart. ³⁸⁵ The third portion was the National Film Preservation Act of 1992, a nine-page enactment that treats one aspect of copyrightable subject matter, but does not itself amend the Copyright Act. ³⁸⁶ That third title itself repealed

381. See 7 NIMMER ON COPYRIGHT, *supra* note 57, app. 2A[B].

382. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12.01[E][2][b].

383. See, e.g., *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

384. See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999); *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

385. The repeal of section 108(i), noted above, eliminated the requirement for the Register of Copyrights to prepare reports at five-year intervals about the effect of library reproductions on the rights of copyright owners.

386. For the full text, see 7 NIMMER ON COPYRIGHT, *supra* note 57, app. 2C[B][1].

the National Film Preservation Act of 1988,³⁸⁷ showing that legislative ferment is not limited to amendments to the Copyright Act proper.³⁸⁸

b. Evaluation

Eliminating from consideration those amendments that are simply technical or that are ancillary to major changes effectuated to other bodies of law, it is possible to evaluate the various substantive amendments using the criteria for statutory evaluation set forth above.³⁸⁹ By doing so, we are left with twelve candidates to catalog in the following tables. For ease of reference, they are divided between those amendments of national significance (Table D1) as reflected in the final column of Table C1 and those of less than national import (Table D2), again as reflected in that final column of Table C1:

TABLE D1
EVALUATION OF EARLY SUBSTANTIVE AMENDMENTS OF NATIONAL SIGNIFICANCE

<i>Enactment</i>	<i>Recap of Page-Length</i>	<i>Coherent?</i>	<i>Transparent?</i>	<i>Real?</i>	<i>Broad?</i>
Computer Software Copyright Act of 1980	1/3	✓	✓	✓	✓
Record Rental Amendment of 1984	1/2	✓	✓	✓	✓
Berne Convention Implementation Act of 1988	3	✓	✓	✓	✓
Copyright Remedy Clarification Act	1	✓	✓	✓	✓
Architectural Works Copyright Protection Act	1/4		✓	✓	✓
Computer Software Rental Amendment Act of 1990	2	✓		✓	✓
Copyright Renewal Act of 1992	2	✓	✓	✓	✓
Fair Use of Unpublished Works Provision	1/8	✓	✓	✓	✓

387. Pub. L. No. 100-446, 102 Stat. 1774, 1782-88 (codified at 2 U.S.C. § 178-178I) (repealed by Act of June 26, 2002, Pub. L. No. 102-307, § 214, 106 Stat. 272).

388. For discussion, see 3 NIMMER ON COPYRIGHT, *supra* note 57, § 8D.02[D][3].

389. See *supra* Part III.B.1.

TABLE D2
EVALUATION OF EARLY SUBSTANTIVE AMENDMENTS OF NARROW
SIGNIFICANCE

<i>Enactment</i>	<i>Recap of Page-Length</i>	<i>Coherent?</i>	<i>Transparent?</i>	<i>Real?</i>	<i>Broad?</i>
Semiconductor Chip Protection Act of 1984	15	✓			✓
Low Power Cable Television Station Provisions	1/2	✓		✓	
Satellite Home Viewer Act of 1988	9	✓			
Visual Artists Rights Act of 1990	3				✓

The first striking feature of these tables is how seamlessly they continue lessons from the 1976 Act: The Computer Software Copyright Act of 1980 and the Record Rental Amendment of 1984, at a third and half of a page respectively, both exert national significance on copyright doctrine, whereas the fifteen pages of the Semiconductor Chip Protection Act of 1984 and the nine pages of the Satellite Home Viewer Act of 1988 fail to do so. Abstracting those examples, the general conclusion follows through the dozen entries of the tables that long provisions continue to lack national significance, whereas some short provisions exert such significance (although there continue to be short provisions that also lack national significance).³⁹⁰

The overall tally is indicative—of these dozen substantive amendments, eight qualify as nationally significant developments in copyright law.³⁹¹ (As to the remaining four occasions,³⁹² we will see below that Congress' track record is much more dismal during the decade since.)³⁹³ The result is to embed the NCL more deeply into Title 17. The nationally significant features summarized in Table D1 that were added to the Copyright Act over its first fifteen years total a bit under ten pages. By contrast, the features added during this same time period that fail to qualify as nationally significant summarized in Table D2 add almost three times as many pages. The disparity becomes even wider, therefore, between the length of the Copyright Act taken as a whole

390. Emblematic of that last phenomenon is the half-page Low Power Cable Television Station Provisions, which simply tweaked the definition of local service area applicable to the compulsory cable license of 17 U.S.C. § 111(f).

391. See *supra* Table D1.

392. See *supra* Table D2.

393. See *infra* Part III.C.3.

and what is significant in copyright law to the entire nation (as opposed to those features that govern the beltway subculture).

In addition, the final four columns of Tables D1 and D2 reveal an interesting progression. The first two amendments, the Computer Software Copyright Act of 1980 and the Record Rental Amendment of 1984, each sweep the awards by qualifying as coherent, transparent, real, and broad, thus deserving their evaluation as nationally significant. But when we reach the next one in time, the Semiconductor Chip Protection Act of 1984, Congress has already sacrificed transparency and reality.³⁹⁴ It is therefore not surprising that its resulting product fails to qualify as nationally significant.

Still, the overall record remains positive. The checks far predominate over the blanks throughout both tables, notably excepting the Visual Artists Rights Act of 1990, with its multiple defects along the axes of *coherence*,³⁹⁵ *transparency*,³⁹⁶ and *reality*.³⁹⁷ Moreover, when the focus is on Table D1—that is, the amendments that are fictively part of the NCL—then, just like in Table B, the record is close to perfect, as only two blanks mar the scorecard.³⁹⁸ During this period, therefore, Congress continued to fulfill the ideals of good draftsmanship on which the original 1976 Act was founded. As we shall see, different sensibilities rose to the fore during the next successive interval.

Synopsis. After two dozen amendments to the 1976 Act, its basic character only emerged stronger. In other words, Title 17 still consisted of the National Copyright Legislation immiscibly combined with detailed within-the-beltway regulations. Although Title 17 as a whole grew during the period 1976–1992, the disparity only heightened—in other words, the

394. See *infra* Part IV.B.1.

395. Among the problems lurking here, Congress desired to create a “uniform federal law,” but failed to coordinate the rights it created with rights under state law. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 8D.06[E]. The law as passed deleted a provision from the House bill specifying the duration of *post mortem* rights, leading Wendy Gordon to question the sanity of the entire enterprise. See *id.* § 8D.06[E] n.198.7.

396. A host of questions remain unanswered to date about that 1990 enactment. See *id.* § 8D.06[F][2]. Indeed, depending on the method of its interpretation, this pro-artist effort could actually end up setting back the rights that those artists otherwise would have enjoyed. See *id.* § 8D.06[F][3].

397. That amendment fails the reality principle of actually effecting changes to the legal framework by its provision for waiver, leading to the possibility of its systematic defeasance by those who oppose its existence. See 17 U.S.C. § 106A(e)(1) (2000); see also REGISTER OF COPYRIGHTS, TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES 97 (1989) (noting that the parallel California statute protecting works of fine art contains no waiver provision “because it was thought that waiver would undercut the rights granted artists under the statute”).

398. One concerns coherence of the Architectural Works Copyright Protection Act. The reason for this blank is that the principal case construing that amendment resulted in the only decision within recent memory to splinter an appellate panel of three into three separate opinions, each disagreeing with the other. See *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000).

NCL remained small, the D.C. regulatory aspects became even more distended. Therefore, whereas the Indianapolis sculptor/New York publisher/Nashville singer/L.A. lawyer³⁹⁹ needed to know less than 50 percent of Title 17 as of 1980, by 1992, the proportion that they had to master had grown even smaller. Nonetheless, those basic characteristics continued to prevail: As of 1992, the Copyright Act remained a somewhat terse (albeit less brief) statement of general principles crowded out by ever-widening detail.⁴⁰⁰

3. Subsequent Deforming Amendments

a. Catalog of Amendments

With those first two dozen amendments under our belt, we are prepared to confront the next two dozen. Time speeds up here—the first set was spread over the interval from 1976 to 1992; the next set emanates from the single decade covering 1992 to 2002. The following table summarizes:

TABLE C2
MOST RECENT TWO DOZEN AMENDMENTS TO 1976 ACT
1992–2002

Name and Citation	Principal Provisions Added to 1976 Act	Approximate Page-Length of Additions	Reported Decisions	Consultations	Nationally Significant?
Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (Oct. 28, 1992)	§§ 1001–1010	8	Some	Few	No
North American Free Trade Agreement (NAFTA) Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2114 and 2115 (Dec. 8, 1993)	§ 104A	1/2	Few	Some	No
Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (Dec. 17, 1993)	§§ 116, 801-803	7	None	None	No

399. See *supra* Part III.C.1.c *in fine*.

400. See *supra* Part III.C.1.b.

<i>Name and Citation</i>	<i>Principal Provisions Added to 1976 Act</i>	<i>Approximate Page-Length of Additions</i>	<i>Reported Decisions</i>	<i>Consultations</i>	<i>Nationally Significant?</i>
Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (Oct. 18, 1994)	§§ 111(f), 119	3	Few	None	No
Uruguay Round Agreements Act, Pub. Law No. 103-465, 108 Stat. 4809 (Dec. 8, 1994)	§§ 104A, 1101	9	Many	Many	Yes
Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995)	§§ 114(d), 115(c)	9	None	Many	No
Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386, 1388 (July 2, 1996)	Minor change to § 603(c)		N.A.	N.A.	Part of criminal law
Legislative Branch Appropriations Act, 1997, Pub. L. No. 104-197, 110 Stat. 2394, 2416 (Sept. 16, 1996)	§ 121	2/3	None	None	No
Copyright Amendments [including legislative overruling of <i>La Cienega</i>], Pub. L. No. 105-80, 111 Stat. 1529 (Nov. 13, 1997)	§ 303(b)	1 line	Few	Some	Yes
No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (Dec. 16, 1997)	§§ 101, 506(a), 18 U.S.C. § 2319	2	Few	Some	Yes
Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998)	§§ 203, 301-304	Miscellaneous words extending all terms 20 years	Many	Many	Yes
Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998)	§§ 110(5), 512	2	Yes	None	Yes

<i>Name and Citation</i>	<i>Principal Provisions Added to 1976 Act</i>	<i>Approximate Page-Length of Additions</i>	<i>Reported Decisions</i>	<i>Consultations</i>	<i>Nationally Significant?</i>
WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)	§§ 101, 1201-1205	16	Many	Many	Yes
Online Copyright Infringement Liability Limitation Act (OCILLA), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)	§ 512	10	Many	Many	Yes
Computer Maintenance Competition Assurance Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)	§ 117	3/4	Few	Some	Yes
[Title IV of Digital Millennium Copyright Act], Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)	§§ 108, 112(a), 114	15	None	Few	Yes
Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)	§§ 1301-1332	14	None	None	No
Copyright Amendments and Amendments to the Vessel Hull Design Protection Act, Pub. L. No. 106-44, 113 Stat. 221 (Aug. 5, 1999)	Various	Various	N.A.	N.A.	Technical
Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, app. I (Nov. 29, 1999)	§ 101	Adds "sound recording" to definition of "work made for hire"	N.A.	N.A.	Repealed
Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat 1774, (Dec. 9, 1999)	§ 504(c)	Substituted higher dollar figures	Some	Many	Yes

<i>Name and Citation</i>	<i>Principal Provisions Added to 1976 Act</i>	<i>Approximate Page-Length of Additions</i>	<i>Reported Decisions</i>	<i>Consultations</i>	<i>Nationally Significant?</i>
Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (Oct. 27, 2000)	Various	Various	N.A.	N.A.	Repealing above
Intellectual Property and High Technology Technical Amendments Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758 (Nov. 2, 2002)	Various	Various	N.A.	N.A.	Technical
Technology, Education, and Copyright Harmonization (TEACH) Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758 (Nov. 2, 2002)	§§ 110(2), 112(f)	3	Too soon as of now to tell		
Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (Dec. 4, 2002)	§ 114	1 (plus more uncodified pages of changes)	Too soon as of now to tell		

NOTES TO TABLE C2

Legislative Branch
Appropriations
Act, 1997:

The sole copyright feature of this amendment was to add a provision for Braille works⁴⁰¹—in the process ignoring that the Copyright Act had already embodied an antecedent provision showing the same solicitude,⁴⁰² which in turn had to be eliminated in a later technical amendment.⁴⁰³

NAFTA
Implementation Act:

This massive law amended the Copyright Act in several particulars: It eliminated the sunset provision from the Record Rental Amendment of 1984⁴⁰⁴ and restored Mexican motion pictures from the public domain by adding a new section 104A. Note that the latter provision, however, was short-lived, as the

401. 17 U.S.C. § 121(a) (2000).

402. Act of Oct. 19, 1976, Pub. L. No. 94-553, § 710, 90 Stat. 2541, 2594 (repealed 2000).

403. See Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, § 3(a)(1), 114 Stat. 1444.

404. Pub. L. No. 103-182, § 332, 107 Stat. 2055.

Uruguay Round Agreements Act replaced it via a new section 104A.⁴⁰⁵

Copyright Royalty
Tribunal Reform Act of
1993:

This amendment revised sections 116 and 801 through 803 of the Act. In those regards, it eliminated more than it added. By way of explanation, the 1976 Act implemented section 116 as a jukebox compulsory license; then the Berne Convention Implementation Act of 1988 added an alternative section 116A to the statute; later, this Copyright Royalty Tribunal Reform Act of 1993 eliminated the original section 116 and retitled the remaining section 116A as the sole remaining section 116.⁴⁰⁶ After this 1993 amendment, therefore, the size of the Act shrunk. By the same token, this 1993 amendment, albeit adding new elaborate language for sections 801 through 803, simultaneously removed sections 805 through 810, again on balance shrinking the Act. In addition, this amendment revamped sections 111, 118 and 119 of the Act in various particulars.

Pub. L. No. 105-80:

Even though Table C1 already contained eight amendments to the Copyright Act denominated “technical,” each of them only dealt with one discrete domain. Thus, for example, the Act To Amend The Manufacturing Clause Of The Copyright Law applied solely to one specific provision of law, extending its application on an interim basis for four years.⁴⁰⁷ By contrast, the Copyright Amendments and Amendments to the Semiconductor Chip Protection Act of 1984, which is the official title of Pub. L. No. 105-80, inaugurated new ground. That 1997 law effectuated on the order of fifty separate language changes to clear up numerous problems scattered throughout Title 17.⁴⁰⁸ In addition, it effectuated one substantive amendment, namely to overrule by statute

405. See *infra* Part III.D.3.

406. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.17[A].

407. Act to Amend the Manufacturing Clause of the Copyright Law, Pub. L. No. 97-215, 96 Stat. 178 (1982) (extending 17 U.S.C. § 601(a)).

408. Most have to do with punctuation, capitalization, or rectification with other provisions. Thus, an example is as follows: “[I]n the item relating to chapter 9, by striking ‘semiconductor chip products’ and inserting ‘Semiconductor Chip Products.’” Act of Nov. 13, 1997, Pub. L. No. 105-80, § 12(a)(1)(C), 111 Stat. 1529, 1534 (1997).

the construction on publication of sound recordings reached in *La Cienega Music Co. v. ZZ Top*.⁴⁰⁹

WIPO Copyright
Treaties . . . Act of 1998:

This amendment constitutes Title I of the epochal Digital Millennium Copyright Act. The succeeding four listed amendments constitute Titles II through V of that same omnibus enactment.

Pub. L. No. 106-44:

This amendment, entitled "Copyright Amendments and Amendments to the Vessel Hull Design Protection Act" makes dozens of technical corrections to the Act, of a comparable character to those noted above in Pub. L. No. 105-80.⁴¹⁰

Satellite Home Viewer
Improvement Act
of 1999:

This amendment primarily altered the communications laws of the United States, rather than the Copyright Act. However, a provision towards the end denominated "Technical Amendments"⁴¹¹ made a substantive change to copyright doctrine by adding the category of "sound recordings" as eligible to qualify as specially commissioned works for hire. In addition, the Satellite Home Viewer Improvement Act of 1999 actually was part of the larger Intellectual Property and Communications Omnibus Reform Act of 1999. Buried toward the end of that omnibus enactment is another feature, likewise denominated "Technical Amendments,"⁴¹² which likewise actually exerts substantive impact.⁴¹³

Work Made for Hire and
Copyright Corrections
Act of 2000:

This amendment makes various changes of a technical nature to the Copyright Act, relating to fees charged by the Copyright Office. More importantly, it repealed the addition of "sound recordings" as an eligible category of specially commissioned works.⁴¹⁴

409. 53 F.3d 950 (9th Cir. 1995); see *supra* notes 82–86 and accompanying text; *infra* Part IV.G.1.

410. Again, an example illustrates: "Section 119(a)(8)(C)(ii) of title 17, United States Code, is amended by striking 'network's station' and inserting 'network station's.'" Act of Aug. 15, 1999, Pub. L. No. 106-44, § 1(g)(4), 113 Stat. 221, 222.

411. Act of Nov. 29, 1999, Pub. L. No. 106-113, app. I, § 1011, 113 Stat. 1501, 1501A-543.

412. *Id.* § 5005.

413. Nimmer, *supra* note 214, at 463 ("[G]iven that the practical upshot for the decades ahead is to apply an entire body of law that would otherwise have lapsed in 2000, the result—far from technical—is as large a substantive alteration as one can imagine.").

414. See generally Nimmer & Menell, *supra* note 328.

TEACH Act:

Although it is still new, the TEACH Act has all the hallmarks of arcane amendments for specialized areas that have preceded it, such as the Satellite Home Viewer Act of 1994. For that reason, it will be categorized below along with the amendments lacking national significance.

Small Webcaster Settlement Act of 2002:

Although this enactment is also new, it amounts to a specialized settlement of claims to effectuate a pre-arranged deal for a limited population.⁴¹⁵ As such, it will be cataloged along with the amendments lacking national significance.

b. Evaluation

The stage is now set to evaluate various substantive amendments from the last decade, again using the same criteria for statutory evaluation employed above. This time, there are nineteen substantive amendments. Again, for ease of reference, they are divided between those amendments of national significance (Table D3) as reflected in the final column of Table C2, and those of less than national import (Table D4) in that final column of Table C2:

TABLE D3
EVALUATION OF LATE SUBSTANTIVE AMENDMENTS OF NATIONAL SIGNIFICANCE

Enactment	Recap of Page-Length	Coherent?	Transparent?	Real?	Broad?
Uruguay Round Agreements Act	9				✓
La Cienega overruling	1 line		✓	✓	✓
No Electronic Theft (NET) Act	2				✓
Sonny Bono Copyright Term Extension Act	Misc. words	✓	✓	✓	✓
Fairness in Music Licensing Act of 1998	2				

415. See *infra* Part IV.E.3.

<i>Enactment</i>	<i>Recap of Page-Length</i>	<i>Coherent?</i>	<i>Transparent?</i>	<i>Real?</i>	<i>Broad?</i>
WIPO Treaties Implementation Act of 1998	16				✓
OCILLA	10				✓
Computer Maintenance Competition Assurance Act	3/4		✓	✓	✓
[Title IV of Digital Millennium Copyright Act]	15				
Digital Theft Deterrence and Copyright Damages Improvement Act of 1999	Misc. words	✓	✓	✓	✓

TABLE D4
EVALUATION OF LATE SUBSTANTIVE AMENDMENTS OF NARROW
SIGNIFICANCE

<i>Enactment</i>	<i>Recap of Page-Length</i>	<i>Coherent?</i>	<i>Transparent?</i>	<i>Real?</i>	<i>Broad?</i>
Audio Home Recording Act of 1992	8				
NAFTA Implementation Act	1/2				
Copyright Royalty Tribunal Reform Act of 1993	7	✓		✓	
Satellite Home Viewer Act of 1994	3				✓
Digital Performance Right in Sound Recordings Act of 1995	9				
Legislative Branch Appropriations Act, 1997	2/3		✓		

Enactment	Recap of Page-Length	Coherent?	Transparent?	Real?	Broad?
Vessel Hull Design Protection Act	14	✓			
TEACH Act of 2002	3				✓
Small Webcaster Settlement Act of 2002	1				

Synopsis: As has been seen above, the 1976 Act, both at its initial enactment and through its first two dozen amendments, could be conceptualized as a terse NCL mixed in with extraordinarily detailed, but ultimately separate, regulatory machinations.⁴¹⁶ By the time the next two dozen amendments had been implemented, however, that dichotomy no longer pertained. Instead, the Act as it currently stands is bloated in all particulars. The fiction of a terse NCL—which is all that people outside of Washington, D.C., needed to know⁴¹⁷—no longer governs. Instead, as we shall see, the jumble of requirements packaged together as Title 17 now reaches into all corners of the nation—right down to a seller of ink in Kentucky.⁴¹⁸ Wading through interminable pages of opaque, contradictory, and indecipherable regulations in Title 17 is no longer the exclusive province of “a highly litigious D.C. subculture”; it is now the lot of citizens everywhere who wish to follow the copyright laws.

D. Tally of Neutral Criteria

With the benefit of the comprehensive review set forth above, it becomes possible to draw some conclusions about where copyright law has been and where Congress is steering it. The analysis tracks both the formal standards comprehensibly charted above, as well as other desiderata noted earlier.⁴¹⁹

1. Coherence, Transparency, Reality, Breadth

We have posited above the fiction of the NCL.⁴²⁰ As reflected in both the 1976 Act itself and its intervening amendments through 1992, that NCL reflected good drafting choices. The proof is the preponderance of checks in

416. See *supra* Part III.C.1.b.

417. See *supra* Part III.C.1.c *in fine*.

418. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 970–71 (E.D. Ky. 2003).

419. See *supra* Part III.B.1.

420. See *supra* Part III.C.1.b.(2).

Tables B and D1. Though the marks are less than perfect, they certainly deserve an "A" for exceeding a score of 90 percent. By contrast, Table D3 tells a radically different story—for the first time, the blanks exceed the checks, meaning that the grade has dipped below 50 percent. Moreover, when the non-NCL amendments of Table D4 are scrutinized, checks become an endangered species, yielding an astonishing grade of 16 percent.

Gauged by formal criteria, accordingly, the grade that Congress gets for its recent forays into Title 17 is an "F." Moreover, the gravity of the failure is only increasing as time goes on. In addition, the considerations mustered below aggravate these shortcomings.

2. Public Accountability

Broadening our focus, let us begin with the legal ideal of public accountability. Congress should not, for example, amend the Copyright Act after having issued a roll call limited to the issue of Social Security.

One aspect of public accountability is allowing different viewpoints to be heard. If Congress shrouded its copyright debates in secrecy and forbade negative votes to be made public, there would be an extreme violation of this desideratum.⁴²¹ Happily, minority viewpoints punctuate many of the reports for the amendments selectively noted above. Those dissents provide invaluable commentary.⁴²² In fact, the CONTU Final Report itself embodies an extremely long dissent from John Hersey, which provides one of the springboards for this Article.⁴²³

The reason that accountability is not listed as a fifth factor in the tables above⁴²⁴ as to each of the sections of the 1976 Act and its subsequent amendment is that, historically, there has never been an issue of underhanded copyright amendments. But that situation changed in recent years. The culprit is the Satellite Home Viewer Improvement Act of 1999. The

421. See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

422. Representative Boucher's dissent provided much of the launching point for chapter 12 of *Copyright: Sacred Text, Technology and the DMCA*, cited *supra* note 214. In addition, much of chapter 13 of that book also takes off from the dissents that members of Congress expressed about the Digital Millennium Copyright Act. As noted therein, the system of Jewish law likewise recognizes the benefit of recording dissents. See David Nimmer, *A Riff on Fair Use*, in *COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA*, *supra* note 214, at 385, 424 n.249. The early Islamic jurist Waki' similarly observed: "The people of knowledge (the scholars) document all the evidence [on a matter], whether pro or con. The people of whim, however, document only the evidence that supports their position [and ignore the rest]." ABOU EL FADL, *supra* note 234, at 165 (alteration in original).

423. See *supra* Part II.C.3.c.

424. See *supra* Part III.C.

omnibus legislation into which that amendment was packaged introduced two stealth amendments mislabeled as “technical,” one as to sound recordings as works for hire, the other as to protection of boat hulls. Contrary to labeling, both, in fact, produced significant substantive impact.⁴²⁵ Accordingly, that amendment introduced the innovation into U.S. copyright law of failing a formal criterion to which all previous amendments had rigidly adhered—itsself occasioning the need for a subsequent corrective amendment, the Work Made for Hire and Copyright Corrections Act of 2000.⁴²⁶ Fortunately, though, that baleful result has not been replicated in any of the five subsequent alterations to the Act.

Nonetheless, the danger has scarcely passed. Though much fanfare has attended the work-for-hire correction just noted, scarcely any attention has been paid to the circumstances of the other stealth amendment. Yet if anything, the latter is more significant, as some background clarifies. The proposal to include protection for boat hulls as Title V of the Digital Millennium Copyright Act excited tremendous opposition; the critics agreed to its inclusion only because it was passed as a two-year experiment, after which all thirty-two provisions of Title 17 protecting boat hulls were destined to lapse.⁴²⁷ Senator (now Attorney General) John Ashcroft condemned the provision outright as a “fundamental shift in the tradition and breadth of copyright law.”⁴²⁸ Senator Orrin Hatch explicitly conditioned his approval for the bill on that “sunset” provision, which made the amendment “truly experimental.”⁴²⁹ Senator Strom Thurmond concurred in that assessment.⁴³⁰ Yet before that experimental period even passed—pointedly, before the report mandated by statute had even been prepared for consideration⁴³¹—the stealth amendment, noted above, eliminated the sunset. “It is impossible to believe that this latter course resulted from any deep study of the practical results of the experimental

425. Nimmer, *supra* note 214, at 463 (“[G]iven that the practical upshot for the decades ahead is to apply an entire body of law that would otherwise have lapsed in 2000, the result—far from technical—is as large a substantive alteration as one can imagine.”).

426. See generally Nimmer & Menell, *supra* note 328.

427. See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 505, 112 Stat. 2860, 2918 (1998) (“No cause of action based on Chapter 13 of Title 17, United States Code as added by this title, may be filed after the end of that 2-year period.”).

428. 144 CONG. REC. 19,521 (1998) (“At best, it is a dubious idea that was attached without discussion or consideration.”).

429. 144 CONG. REC. 24,466 (1998).

430. *Id.* at 24,465.

431. The penultimate provision of the Digital Millennium Copyright Act directed that two studies be prepared for Congress “evaluating the effect” of the Vessel Hull Design Protection Act, presumably to afford Congress the data on which to evaluate whether it should be converted from an interim to a permanent feature of the law. Digital Millennium Copyright Act § 504(a), 112 Stat. at 2917.

regime—particularly inasmuch as not a single reported decision transpired during that interval.”⁴³²

Even that is not all. For still today, an even greater problem remains lurking in the statutory text regarding boat hulls. To understand the threat, we must toggle among various time periods.

- The heading for Chapter 13 added by Title V of the Digital Millennium Copyright Act is “Protection of Original Designs.” Its first provision provides that the “owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.”⁴³³ That provision appears in a section entitled “Designs Protected.”⁴³⁴ Accordingly, everything about the amendment screams its intent to inject design protection into the Copyright Act.
- Such a course of action would overrule the drafting decision reached in crafting the 1976 Act to omit a proposed title providing such protection.⁴³⁵ Though the Senate passed that title, the House of Representatives deleted it, meaning that it failed to make its way into the final Act.⁴³⁶
- It is only later upon minutely parsing the details of Title V of the Digital Millennium Copyright Act that one realizes that protection has been limited to “a vessel hull.”⁴³⁷ Evidently someone went to the trouble to draft the thirty-two sections of the Vessel Hull Design Protection Act as broadly as possible. One need not be a conspiracy theorist to speculate that the reason behind it might have been to set the stage for yet another stealth amendment to the Copyright Act in the future.

432. Nimmer, *supra* note 214, at 463.

433. 17 U.S.C. § 1301(a)(1) (2000).

434. *Id.* § 1301.

435. Protection of Ornamental Designs of Useful Articles, S. 22, 94th Cong. tit. II (1975); see 8 NIMMER ON COPYRIGHT, *supra* note 57, app. 4A-246.

436. See H.R. REP. NO. 94-1773, at 82 (1976). For a general history of design protection, see *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985); J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143.

437. 17 U.S.C. § 1301(b)(2).

- If a simple amendment were passed in the future, eliminating the definition, the result would be that design protection in general would at that juncture take its place in Title 17. It remains to be seen whether, even with the exercise of diligence, such a future course of action can be avoided.⁴³⁸

* * *

In a previous article, I charted how Congress is not truly the author of its own laws, focusing on the example of the Digital Millennium Copyright Act.⁴³⁹ That matter could also be viewed as a subset of public accountability.

To add a word on that subject, consider a follow-up amendment, which emerged from the report on distance education that the Digital Millennium Copyright Act mandated.⁴⁴⁰ Called the TEACH Act, the law emerged based on compromises⁴⁴¹ hammered out by the affected parties.⁴⁴² “[A]ll parties to the negotiations agreed . . . that the complex set of agreements has produced a product . . . that cannot brook changes without jeopardizing the carefully crafted compromises and commitments that made this legislation possible.”⁴⁴³ Notwithstanding that both a member of the House and the Register of Copyrights agreed that the bill under consideration was incorrectly drafted, Congress passed that bill rather than tinkering with its sacrosanct language.⁴⁴⁴ Thus does congressional deference to outsiders know no bounds.

438. Given the history of the two 1999 amendments being labeled “technical” and thrown into unrelated bills at the last second, a heroic amount of congressional oversight might be required to defeat a concerted effort by a well-placed insider to effectuate this legislative change.

439. See David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909 (2002).

440. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758. The DMCA provision mandating the report was Pub. L. No. 105-304, § 403, 112 Stat. 2860 (1998).

441. See S. REP. NO. 107-31, at 3 (2001) (“This legislation has been crafted in a process that has ensured a broad consensus of affected parties.”).

442. See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 127–40 (1999).

443. *Technology, Education and Copyright Harmonization Act of 2001: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. of the Judiciary*, 107th Cong. 15 (2001) (statement of John C. Vaughn, Executive Vice President of Association of American Publishers).

444. Under an earlier bill, the Copyright Office would have been the agency to perform the follow-up study. See *Promoting Technology and Education: Turbo-Charging the School Buses on the Information Highway*, Hearing before the Senate Comm. on the Judiciary, 107th Cong. 15 (2001) (statement of Marybeth Peters, Registrar of Copyrights). Both Register Marybeth Peters and Representative Zoe Lofgren agreed that it would have made sense to designate the Copyright Office to engage in a follow-up report on distance education; the bill, however, provided otherwise. See *id.* at 25 (Lofgren); *id.* (Peters); see also 21st Century Department of Justice Appropriation Authorization Act, Pub. L. No. 107-273, § 13301(d)(1), 116 Stat. 1758, 1758, 1912–13 (2002) (directing Undersecretary of Commerce for Intellectual Property to submit new report in 180 days).

3. Stability

An important ingredient of good lawmaking is stability. For if the law changes willy-nilly, it becomes difficult to comport one's behavior with its dictates.

The tables set forth above do not contain an item-by-item entry for stability.⁴⁴⁵ For it is difficult to take a single amendment in isolation and to label it as too radical a departure from previous standards—if the intervening changes in the marketplace or technology have been sufficiently great, for example, then it is not untoward to effect correspondingly great changes to copyright law. But from the perspective of multiple amendments, the assessment becomes possible. Tables C1 and C2, with their comprehensive catalog of all amendments to the 1976 Act, afford the data requisite to reaching a conclusion about whether copyright has maintained or lost its equilibrium.

Those tables collectively chart a sea change in Congress' copyright amendments. The trend over time has been to move from stability to volatility. First, there is the sheer number—whereas the total number of substantive amendments from 1976 to 1992 summarized in Tables D1 and D2 numbered a dozen, in the far shorter period of 1992 to 2002, the total number of substantive amendments summarized in Tables D3 and D4 falls just short of a score. This first sign is indicative of the explosive nature of the change that is underway.

Second is length. Whereas the substantive amendments from the earlier period (Tables D1 and D2) totaled roughly half the length of the 1976 Act, those summarized above from the last decade (Tables D3 and D4) cumulatively run about half again as long as the entire 1976 Act. It is astonishing to realize that the decades of advance study that Congress spent to craft the 1976 Act of about seventy pages has now been dwarfed by the rush over the past decade to add over a hundred new pages to the statute.⁴⁴⁶

Third, the trend in both the 1976 Act and the first two dozen amendments was to keep the NCL simple; in other words, although various amendments might have gone on for many pages, those that were of broad national significance were comparatively brief. Indeed, the fictive NCL of 1976 ran only thirty-two pages,⁴⁴⁷ and had expanded to only forty-eight pages even after all the amendments over the next fifteen years.⁴⁴⁸ However, the rash of recent amendments reflected in Table D3 have collectively added

445. See *supra* Part III.C.

446. See *supra* notes 94–97.

447. See *supra* Part III.C.1.c.

448. See *supra* Part III.C.2.b.

fifty-four new pages to the NCL.⁴⁴⁹ Accordingly, it is fair to say that Congress has now turned its back on the methodology of limiting the NCL to terse pronouncements. The new catchword is *bloated*.

Fourth, the recent acceleration of copyright amendments demonstrates that the gyre is widening at an alarming pace.⁴⁵⁰ After its enactment in 1976, the current Act remained unaltered for many years. Putting aside technical amendments and those in other fields (such as bankruptcy and criminal law), Table C1 shows that the only amendment in the first few years was implementation of CONTU. Moreover, that amendment came about not because Congress wished to alter the current Act, but rather because as of its passage in 1976, Congress was not yet ready to grapple with computer software. It therefore enacted an interim section 117 as a “placeholder” until it was ready to adopt concrete language for that domain.⁴⁵¹ After considering the CONTU report, Congress adopted that replacement section 117.⁴⁵² Properly viewed, therefore, the 1980 text is an integral part of the 1976 Act, albeit adopted four years after the balance of the Act was first passed; it is in this sense not an “amendment” at all.⁴⁵³

Viewed in this light, the first true amendment to the 1976 Act of substance did not transpire until 1984.⁴⁵⁴ The Act therefore remained unaltered for the first eight years of its existence. The contrast with the most recent eight years could not be more striking—in the 1994–2002 interval, Congress implemented over twenty amendments!

The instability of those changes is beyond dispute when one considers some of the particulars:

- In the NAFTA Implementation Act, Congress added a new section 104A, effective January 1, 1994, resurrecting certain works from the public domain. Before even a year elapsed (on December 8, 1994),

449. See *supra* Part III.C.3.b.

450. The pace is so quick that not even Congress (or its staffers) can keep track. A case in point is the FMLA, which added a new section 512 to the Copyright Act. Pub. L. No. 105-298, § 203(b), 112 Stat. 2827, 2830 (1998) (enacted Oct. 27). The next day, Congress passed the Digital Millennium Copyright Act, which added a rival section 512 to the same Act, unaware of the previous day's handiwork. Pub. L. No. 105-304, § 202(a), 112 Stat. 2860, 2877 (1998) (enacted Oct. 28). Congress therefore had to pass a later technical amendment, changing the earlier addition to section 513. Act of Aug. 5, 1999, Pub. L. No. 106-44, § 1(c), 113 Stat. 221.

451. See *supra* Part II.C.1.

452. See *supra* Part II.C.4.

453. Congress later did the same thing with adherence to the Berne Convention, spreading out the implementing amendments over the course of years. In particular, the first step came in the Berne Convention Implementation Act of 1988, with follow-up effectuated through the Architectural Works Copyright Protection Act, Visual Artists Rights Act of 1990, Copyright Renewal Act of 1992, and the Uruguay Round Agreements Act.

454. As to the changes that 1984 initiated, see *infra* Part IV.B.1.

Congress repealed that section. It replaced it with an even newer section 104A via the Uruguay Round Agreements Act;

- In the Satellite Home Viewer Improvement Act of 1999, Congress defined “sound recordings as specially commissioned works for hire. In the Work Made for Hire and Copyright Corrections Act of 2000, Congress repealed that change, and in the process added much new language disclaiming the intent to have effectuated any substantive alteration through that earlier abortive enactment;⁴⁵⁵
- A comparison between Tables C1 and C2 reveals that the 1976 Act survived without an omnibus technical amendment from enactment in 1976 all the way until 1997.⁴⁵⁶ From that time forward, by contrast, the pace of amendment had become so great that a scant two years later, Congress had to make more dozens of technical amendments.⁴⁵⁷ Since then, there has been a steady stream of technical “improvements” to the exploding contours of Title 17;
- The Small Webcaster Settlement Act of 2002 was required to redress the changes that Title IV to the Digital Millennium Copyright Act in 1998 failed to implement to the Digital Performance Right in Sound Recordings Act of 1995.⁴⁵⁸

If any doubts remained about stability, those considerations should dispel them.

4. Retroactivity

Another ideal to which laws should aspire is to regulate conduct on a going-forward basis. After all, if Congress makes illegal in 1995 conduct that was undertaken in 1990, then compliance with the law becomes aleatory, if not downright impossible.⁴⁵⁹ From this perspective, the recent amendments to the Copyright Act evince yet further flaws.⁴⁶⁰

As enacted, the 1976 Act was scheduled to take effect largely on January 1, 1978, in order to afford all actors plenty of time to comport their future

455. See *supra* Part III.D.2.

456. See Act of Nov. 13, 1997, Pub. L. No. 105-80, 111 Stat. 1529.

457. See Technical Corrections to Title 17, Pub. L. No. 106-44, 113 Stat. 221 (1999).

458. See *infra* Part IV.E.

459. See *supra* Part III.B.1.

460. As noted *supra* note 282, no hermetic division separates the various standards proposed herein. The defects cataloged in this subsection and those that follow could be conceptualized along the *prospectivity* plane, or as flaws in *coherence*, *stability*, *possibility*, or even on other bases.

behavior to its strictures. No portion of that Act explicitly commanded retroactive protection, as to do so would raise questions of due process.⁴⁶¹

In the slough of amendments that followed over the decades, Congress followed the same practice—each such amendment took effect either as of the date of amendment or at a specified date in the future. None of the first twenty-six amendments to the Copyright Act purported to require retroactive application.

The first breach in the wall took place in 1994. In the Satellite Home Viewer Act of 1994, Congress provided on October 18, 1994, that its new statutory definition of “local service area”⁴⁶² should apply retroactively to July 1, 1994.⁴⁶³ Later, in the Satellite Home Viewer Improvement Act of 1999, Congress amended that 1994 enactment, again making a portion retroactive.⁴⁶⁴ The Digital Millennium Copyright Act likewise follows suit; a portion of Title IV of that 1998 enactment makes changes retroactive to 1995.⁴⁶⁵ Likewise, an intervening technical amendment in 1997 reached back to 1987.⁴⁶⁶

Instability begets incoherence, which in turn necessitates the evil of retroactivity to clean up the previous mess. Thus, when Congress decided to repent for its breach of the norm of public accountability by repealing the 1999 stealth addition of “sound recordings” to the definition of specially created

461. See 1 NIMMER ON COPYRIGHT, *supra* note 57, § 1.11.

462. 17 U.S.C. § 111(f) (2000).

463. The “effective date” provision of that enactment is so bizarre as to warrant quotation in full:

(a) IN GENERAL.—Except as provided in subsections (b) and (d), this Act and the amendments made by this Act take effect on the date of the enactment of this Act.

(b) BURDEN OF PROOF PROVISIONS.—The provisions of section 119(a)(5)(D) of title 17, United States Code (as added by section 2(2) of this Act) relating to the BURDEN of proof of satellite carriers, shall take effect on January 1, 1997, with respect to civil actions relating to the eligibility of subscribers who subscribed to service as an unserved household before the date of the enactment of this Act.

(c) TRANSITIONAL SIGNAL INTENSITY MEASUREMENT PROCEDURES.—The provisions of section 119(a)(8) of title 17, United States Code (as added by section 2(5) of this Act), relating to transitional signal intensity measurements, shall cease to be effective on December 31, 1996.

(d) LOCAL SERVICE AREA OF A PRIMARY TRANSMITTER.—The amendment made by section 3(b), relating to the definition of the local service area of a primary transmitter, shall take effect on July 1, 1994.

Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 6, 108 Stat. 3477, 3481.

464. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, app. I, § 1012, 113 Stat. 1501A-521, 1501A-544 (the law passed Nov. 29, 1999, rolling back rates retroactively to July 1, 1999).

465. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405(a)(5), 112 Stat. 2860, 2899 (1998) (stating that it “shall be deemed to have been enacted as part of the Digital Performance Right in Sound Recordings Act of 1995”).

466. Act of Nov. 13, 1997, Pub. L. No. 105-80, § 13(c), 111 Stat. 1529, 1536. Moreover, another portion of that same 1997 amendment effectuated its changes effective as of 1994. *Id.* § 13(b). Subject to those two exceptions, the rest of that Act took effect as of the date of enactment. *Id.* § 13(a).

works for hire,⁴⁶⁷ it had to make the 2000 corrective legislation retroactively applicable as of the date of the initial 1999 “technical” amendment.⁴⁶⁸

The previous phenomenon is simply a special case of the general rule that the problem of retroactivity meshes with problems of coherence, stability, and randomness.⁴⁶⁹ When Congress added an antibootlegging feature to the Copyright Act via the Uruguay Round Agreements Act, it selectively incorporated certain features of antecedent law and omitted others. As a result of its drafting choices, the argument arises that the law applies retroactively—that is, that one who sold bootlegged recordings before its effective date could become liable thereafter.⁴⁷⁰ To date, no cases address that anomaly.

Finally, copyright resurrection via the Uruguay Round Agreements Act and the *La Cienega* amendment implicate the domain of retroactivity.⁴⁷¹ Strictly speaking, however, those amendments are better viewed as “retrospective” legislation rather than as retroactively realigning the rights of parties.⁴⁷² Properly viewed, therefore, those features do not fall afoul of the nonretroactivity standard.⁴⁷³

5. Randomness

A last standard for good lawmaking is that the content of a statute reflect deliberate choice rather than random drift amidst uncontrolled verbiage.

467. See *supra* Part III.D.2.

468. The consequences cascade. One legislator admitted that the language chosen to rectify the error is more than “slightly awkward in its legislative construction.” 146 CONG. REC. H7772 (daily ed. Sept. 19, 2000) (statement of Rep. Conyers). The problem is that the past mistake engendered such hostility between opposing forces that the later “compromise was not easily reached.” 146 CONG. REC. H7244 (daily ed. Sept. 6, 2000) (statement of Rep. Coble).

469. See *supra* note 282.

470. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 8E.03[C][5].

471. See generally *id.*, ch. 9A. For a particular discussion about the Rule of Retroactivity embodied in Article 18 of the Berne Convention, see *id.* § 9A.02.

472. See *Landsgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *United States v. \$814,254.76 in United States Currency*, 51 F.3d 207 (9th Cir. 1995). In other words, after those amendments took effect in 1996 and 1997, copyrights prospectively sprung back into existence. However, those amendments did not create a new cause of action in 1998 to sue based solely on conduct undertaken in 1995, for example.

473. A contrary argument arises as to the *La Cienega* amendment. That 1997 amendment inserted the following language into the Act, without specifying any effective date: “The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.” 17 U.S.C. § 303(b) (2000). A court that took “for any purpose” hyperliterally could sustain suit filed after its effective date complaining of conduct that took place in 1995, for example. It is suggested that that retroactive approach should not be followed. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 9A.05[B] n.21.

Unfortunately, the Copyright Act's convoluted character inevitably leads to substantive matters on occasion slipping below the radar screen.

Consider a follow-on to the feature of retroactivity confronted above.⁴⁷⁴ In 1987, Congress extended the Semiconductor Chip Protection Act of 1984.⁴⁷⁵ Later aware that the 1987 language contained a typo, Congress included a correction in a 1997 technical amendment.⁴⁷⁶ Unlike the scores of other like corrections in that same enactment,⁴⁷⁷ Congress made that one alone retroactively effective.⁴⁷⁸ Given that the backwards sweep of that lone grammatical feature was not included in the House bill reported out of committee,⁴⁷⁹ it is impossible to imagine any rationale for the distinction. Randomness seems to enjoy full sway in this example.

A more pointed example is that Congress has added numerous interim features of copyright law on an experimental basis, and later decided to extend them⁴⁸⁰ or institute them permanently⁴⁸¹ once the experiment had been deemed a success.⁴⁸² Yet in the *Red Baron* instance explicated below,⁴⁸³ Congress simply forgot to return to the laboratory when the experiment ended.⁴⁸⁴ The feature in question therefore expired with no awareness in Congress that its deadline had arrived—despite the fact that the rationale for

474. See *supra* Part III.D.4.

475. Pub. L. No. 100-159, 101 Stat. 899 (1987) (current version at 17 U.S.C. § 1914 (2000)).

476. Act of Nov. 13, 1997, Pub. L. No. 105-80, § 12(b)(1), 111 Stat. 1529, 1536 (1997) (changing "orginating" to "originating").

477. E.g., *id.* § 12(a)(15) (changing "nondramtic" to "nondramatic").

478. *Id.* § 13(c) (indicating that it "shall be effective as if enacted on November 9, 1987"). By contrast, the default rule for that legislation was that "the amendments made by this Act shall take effect on the date of the enactment of this Act." *Id.* § 13(a).

479. H.R. REP. NO. 105-25, at 6, 18 (1997).

480. For instance, the Satellite Home Viewer Act of 1988 set up an interim license, due to expire on December 31, 1994. In the Satellite Home Viewer Act of 1994, Congress extended the deadline to December 31, 1999. In the Satellite Home Viewer Improvement Act of 1999, Congress again extended the deadline to December 31, 2004, where it currently rests. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.18[F][5].

481. For instance, the Record Rental Amendment of 1984 contained a sunset provision as of October 3, 1989, to enable the pertinent congressional "[c]ommittee to review and reconsider the appropriateness of and justification for this legislation at a later time." H.R. REP. NO. 98-987, at 6 (1984). That committee later recommended a temporary extension, which Congress passed via the "Act To extend for an additional 8-year period certain provisions . . . relating to the rental of sound recordings . . ." Later still, to comport with the international obligations of the United States, the NAFTA Implementation Act altogether eliminated that sunset. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.12[B][7][d][2].

482. In the case of vessel hulls, however, an amendment was snuck through eliminating the pertinent sunset date without any such examination. See *supra* Part III.D.2.

483. See *infra* Part IV.G.2.

484. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.15[I].

the *Red Baron* fix remained equally operative. Legislation-by-oversight is hardly the hallmark of a stable legal system.

IV. THE ROAD DOWN—AN AKANTHOLOGY

The comprehensive tables set forth above, having thoroughly ventilated the progression of amendments to the 1976 Act from its inception to date, afford the perspective necessary to draw appropriate conclusions about where we are heading.⁴⁸⁵ Collectively, they recount a story of almost continual decline. How did things get so bleak? Congress is not congenitally incapable of crafting good copyright amendments—as even its 1999 Digital Theft Deterrence and Copyright Damages Improvement Act proves, it can still get straight “A”’s measured by formal criteria.⁴⁸⁶ Yet the vast bulk of its recent handiwork tends to sink towards the negative side of the spectrum. What accounts for the difference? How can Congress get back on the straight and narrow?

A. Historical Perspective

Despite the unfortunate decline that has characterized in particular the last decade of copyright amendments, history is not destiny. There is no reason to conclude that ever further decline is the inevitable lot of copyright legislation. To the contrary, pearls of wisdom are not only cognizable but have even been implemented into Title 17. It is a tonic to bear those exceptions in mind while retracing the descent into the netherworld.

Going all the way back to the beginning, the first substantive amendment to the Copyright Act was the Computer Software Copyright Act of 1980. As recounted above, that amendment instituted CONTU’s recommendations.⁴⁸⁷ That first effort won a check in all four categories of evaluation (coherent, transparent, real, and broad), as did the next three substantive amendments of broad copyright significance summarized in Table D1 above. As recently as 1990, therefore, Congress was on a roll in bringing the NCL to ever greater heights. Though it stumbled a bit that year in the Computer Software Rental Amendment Act,⁴⁸⁸ it soon returned to the path of glory. Indeed, the last

485. See *supra* Part III.C.

486. See *supra* Part III.C.3.b.

487. See *supra* Part II.C.

488. See *supra* Part III.C.2.b.

two substantive amendments summarized in Table D1 likewise earn unanimous checks.⁴⁸⁹

In short, Congress has not sacrificed the ability to achieve formal correctness while amending the Copyright Act. But the unanimous checks of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 have become the rare exception. Instead, the vast majority of enactments summarized in Table D4 now constitute such incoherent special-interest legislation as to earn all blanks.⁴⁹⁰ Where did we go wrong? As George Orwell prefigured, it all started in 1984. The discussion that follows presents an *akanthology*⁴⁹¹ of copyright amendment.

B. Sui Generis Addenda

1. Semiconductor Chip Protection Act of 1984

My father's last revision to *Nimmer on Copyright* consisted of a write-up of the Semiconductor Chip Protection Act of 1984 (SCPA).⁴⁹² "It's remarkably strange," he confided in me.

Stranger than he knew. That amendment began the disease currently afflicting Title 17. Up to that point, the Copyright Act had consisted of a lucid kernel (which I have dubbed the "NCL"), surrounded by much extraneous, albeit benign, language.⁴⁹³ But in that year, traces of a malignancy began.

The chief defect of the SCPA is that Congress enacted it as a thaumaturge to avoid future entanglements, rather than out of any sense that it was necessary to redress a present need. In particular, Congress decided that worldwide competition in semiconductor chips would soon become the defining characteristic of a new world order. Just as the nineteenth century had seen the growth of the great Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, the sages in our government sponsored the Washington

489. See *supra* Part III.C.2.b. In the Copyright Renewal Act of 1992, Congress improved U.S. copyright law by prospectively eliminating the requirement of renewal registration as a condition to continued copyright subsistence. That amendment furthered the process of rectifying U.S. copyright law with the norms mandated by the Berne Convention. It did so through a coherent set of amendments that have—like the 1980 through 1984 amendments discussed above—withstood the test of time rather than leading to vast interpretive puzzles. By the same token, the Fair Use of Unpublished Works Provision has been a success. See *infra* Part IV.G.1.

490. See *supra* Part III.C.3.b.

491. The Greek for "flower" is *anthos*. Hence, an "anthology" is an ordered collection of flowers. The Greek for "weed" is *akantha*. Hence, the neologism of an "*akanthology*."

492. MELVILLE B. NIMMER, NIMMER ON COPYRIGHT §§ 18.01–.10 (1985) (release 17).

493. See *supra* Part III.C.1.b.

Conference For The Protection Of Semiconductor Chips. At the same time, they introduced the innovation into Title 17 of a new Chapter 9 consisting of fourteen new sections, minutely regulating mask works for semiconductor chips as a type of "paracopyright" entitlement.⁴⁹⁴

The sequel is not pretty. First, the various innovations introduced by the SCPA have not contributed to copyright doctrine. Rather, they constitute a *sui generis* form of protection absolutely distinct from the rest of the Copyright Act. To cite but a few examples, copyright lasts for seventy years *pma*; by contrast, rights in mask works endure for only ten years.⁴⁹⁵ Copyright arises automatically as soon as a work is fixed in a tangible medium of expression; rights in mask works spring into existence, by contrast, only when appropriate registration is effected in the requisite government agency or when commercial exploitation occurs.⁴⁹⁶ In these and countless other particulars, the SCPA stands alone.⁴⁹⁷

So how has the SCPA been construed in the almost two decades since it came into existence? Hardly at all. A grand total of two published decisions have issued thereunder, both emanating from the same underlying litigation.⁴⁹⁸ In terms of actual impact on actors in the marketplace, its impact accordingly appears to be nil. Even as of two decades since its enactment, the SCPA massively fails the *reality* principle, inasmuch as it is geared at a neverland.

But that assessment by itself is actually overly rosy. In fact, the SCPA has proven to be of negative value. By introducing the notion of reciprocity into Title 17, the United States has opened itself up to parallel tactics from other nations.⁴⁹⁹ That thrust is absolutely contrary to the general posture of the U.S. government, which wants all nations to implement across-the-board copyright standards, regardless of formal reciprocity.⁵⁰⁰

One could theoretically forgive these various defects if the addition of the SCPA to Title 17 achieved its goal within the international copyright framework. In other words, if the Washington Treaty For The Protection Of Semiconductor Chips itself proved of great value to the United States, then perhaps the price of including its lugubrious features in Title 17 might

494. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12A.18[B] n.15.

495. 17 U.S.C. § 904(b) (2000).

496. *Id.* § 904(a).

497. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8A.02–12.

498. *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 705 F. Supp. 491, 493–94 (S.D. Cal. 1988); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 757 F. Supp. 1088, 1095 (S.D. Cal. 1990).

499. See Panel Commentary of Jean-François Verstryngne, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 165, 166–67 (1993).

500. See generally 4 NIMMER ON COPYRIGHT, *supra* note 57, ch. 18.

have been worth paying. But that is not the case either. The list of signatories to the Washington Treaty is as follows: China, Egypt, Ghana, Guatemala, India, Liberia, Yugoslavia, and Zambia. One fails to discern in that enumeration any of the high-tech bastions of the world. Indeed, Washington, D.C. has itself not signed onto its eponymous treaty. For all these reasons, the legacy of the SCPA is unremittingly bleak.

2. Vessel Hull Design Protection Act

Congress replicated the *sui generis* approach of the SCPA when enacting Title V of the Digital Millennium Copyright Act, namely, the Vessel Hull Design Protection Act.⁵⁰¹ It bettered the fourteen sections added in 1984 by accreting thirty-two new sections in this 1998 amendment.⁵⁰² Worse yet, the “need” for this amendment was embarrassingly slender.⁵⁰³ When the vote came, the amendment passed over the objection of some of the most powerful members of Congress, who acceded to its inclusion in the Digital Millennium Copyright Act only because it was of such limited scope and

501. We have already confronted the underhanded amendments to that enactment. See *supra* Part III.D.2.

502. For a comprehensive analysis, see 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8A.15–21.

503. The only economic rationale for this new scheme that Congress offered comes in a few conclusory sentences:

“Hull splashing” is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded in the sense that they are not benefiting from the many attributes of hull design, other than shape, that are structurally relevant, including those related to quality and safety. It is also highly unlikely that consumer [sic] know that a boat has been copied from an existing design. Most importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await.

H.R. REP. NO. 105-436, at 13 (1998). Given that Congress evidently saw the need for the Vessel Hull Design Protection Act in the economics of incentives to create, then this report is remarkable for its failure to document the issue through citation to any empirical research. Congress evidently adopted the expedient of “legislate now, evaluate later”—rather than conducting an empirical investigation into past effects, it directed a study as to the future impact of the Vessel Hull Design Protection Act, Pub. L. No. 105-304, § 504(a), 112 Stat. 2860, 2917 (1998). But that device was shown to be a scam when Congress later strengthened the Vessel Hull Design Protection Act considerably, even before any such report had issued. See *supra* Part III.D.2.

Moreover, even taking at face value the quote indented above, it seems to collapse of its own weight. If the concern were truly safety, then Congress would have been better advised to address it directly rather than through the proxy of new protection under Title 17. Moreover, the report does not lay any foundation for believing that splashed hulls are invariably unsafe, or even unsafe to any greater degree than unsplashed hulls. It is also unclear why consumers’ lack of knowledge of copying diminishes from their well-being, if they are in fact purchasing the design that appeals to their eyes. Cf. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 30 (2003) (“Reading ‘origin’ in § 43(a) to require attribution of uncopyrighted materials would pose serious practical problems.”).

also of an experimental nature—destined to last only two years. As we have seen, however, that quid pro quo proved illusory when the two-year sunset unceremoniously expired in a later stealth amendment to the Copyright Act.⁵⁰⁴

The strangeness does not end there. As already noted, the Digital Millennium Copyright Act mandated a study of the Vessel Hull Design Protection Act, to facilitate a later evaluation whether it should be converted from an interim to a permanent feature of the law.⁵⁰⁵ When the sunset was later eliminated, Congress again ordered a study to be prepared—*notwithstanding* that the very purpose for that enterprise no longer applied.⁵⁰⁶ The Copyright Office duly complied when the statutory deadline of November 1, 2003, arrived by preparing such a report.⁵⁰⁷ That report revealed that only one lawsuit has been brought under the amendment,⁵⁰⁸ only a small number of vessel hulls has been registered,⁵⁰⁹ and any evidence that the law “has been effective in suppressing infringements of protected hull designs is scant and anecdotal.”⁵¹⁰ Those findings scarcely constitute a ringing endorsement after the fact for the need to have added thirty-two provisions to the Copyright Act.⁵¹¹

3. An Act Cleft in Twain

Earlier, I proposed the fiction of an NCL separate from, but immiscibly combined within, the balance of the Act.⁵¹² We depart the realm of metaphor

504. See *supra* Part III.D.2. The limited scope might likewise prove endangered. See *supra* note 438.

505. See *supra* note 431.

506. See Act of Nov. 29, 1999, Pub. L. No. 106-113, app. I, § 5005(a)(1), 113 Stat. 1501, 1501A-593 (1999). In other words, whether the Report was laudatory or critical, there was no longer any occasion for Congress to act upon it by deciding to extend the statutory deadline or withholding that step.

507. U.S. COPYRIGHT OFFICE & U.S. PATENT & TRADEMARK OFFICE, *THE VESSEL HULL DESIGN PROTECTION ACT: OVERVIEW AND ANALYSIS* (2003).

508. *Id.* at 9.

509. *Id.* at 10.

510. *Id.* at 9. As to those witnesses who testified about that law that “[i]t’s working,” the Copyright Office asked them to furnish “specific examples of designs that would not have been created and introduced to the public but for the protection” of the Vessel Hull Design Protection Act. *Id.* at 12. In response, they were able to proffer no evidence. *Id.* Another industry spokesperson conceded that the enactment “has little effect on the price of [our] product or the cost of [our] product design.” *Id.* at 13.

511. Another anomaly is that that much of the impetus for adopting the Digital Millennium Copyright Act lay in the desire for international harmonization. See, e.g., S. REP. NO. 105-190, at 2 (1998) (“setting a marker for other nations”). One therefore might have thought that its Part V, the Vessel Hull Design Protection Act, would have been designed for a similar purpose. Yet it remains unclear whether designs registered thereunder receive any protection under the laws of other nations. U.S. COPYRIGHT OFFICE & U.S. PATENT & TRADEMARK OFFICE, *supra* note 507, at 14 n.32.

512. See *supra* Part III.C.1.b.(2).

and enter a different reality with the foregoing two amendments: they form no part of the Copyright Act per se; instead, as truly *sui generis* additions, they regulate subject matter adjacent to copyright protection. Together, the forty-six sections that the Vessel Hull Design Protection Act and the SCPA occupy in Title 17 offer little that is apparent in the way of redeeming social value.⁵¹³

Accordingly, the Copyright Act of 1976 as amended to date consists of all portions of Title 17 of the United States Code with the exception of its chapter 9 (devoted to semiconductor chips) and chapter 13 (devoted to boat hulls). Any interpretation of chapter 9 affects only chapter 9; any interpretation of chapter 13 affects only chapter 13. As to the balance of the Act, by contrast, any interpretation reached in one provision may resonate across all the remaining sections and chapters. The fiction of an NCL immiscibly mixed with beltway-centric regulation continues to illuminate the domain of chapters 1 through 8 and 10 through 12 of Title 17.⁵¹⁴

C. Audio Home Recording Act of 1992

When the Audio Home Recording Act (AHRA) was passed in 1992, I concluded that it was the worst thing that had ever happened to the Copyright Act.⁵¹⁵ The AHRA is a forbidding jungle of arbitrary specifications; it marks the turning point, in fact, of Title 17 from a potentially comprehensible embodiment of copyright doctrine into the hopeless mishmash that it has become.⁵¹⁶ When one reflects that the “need” for this radical deformation was in fact nonexistent, it is an occasion for some sadness in the annals of sensible lawmaking.

In brief, the impetus for the AHRA, as for the SCPA,⁵¹⁷ was embodied in the future. Specifically, Congress’ assessment of the state of affairs in 1992 led it to conclude that, in short order, every red-blooded American would be as equipped in his home and office with digital audio tape (DAT) recorders as with telephones, televisions, and other appurtenances without which modern life itself would be inconceivable. In order to pave the way

513. For a potentially lurking time-bomb in the Vessel Hull Design Protection Act, see *supra* Part III.D.2.

514. See *supra* Part III.C.1.b.

515. Note that the Semiconductor Chip Protection Act of 1984 did not affect the Copyright Act, even though it was codified together with it into Title 17. See *supra* Part IV.B.3.

516. For all its flaws on the *reality* plane, the SCPA was not per se *incoherent*. Thus, one who reviewed its language could understand fairly clearly how its parts fit together, even if unsure about their actual impact on this planet.

517. See *supra* Part IV.B.1.

for that inevitable progression, Congress needed to add to Title 17 minute criteria as to how DAT recorders and recording media must be regulated. It did so through defining a Serial Copy Management System, with extensive mandates about exactly how that system needed to be incorporated into every future audio component.⁵¹⁸ The particulars of its implementation are contained in something called "The Technical Reference Document."⁵¹⁹ That document itself covers fourteen pages of fine print.⁵²⁰ But when it came time to pass the legislation itself, Congress omitted that language from the actual enactment.⁵²¹ The result is that it passed a law that required compliance with a document that itself was not legislated into existence. To the virtue of *incoherence*, therefore, must be added the additional quality of *opaqueness*.

But that is not all. Actual experience under the AHRA replicated the flurry of litigation filed under the SCPA—none at all. Instead of DAT products becoming as ubiquitous as Congress imagined when it frantically adopted this legislation, the revolution never occurred. DATs have become standard equipment in American homes to about the same extent as videophones. As a result, this amendment also fails the *reality* principle. In particular, there has been even less litigation under this 1992 amendment than its 1984 predecessor—to be precise, one case.

To understand how that particular case arose, more background is in order. This legislation implemented terms worked out by record companies and hardware manufacturers.⁵²² It resolved the long-simmering dispute over the propriety of home taping.⁵²³ My father had long taken the view that making a tape for home use that replicated an entire record album did not qualify as fair use.⁵²⁴ But lingering statements from the House Report for the

518. 17 U.S.C. § 1002(a)(1) (2000).

519. See S. REP. NO. 102-294, at 11 (1992) (discussing section 1021(a)(1)(A) of 1991 bill).

520. *Id.* at 17–30.

521. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.03[B].

522. See H.R. REP. NO. 102-873, at 9 (1992).

523. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.01[D][3].

524. See *id.* His conclusion is worth quoting at length:

There remains the difficult problem of an appropriate remedy. It is both impractical and undesirable to attempt to enforce the reproduction right as against the home tapper. The only feasible method of enforcement would appear to be as against the manufacturer of audio recording equipment and tapes. This raises the issue of contributory infringement, discussed elsewhere in this treatise. Assuming contributory infringement is found, the conventional remedy of an injunction against the sale of recording equipment and tapes is itself undesirable. Society should not lose the benefit of recording technology. Legislation providing for a compulsory license would appear to be the most acceptable solution. But absent such legislation, it would appear to be open to the courts to order a royalty payment to be made in lieu of an injunction.

Id.; see *infra* Part V.A.1.

Sound Recording Amendment of 1971,⁵²⁵ as well as floor statements in that year, gave rise to a contrary imputation that continued to be argued.⁵²⁶

Congress resolved the issue by creating via the AHRA a safe harbor for such home taping.⁵²⁷ The language used is stilted. It basically provides that consumers acting for noncommercial purposes may make as many analog copies of music as they want, and also can make as many digital copies of music as they want⁵²⁸—but those latter would need to be subject to the above-referenced Serial Copy Management System,⁵²⁹ which in turn would require a royalty to be paid for purchase of the copying equipment and media.⁵³⁰

The amendment also incorporated a signal exception. While Congress was preparing for the forthcoming DAT revolution, one matter about which it was certain was that it did not have to integrate its DAT regulations with the separately burgeoning field of personal computers. After all, PCs were used for a variety of financial and technical applications having nothing to do with music—no one but a geeky propeller-head would do something as bizarre as to use the instrumentality of a PC to listen to music.⁵³¹ For that reason, Congress carved out an exception from the strictures of this 1992 legislation for sound recordings accessed by computer means.

That fateful decision led to the one and only reported case arising under the AHRA. In *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*,⁵³² plaintiff complained about the manufacturing of a Rio portable music player, “a small device (roughly the size of an audio cassette) with headphones that allows a user to download MP3 audio files⁵³³ from a computer and to listen to them elsewhere.”⁵³⁴ That device allowed its users to troll the Internet and thereby obtain access to a variety of unlicensed music, along with authorized materials.⁵³⁵

525. Pub. L. No. 92-140, 85 Stat. 391 (1971).

526. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8B.01[D][1]–[D][1][b].

527. 17 U.S.C. § 1008 (2000) (indicating that the safe harbor was “based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.”).

528. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.07[C][2].

529. See *id.* § 8B.03[B].

530. See *id.* § 8B.04.

531. See generally Nimmer, *supra* note 311.

532. 180 F.3d 1072 (9th Cir. 1999).

533. Those files are compressed files containing music, in its most popular “downloadable” form. See Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, ENT. L. REP., Sept. 1998, at 4, 4.

534. *Recording Indus. Ass'n of Am.*, 180 F.3d at 1073.

535. The court stated:

In contrast to piracy, the Internet also supports a burgeoning traffic in legitimate audio computer files. Independent and wholly Internet record labels routinely sell and provide

But the district court and circuit court forcefully rejected plaintiff's argument. The trial court noted tersely that "technology has outpaced the AHRA."⁵³⁶ In affirming, the Ninth Circuit added the following dictum:

In fact, the Rio's operation is entirely consistent with the [AHRA]'s main purpose—the facilitation of personal use. As the Senate Report explains, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial use*." The Act does so through its home taping exemption, which "protects all noncommercial copying by consumers of digital and analog musical recordings." The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.⁵³⁷

The sole operative effect of that litigation has been to create a defense for the *Napster* case.⁵³⁸ The pro-music intent underlying this 1992 amendment, in actual practice, has therefore devolved into an anti-music industry defense (albeit ultimately unsuccessful) in another context. Thus has failure compounded upon failure.

D. Uruguay Round Agreements Act

Three years later, I had to conclude that Congress had not fully plumbed the depths of bad lawmaking through its previous enactment of the AHRA; rather, it was still able to expand handily into new vistas. The occasion was passage in 1995 of the Uruguay Round Agreements Act (URAA).⁵³⁹

In this instance, formal defects inhered not so much in *incoherence*, *transparency*, *reality*, and *breadth*—rather, this legislation extended the vector to new domains. In particular, all previous copyright legislation for two centuries had been rooted in the Copyright Clause to the U.S. Constitution.

free samples of their artists' work online, while many unsigned artists distribute their own material from their own websites. Some free samples are provided for marketing purposes or for simple exposure, while others are teasers intended to entice listeners to purchase either mail order recordings or recordings available for direct download (along with album cover art, lyrics, and artist biographies).

Id. at 1074.

536. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 29 F. Supp. 2d 624, 630 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072.

537. 180 F.3d. at 1079 (citations omitted).

538. See *infra* Part V.A.

539. Pub. L. No. 103-564, 108 Stat. 4809 (1994).

In the URAA, Congress blithely tossed aside that requirement.⁵⁴⁰ Moreover, it did so sub silentio, not even acknowledging that it was breaking new ground in this regard—unlike previous and subsequent copyright amendments, elaborately analyzed through a House report or Senate report (most frequently, both) that set forth the constitutional underpinnings, no such procedure was observed for the URAA.⁵⁴¹ Instead, Congress simply overhauled the copyright laws as an afterthought to overhauling the rest of the laws of the United States in order to comport with the new discipline of world trade.⁵⁴² Having extensively analyzed those constitutional difficulties elsewhere, I will not rehearse the argument here.⁵⁴³ Suffice it to say that by this time, it was already apparent that copyright amendments were running amok.

E. Performance Rights in Sound Recordings

When Congress first accorded limited rights to sound recordings in 1971, it denied them any performance right.⁵⁴⁴ For that reason, radio stations in the United States have never had to pay the singers, bands, and record companies⁵⁴⁵ whose wares they ceaselessly advertise and play.⁵⁴⁶ (That status continues right to the present, notwithstanding the amendments to be canvassed momentarily.)⁵⁴⁷ With the advent of the Internet, Congress could have remedied that defect by inserting in (or deleting from) the Act a few judicious words.⁵⁴⁸ The Clinton administration recommended exactly that course.⁵⁴⁹ But Congress chose a different path, with enormous repercussions for the coherence of copyright law.

540. For a full analysis, see David Nimmer, *supra* note 73.

541. See *id.* at 1408–09.

542. See *id.* at 1412.

543. See *id.* at 1408–16.

544. See *infra* Part IV.G.1.

545. As to musical compositions, in contrast to sound recordings, the radio stations are obligated to pay.

546. When that status was new and untested, and radio stations seemed to be the Napster of their era, see *infra* Part V.A.2, copyright owners attempted to ban such unlicensed radio performances, see JESSICA LITMAN, *DIGITAL COPYRIGHT* 43 (2001).

547. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[B][1][b]. It even applies with respect to digital radio broadcasts, as long as they are nonsubscription. However, it does not extend to subsequent webcasting of FCC-licensed radio signals. See *id.*

548. See David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 189 (2000) (“It never needed to be that complex.”).

549. See WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 225 (1995) (recommending “full public performance right”).

1. Digital Performance Right in Sound Recordings Act of 1995

The path it chose was to adopt a compromise worked out among the record industry, songwriters, music publishers and other interested entities.⁵⁵⁰ The result was that Congress amended the 1976 Act via the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). Review of this amendment convinced me directly that I had been uniformly wrong in past assessments—this amendment was by far the worst thing that had happened to date to copyright law. It was comforting in due course to find myself not alone in that assessment. One of my father's all-time favorite students (and a valued colleague of my own) has commented that "the organization of the new Act makes it appear that each subsection was written on a separate 5-by-7-inch card, and that the cards were spilled on the floor and accidentally reassembled out of order just before the bill was retyped in the form in which it was enacted."⁵⁵¹

The DPRA is a masterpiece of incoherence. Writing up its terms exposed numerous examples of inconsistency, opaqueness, etc.⁵⁵² As a single example, one of its provisions allows relief from the strictures otherwise imposed in the event that the licensor of sound recordings executes grants to "at least 5 different interactive services [and, as to each grant, for] no event less than 50 sound recordings."⁵⁵³ The legislative history explains that compliance with this provision occurs when a licensor "has granted performance licenses for a total of 10,000 sound recordings to five different interactive services, and each service received a performance license for at least 1,000 sound recordings."⁵⁵⁴ But what about a singer-songwriter who has not signed with a major label, instead retaining ownership of her own oeuvre? Working through the math, unless she owns at least 200 sound recordings, she lacks the requisite inventory to issue enough licenses to satisfy this statutory provision.⁵⁵⁵ Thus, we see a classic violation of the *breadth* principle—this amendment was crafted to apply only to the oligopoly of the companies who lobbied for its passage, to whom it did not even occur that Title 17 of the United States Code is designed to apply to the nation as a whole.

550. See H.R. REP. NO. 104-274, at 11–12 (1995).

551. Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP., Nov. 1995, at 3, 3.

552. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8.21–.24.

553. 17 U.S.C. § 114(d)(3)(B)(i) (2000).

554. S. REP. NO. 104-128, at 26 (1995).

555. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[E][1][b] n.427.

In brief, this amendment defines two new types of copyright exploitation—digital audio transmission⁵⁵⁶ and digital phonorecord delivery.⁵⁵⁷ Briefly stated, the former occurs when music is streamed, for instance, by a web site to a user. The latter consists of “record sales” updated to reflect the potentials afforded by the Internet, such as occurs when someone decides to buy tracks or an entire album not by visiting a physical outlet, but by paying cybercash for an appropriate transmission.

After I had elaborately written up all the specifications of this Act,⁵⁵⁸ a client approached me to ask which statutory provisions it needed to invoke in order to engage in real-world activity. I went back to consult the elaborate specifications regarding “digital audio transmission” and “digital phonorecord delivery” to determine how best to characterize the subject activities. In the process, I was compelled to acknowledge that my treatise analysis across almost a hundred pages⁵⁵⁹ setting up innumerable pigeonholes corresponding to the statutory framework had failed to confront the real-world questions facing this client. Worse, it seemed that if the client simply complied with the strictures for “digital audio transmission,” it risked being sued for having failed to style its activity as “digital phonorecord delivery”; conversely, if it rigorously complied with the latter formulation, it faced the complementary risk as to the former. In other words, the language of the statute was phrased in such an unworldly fashion that actual entities situated in this universe had no way of knowing how to characterize their own conduct.

Notwithstanding extensive review of all of the pertinent committee reports, Senate/House statements, and other ancillary materials, this conundrum proved unbridgeable. (Although the matter is too technical for the flow of this Article of general import, the interested reader can consult my thinking of marginal relevance.)⁵⁶⁰ At that point, cynicism stepped in, and I asked

556. 17 U.S.C. § 114(j)(5).

557. *Id.* § 115(d).

558. See 2 NIMMER ON COPYRIGHT, *supra* note 57, §§ 8.21–.24.

559. See *id.*

560. Among the many innovations of the DPRA, it augmented the traditional dichotomy between compulsory licenses and complete ownership (by which the copyright owner, if it chose, could issue a consensual license on any terms that it desired) with an intermediate creature that the statute calls “voluntary licenses” and then proceeds to regulate highly. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[E]. Congress expressed the fear that, given untrammelled freedom, “sound recording copyright owners might become ‘gatekeepers’ to the performances of musical works.” H.R. REP. NO. 104-274, at 21 (1995). That background must be borne in mind for the following discussion.

Consider a commercially available bit stream encoding a musical performance—as opposed to a bit stream conveying staff notation, which could be characterized as “volatile sheet music.” See text accompanying *supra* note 302. The rights of both sound recording and music copyright proprietors are thereby implicated. If conceptualized as being “delivered,” then the mechanical compulsory

license governs. Royalties must therefore be paid to the music owner for reproduction and public distribution, and permission must be secured from the owner of the sound recording.

- But one and the same conduct could also be conceptualized as a transmission. Given that transmissions qualify as public performances, liability for those transmissions lies outside the distribution right. See *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995). In that case, payment of mechanical royalties does not necessarily afford immunity; rather, ASCAP, BMI, or SESAC must grant a performance right in the music and, to the extent that a subscription or interactive audience is the target, on top of that a statutory or regulated “voluntary” license fee must be remitted to the owner of the sound recording. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[E].
- Looked at from the other side, a party who pays the performing right society for music performance rights and who in addition qualifies for a statutory license to perform the subject sound recording has not discharged its reproduction and distribution obligations; in addition, to the extent that both characterizations (distribution and transmission) simultaneously apply, it must also pay the mechanical compulsory license fee to the music proprietor, and act with due permission from the owner of the sound recording.

Yet if we are dealing with a transmission exempt from the public performance right—unscrambled over-the-air radio, for example—then it is similarly exempted from the obligation to pay any mechanical royalties for digital phonorecord delivery. To unpack that status, the radio station is exempt in the performance ambit only from the newly added sound recording right; it must still pay its ASCAP, BMI, or SESAC license to perform music. Its exemption from section 114’s sound recording performance right also exempts it from the need to comply with section 115’s mechanical compulsory license, so it apparently owes the music owner nothing further. But section 115 does not excuse the necessity to license the sound recording—to the extent that a sound recording is being distributed, the copyright owner’s traditional right under section 106(3) is undiminished. In this scenario, therefore, the radio station must make one performance payment to the music owner and one distribution payment to the sound recording proprietor.

Consider two situations: (1) unscrambled over-the-air radio broadcast of a current hit; and (2) interactive “delivery” of that hit. As to each, we must separately evaluate two copyrights (music and sound recording) and two types of rights (performance on the one hand, and reproduction and distribution on the other). Resolving this matter therefore summons up a complex matrix.

(1) Beginning with the radio broadcast, the station’s ASCAP license covers *performance* of the music. Performance of the sound recording, because noninteractive, is exempt under section 114. Turning to *reproduction* rights, because transmission of the sound recording is exempt, a parallel exemption also arises to the mechanical compulsory license under section 115. The upshot is that no payment is required to the music owner. And what about the sound recording owner? Apparently, the radio station’s broadcast should not be viewed as a digital phonorecord delivery, meaning it calls forth no need to pay on this basis either. But to the extent that the contrary view prevails, an obligation remains to obtain a license from the sound recording owner for exploitation of its distribution right.

(2) As to the interactive service, its BMI license should cover *performance* of the music. Performance of the sound recording, by contrast, is subject to voluntary license. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[D][1]. But the license is not all that voluntary, inasmuch as it is governed by strictures such as a one-year limitation. See *id.* Moving now to the concurrent acts of *reproduction and public distribution*, new considerations govern. Such music exploitation is beyond BMI’s authority to license. To obtain permission to reproduce and distribute the music, the new features of the mechanical compulsory license come into play. See *id.* § 8.23[B][1]. Those features do not grant any right in the subject sound recording. See *id.*

Therefore, such *reproduction and distribution* rights must be separately licensed at the time that the *performance* “voluntary licenses” referenced above are secured. But if a party comes to license

some of the principals who had presented this legislation to Congress whether they had deliberately crafted the product to be so impenetrable that companies would feel that they had no choice but to license both types of conduct, given their inability to figure out in which paradigm their own activity fit. The fact that not one of my interlocutors denied that intent was, to me, tantamount to an admission that it underlay at least some of the rationale of the affected actors. In other words, purposeful incoherence inserted into Title 17 ensured maximum revenue, given the practical inability to determine how to comply with the law. And Congress went along with the scheme.

2. Title IV to Digital Millennium Copyright Act

Title IV to the Digital Millennium Copyright Act constitutes a wholesale revision of the Digital Performance Right in Sound Recordings Act—the salient difference being that it is longer still than its predecessor, far more detailed, and blatant about its pork-barrel quality of favoring individual entities over others.⁵⁶¹ Writing up this amendment, I had to cast off all previous assessments and concede that this latest feature was indeed the worst amendment ever thrust upon the Copyright Act. Indeed, simply to render it minimally comprehensible required a seventy-page article.⁵⁶² But even that enterprise left many of the basic questions unanswered—certainly the 1998 amendment did nothing to resolve the seemingly purposeful ambiguity in the boundary separating the two primary innovations of 1995, digital audio transmission and digital phonorecord delivery.⁵⁶³ Instead, Congress simply heaped more incoherence on top of its prior efforts. It seemed that we had hit rock bottom.

3. Small Webcaster Settlement Act of 2002

We had not. The Small Webcaster Settlement Act of 2002, a follow-up to the prior two amendments, unquestionably outdid their negative qualities.

those sound recordings, hat in hand, and must obtain reproduction rights as well as performance rights, then the strictures placed solely on licensing of the latter are of little moment. See *id.* § 8.22[D][1]. For instance, the owners of sound recordings must offer most-favored-nation deals for digital *transmission* rights (performance) of their works under certain circumstances. See *id.* § 8.22[E][2][a]. Yet if those rights can effectively be exercised only together with reproduction rights, which are unregulated, then the sound recording proprietors can simply condition grant of the requisite *reproduction* right on such onerous terms as it desires; the most-favored-nation performance protection is effectively rendered nugatory. In this way, Congress seems to have failed its goal of avoiding the “gatekeeper” phenomenon.

561. See *supra* note 273 and accompanying text.

562. See generally Nimmer, *supra* note 548.

563. See *supra* Part IV.E.1; *supra* note 560.

Moreover, it premised its handiwork on a defect culled from another source. In particular, Congress took the chief flaw of the AHRA and enshrined it as the cynosure of this new legislation.⁵⁶⁴

Reverting to that earlier 1992 amendment, it should be recalled that Congress wished to require all actors to comport themselves with the Technical Reference Document consisting of fourteen technical pages defining the Serial Copy Management System, but at the end, it decided not even to legislate that feature.⁵⁶⁵ Accordingly, the law as it stands on the books is incomprehensible. Congress decided in 2002 to do the AHRA one better.

The need for the Small Webcaster Settlement Act of 2002 arose because of lingering defects in the two amendments just confronted above. In particular, the Digital Performance Right Amendment of 1995 sought to control webcasting. But its language was crafted so poorly so as to fail that primary intention. Specifically, the 1995 law defined all "subscription services" as outside the scope of liability; it imposed strictures solely as to digital audio transmissions to "interactive services." As a consequence, companies could offer subscription services to music on the Internet of digital quality without paying anything for the privilege.⁵⁶⁶ To remedy that defect, Congress returned to this domain in Title IV of the Digital Millennium Copyright Act. It plugged the hole as to subscription services and otherwise made this right even more complicated.⁵⁶⁷ But the cumulative legislation as it stood on the books was still unworkable in the marketplace. Within one month after passage of the 1998 amendment, the Copyright Office had to announce that it would sponsor negotiations aimed at resolving the impasse.⁵⁶⁸ Those negotiations failed, leading to further studies and litigation.⁵⁶⁹ Accordingly, Congress had to step in yet again to fix the mess it had created through its 1995 and 1998 amendments. In October 2002, the House of Representatives therefore took up consideration of a bill entitled the "Small Webcaster Amendments Act of 2002," otherwise known as H.R. 5469.⁵⁷⁰ That bill defined precisely the relief that Congress intended.⁵⁷¹ All parties decided that they could live with that new statutory arrangement.

But then they changed their minds. The House accordingly withdrew consideration of H.R. 5469. In its place, the Senate substituted the Small

564. See *supra* Part IV.C.

565. See text accompanying *supra* note 519.

566. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[B][1][a].

567. See *id.* § 8.22[B][1][b].

568. See 64 Fed. Reg. 52,107 (Sept. 27, 1999).

569. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[F][1][a]–[c].

570. See 148 CONG. REC. H7043 (daily ed. Oct. 7, 2002).

571. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[F][1][d].

Webcaster Settlement Act of 2002. That latter bill then moved to enactment. The difference between the actual statute and the predecessor bill is that the earlier version actually set forth the relevant terms that would govern. By contrast, the law as it now appears on the books is bereft of specificity. The chief congressional sponsor forthrightly concedes the point:

Instead of specifying the rates and terms of the discount for non-commercial and small commercial webcasters, the Senate substitute delegates the ability to establish an industry-wide discount to the collecting agent for copyright owners and recording artists. The understanding and expectation of both the House and the Senate is that the collecting agent will offer noncommercial and small commercial webcasters a royalty discount based on the terms and conditions set in the House-passed version of H.R. 5469. In other words, Congress expects that the collecting agent will offer noncommercial and small commercial webcasters the same deal represented by H.R. 5469.

There is no doubt that this approach is unusual. Unlike the typical statutory license rate-setting process, this approach does not involve any governmental entity in the rate-setting process, except for the Copyright Office's ministerial task of publishing those agreements in the Federal Register. This should not be considered a precedent or model for future legislation. It is a response to the unique circumstances surrounding the reaction to the rates set by the Librarian of Congress, the ensuing negotiations between copyright owners and webcasters, and the opposition H.R. 5469 generated in the Senate.⁵⁷²

A canon of statutory construction holds that “[a]doption of an amendment is evidence that the legislature intends to change the provisions of the original bill.”⁵⁷³ As applied to the instant situation, the elimination by Congress of particular features to which the parties objected would evidence the intent that those features not govern. By contrast, the intent behind the Small Webcaster Settlement Act of 2002 is the opposite—Congress did intend for the excised features to govern. It simply did not have the courage to say so, lest its handiwork be viewed as “a precedent or model for future legislation.” Forfend the thought—no one should use provisions of Title 17 as a model for the future content of Title 17!

The temporal reach of the Small Webcaster Settlement Act of 2002 is also astonishing. The law took effect upon enactment on December 4,

572. 148 CONG. REC. H8996 (daily ed. Nov. 14, 2002) (statement of Rep. Berman); see also 148 CONG. REC. S11726 (daily ed. Nov. 20, 2002) (statement of Sen. Leahy) (“[N]o broad principles should be extrapolated from the rates, terms and record-keeping provisions contained in the bill.”).

573. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48:18, at 484–85 (6th ed. 2000).

2002.⁵⁷⁴ It opened up a window for parties to settle their disputes. As set forth in Title 17 of the United States Code, that “authority to make settlements . . . shall expire December 15, 2002.”⁵⁷⁵ Higher mathematical prowess is unnecessary to calculate that this amendment was operative for a grand total of eleven days.⁵⁷⁶ It is shocking to note the depths to which legislation-by-abdication has led Congress to incorporate special-pleading incoherence into Title 17 of the United States Code.⁵⁷⁷

Other drafting anomalies abound. As initially crafted, for example, H.R. 5469 defined the cutoff to qualify as “small.” Accordingly, a court called upon to adjudicate the bounds of that bill (had it been enacted) would have been able to perform the exercise. Yet the situation as it actually unfolded is wholly different. For in its haste to eliminate from the statute anything that could actually offer substantive guidance, Congress eliminated those definitions from the text. As a consequence, though the Small Webcaster Settlement Act of 2002 is facially limited to “small” webcasters, the term itself is left undefined. As a consequence, the most massive actor in the field could plausibly claim to fall within its rubric.⁵⁷⁸ Nonetheless, that circumstance did not come to pass during the eleven-day interval for which the law was operative.

F. Digital Millennium Copyright Act

As bad as all the foregoing amendments are—and they are indeed egregious—nothing compares for sheer formal defects to the Digital Millennium Copyright Act (DMCA). Massive in scope and even more gargantuan in procedural complexity, the DMCA is the granddaddy of all distensions of copyright doctrine, reminiscent of Jeremy Bentham’s “nonsense on stilts.”⁵⁷⁹ Whether one approves of the substantive thrust of the DMCA’s compromises reached after mammoth negotiations among record companies, motion picture studios, telephone providers, equipment manufacturers, and others, it is clear that its execution leaves copyright law in shambles.

574. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

575. 17 U.S.C.A. § 114(f)(5)(F) (West 2003).

576. A different portion of the same amendment authorized settlements as to noncommercial broadcasters until May 31, 2003. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[F][3][c].

577. As usual, my father hit the nail on the head: “[A]t some point legislators have the responsibility to decide policy issues irrespective of the ability of the private interests to agree.” Nimmer, *supra* note 124, at 938.

578. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.22[F][3][d].

579. See Jeremy Bentham, *Anarchical Fallacies*, art. ii, in 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843).

Because I have written extensively about the DMCA in other contexts, I will not rehearse in detail its various procedural defects. The following points summarize:

- *Coherence.* For sheer incoherence, the massive scope of the DMCA is nonpareil. It has the signal distinction of failing to embody the chief goal that its congressional architects ceaselessly proclaimed; namely, saving the country from the specter of a pay-per-use world.⁵⁸⁰ It is subject to endless contradictions and interpretive dead ends.⁵⁸¹ Among many other examples, its antipornography feature cannot be sensibly understood;⁵⁸² it creates the specific offense of deleting “copyright management information” that does not exist;⁵⁸³ it defines contradictory elements of mental intent;⁵⁸⁴ and it treats watermarks in mutually exclusive categories.⁵⁸⁵
- *Reality.* The DMCA is unique by regulating in 1998 activities that not only had no existence then but which still continue to have no reality today.⁵⁸⁶ As an example, its provision governing “technical measures that are used by copyright owners to identify or protect copyrighted works”⁵⁸⁷ may not come to fruition until decades or centuries in the future.⁵⁸⁸
- *Breadth.* In terms of parochial interests, great swaths of the legislation were crafted for the particular benefit of named entities, with no pretense of serving the commonweal generally. This is the instance, noted above, in which Congress explicitly granted a special dispensation to “TCI Music, Digital Cable Radio Associates, and Muzak that was not applicable to other individuals and corporations.”⁵⁸⁹ In addition, Congress inserted the longest portion of section 1201 for the specific benefit of Macrovision Corporation.⁵⁹⁰

580. See Nimmer, *supra* note 422, at 415.

581. See Nimmer, *supra* note 548; David Nimmer, *Puzzles*, in COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA, *supra* note 214, at 329.

582. See Nimmer, *supra* note 422, at 405–12.

583. See *id.* at 412–33.

584. See *id.* at 433–43; Nimmer, *supra* note 214, at 445–56.

585. See Nimmer, *supra* note 214, at 456–65.

586. See Nimmer, *supra* note 271, at 519–35.

587. 17 U.S.C. § 512(i)(2) (2000).

588. See Nimmer, *supra* note 271, at 526.

589. See text accompanying *supra* note 273. That defect took place in Title IV of the DMCA.

590. See Nimmer, *supra* note 214, at 475–77; Nimmer, *supra* note 271, at 524–25 (discussing 17 U.S.C. § 1201(k) (2000)). This defect occurs in Title I of the DMCA.

- *Transparency.* A transparent law clearly signals its readers to the domains of its application. The fact that litigation is reaching disparate conclusions at present whether the Digital Millennium Copyright Act even applies to such diverse realms as ink cartridges and garage door openers dispels any impression that it succeeds at being transparent. We return at some length to those considerations below.⁵⁹¹

With the conjunction of the Small Webcaster Amendments Act of 2002 and the Digital Millennium Copyright Act, there can be no doubt that Congress is capable of missing the target of crisp formal drafting by a wide mark. The question remains whether it can still hit the target. Happily, other instances provide counterexamples.

G. Coming Up For Oxygen—Interpretive Corrections

The akanthology of deforming amendments canvassed above shows that Congress has failed when attempting to draft huge, multisection, involuted schemes to head off future harms. The experience is particularly bleak when one reflects that the contemplated future usually never dawned.⁵⁹²

1. Success of the Enterprise

To lift the spirits, let us depart from those amendments geared at a vision of future developments to scrutinize instances in which Congress amended the Copyright Act for the diametrically opposite reason. Our focus now is on instances in which Congress passed an amendment because of a concrete event in the past, namely a court decision with which it was dissatisfied.

Such amendments differ in kind not only from those treated in the above akanthology, but from all other instances in which Congress has amended its own blueprints to confront future scenarios. As an example of that last phenomenon, consider the TEACH Act.⁵⁹³ It revises sections 110(2)

591. See *infra* Part V.B.

592. In particular, Congress wished to safeguard future industries in the realms of semiconductors, DAT recorders, and webcasting, based on wobbly empirical foundations. It also wanted to protect boat manufacturers on similarly shaky ground. The exception to the rule, however, is the Uruguay Round Agreement Act. In that instance, Congress acted for the sake of treaty harmonization, rather than to pave the way for future industries to grow. Indeed, the Uruguay Round Agreement Act suffers the least from formal defects of all the amendments cataloged in the akanthology. See *supra* Part IV.D.

593. See *supra* Part III.D.2.

and 112(f) that Congress itself crafted in 1976. Accordingly, it represents simply a congressional decision to redo its own approach to a given field.⁵⁹⁴

The different focus now under investigation can be appreciated by starting with *White Smith Music Publishing Co. v. Apollo Co.*,⁵⁹⁵ in which the U.S. Supreme Court determined that copyright protection is not available to works that cannot be perceived by the human eye.⁵⁹⁶ Congress continued that interpretation when enacting the 1909 Act; during its pendency, however, Congress decided to jettison the ruling of that case in favor of according copyright protection to sound recordings. It did so, however, on a limited basis: The resulting Sound Recording Amendment of 1971⁵⁹⁷ granted sound recordings only a reproduction right and very limited adaptation right, specifically denying them a public performance right.⁵⁹⁸ That denial, in turn, necessitated the three subsequent amendments to the Copyright Act already confronted.⁵⁹⁹

When overhauling all of copyright doctrine for the current Act, Congress decided at certain points to jettison the holdings of prior cases, as it was entitled to do. For instance, its embodiment of a compulsory license for cable retransmission reflected an attitude different from the exemption under prior copyright law accorded that activity by the Supreme Court's *Teleprompter* and *Fortnightly* decisions.⁶⁰⁰ Arguably, Congress gilded the lily by rejecting further pre-1976 authorities in later amendments to the Act.⁶⁰¹

594. The amendments previously canvassed and not otherwise discussed herein likewise comport with that general methodology. See *supra* Part III.C.2-3. To take a single example, the Copyright Renewal Act of 1992 prospectively alters the mandatory renewal structure that Congress inserted into the 1909 Act and then repeated verbatim in the 1976 Act. See Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (former 17 U.S.C. § 24 (1909 Act)); Act of Oct. 19, 1976, Pub. L. No. 94-533, § 304(a), 90 Stat. 2541 (17 U.S.C. § 304(a) (1976 Act)).

595. 209 U.S. 1 (1908).

596. *Id.* at 12.

597. Pub. L. No. 92-140, 85 Stat. 391 (1971).

598. *Id.*

599. The amendments in question are the Digital Performance Right in Sound Recordings Act of 1995, as amended by Title IV to the Digital Millennium Copyright Act, as further amended by the Small Webcaster Settlement Act of 2002. See *supra* Part IV.E.

600. For a review of contending forces in Congress, including the positions taken by my father and by Professor Laurence Tribe, see RONALD V. BETTIG, COPYRIGHTING CULTURE 173-75 (1996).

601. In the Record Rental Amendment of 1984, Congress retreated from pristine application of the first-sale doctrine. See Pub. L. No. 98-450, 98 Stat. 1727 (1984). That amendment could be viewed pro tanto as a retreat from *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). In the Architectural Works Protection Copyright Act, Congress implemented the Berne Convention obligations of the United States by granting copyright protection to buildings, even if of the functional variety. That holding arguably retreats from *Baker v. Selden*, 101 U.S. 99 (1879). In the Uruguay Round Agreements Act, Congress federalized protection for qualifying unfixed performances. In some measure, that scheme represents a departure from what was envisioned in *Goldstein v. California*, 412 U.S. 546 (1973).

There have been several examples of Congress overruling by statute the rulings of particular post-1976 cases. The *substantive* wisdom of those course corrections is a matter for observers to debate. In each instance, nonetheless, we can grade Congress on *formal* criteria based on how effectively it achieved that legislative reversal. If Congress were to decide in the future to overrule *New York Times Co. v. Tasini*,⁶⁰² for example, spectators could applaud or lament the decision. However, regardless of the substance, there are clear and coherent ways of amending section 201(c), and opaque and incoherent ways of doing so. The instant inquiry focuses on the latter half of the equation.

In *Salinger v. Random House, Inc.*⁶⁰³ and *New Era Publications International, ApS v. Henry Holt & Co.*,⁶⁰⁴ the Second Circuit began to evince an extreme form of protectionism for unpublished works. It seemed to onlookers that selected quotations—even for scholarly purposes—from unpublished works would ipso facto render the defendant liable.⁶⁰⁵ Fearful of being left in an untenable posture, the publishing industry secured an amendment to the Copyright Act. In the Fair Use of Unpublished Works Provision, Congress added a single sentence to the Copyright Act: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” That amendment has been an unqualified success, as no court has followed the bright-line approach of *Salinger* and *New Era* since its effective date. Congress accordingly hit a homerun in that regard.⁶⁰⁶

It also succeeded in jettisoning the result of *La Cienega Music Co. v. ZZ Top*.⁶⁰⁷ As discussed above,⁶⁰⁸ that case construed the Copyright Act in a manner detrimental to music publishers, who thereafter secured passage of the *La Cienega* amendment. Despite some confusion about its intended retroactive application⁶⁰⁹ and whether it was intended to cause forfeitures to those who

602. 533 U.S. 483 (2001).

603. 811 F.2d 90 (2d Cir. 1987).

604. 873 F.2d 576, 583 (2d Cir. 1989).

605. See Karen Burke LeFevre, *The Tell-Tale “Heart”: Determining “Fair” Use of Unpublished Texts*, LAW & CONTEMP. PROBS., Spring 1992, at 153.

606. I have previously categorized the fair use doctrine as lacking all transparency. See Nimmer, *supra* note 262, at 281. So how can the Fair Use of Unpublished Works Provision get high marks as to that formal criterion? The answer is that the opaqueness of section 107 emerges from its four infinitely elastic factors. *Id.* The single sentence added in 1992, by contrast, can be readily understood and applied.

607. 53 F.3d 950 (9th Cir. 1995). That amendment furthers the process of retreating from the limitation of *White Smith Music Publishing Co. v. Apollo Co.* that copyright applies only to visually perceptible works. See text accompanying *supra* note 596.

608. See *supra* note 84 and accompanying text.

609. See *supra* note 473.

had comported themselves lawfully with the pre-amendment text of the Copyright Act,⁶¹⁰ this amendment too has largely achieved its intended result.⁶¹¹

2. Imperfect Implementation

The recitation of amendments just confronted shows how Congress can surgically improve copyright law. Other interventions have not been as successful. Consider three examples.

First, in *Red Baron-Franklin Park, Inc. v. Taito Corp.*,⁶¹² the Third Circuit held that the authorized purchaser of a large video console game, suitable for playing only in video arcades, could not place the machine into a video arcade without derogating from the copyright owner's display right. I have lamented that opinion as a misapplication of the doctrine of implied licenses under copyright law.⁶¹³ Congress, however, took a different tack. As part of the Computer Software Rental Amendments Act of 1990, it amended the first-sale doctrine to provide an exemption to the copyright owner's display right, in order to avoid the *Red Baron* ruling.⁶¹⁴ It made that change on an experimental basis. The amendment was effective only until October 1, 1995, and thereafter was destined to fall into desuetude if not previously renewed by Congress. There is nothing wrong with gathering empirical data to determine whether an ongoing experiment has succeeded or failed. The problem is that Congress later dropped the ball. When the deadline, arrived, no one remembered the ameliorative amendment included in the Computer Software Rental Amendments Act of 1990 to repudiate *Red Baron*.

610. The issue can be conceptualized as follows:

[R]esurrection of massive numbers of American compositions inevitably requires fine sensitivity to balancing the needs of proprietors of newly resurrected works against those of users who had legitimately exploited them.

It is, therefore, disappointing to see not a word in the statute or legislative history relating to those questions. A literal reading of the statute is that a record store in Pasadena that might have been selling unlicensed copies of *Boogie Chillen* for decades—lawfully so, given its subsistence in the public domain—is rendered pro tanto an infringer as of November 13, 1997. Though harsh, that construction may be exactly what Congress intended, given its failure to institute any protection for reliance parties in this context.

3 NIMMER ON COPYRIGHT, *supra* note 57, § 9A.05[B] (footnotes omitted).

611. See *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 692 (9th Cir. 2000) (issuing ruling contrary to the one it declared in *La Cienega*).

612. 883 F.2d 275 (4th Cir. 1989).

613. See David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 26–27 (1996).

614. 17 U.S.C. § 109(e) (2000).

Therefore, the fix lapsed of its own force and has been absent from U.S. law ever since.⁶¹⁵

A second example plugs the loophole exposed in *United States v. LaMacchia*.⁶¹⁶ When the government prosecuted a hacker who had made available from his MIT account free copies of expensive software programs, the court dismissed the indictment because Mr. LaMacchia failed to meet the requisites for criminal copyright infringement by acting “for purposes of commercial advantage or private financial gain.”⁶¹⁷ To redress that situation, Congress passed the NET Act, intending thereby to “criminalize computer theft of copyrighted works whether or not the defendant derives a direct financial benefit from the act’s misappropriation.”⁶¹⁸ The particular expedient adopted by the NET Act is to define “financial gain” to include “receipt or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”⁶¹⁹ The question remains whether Congress thereby succeeded in plugging the *LaMacchia* hole. The answer is “not necessarily.”

[The amendment] is designed to “enable authorities to prosecute someone like LaMacchia who steals or helps others to steal copyrighted works but who otherwise does not profit financially from the theft.” In light of the facts of that prosecution—in which the “indictment does not allege that LaMacchia sought or derived any personal benefit from the scheme to defraud”—it is questionable whether Congress’ observation is on target here. In other words, there may indeed be a subculture in which hackers upload valuable programs for each other’s benefits, the only *quid pro quo* being that “You give what you have, get something you need. No money needed”—but David LaMacchia evidently was not a member of it. Instead, he was apparently a self-styled Robin Hood of the Internet (or perhaps “cyberanarchist”) who gave away other people’s goods without any expectation at all in return.⁶²⁰

There is accordingly a mismatch between the remedy towards which Congress aimed and the language that it employed to achieve that end.

That same mismatch characterizes the final example. Title III of the Digital Millennium Copyright Act,⁶²¹ entitled the Computer Maintenance

615. See *supra* Part III.D.5.

616. 871 F. Supp. 535 (D. Mass. 1994).

617. 17 U.S.C. § 506 (2000).

618. H.R. REP. NO. 105-339, at 5 (1997) (stating that the act would “thereby prevent[] such willful conduct from destroying businesses, especially small businesses, that depend upon licensing agreements and royalties for survival.”).

619. 17 U.S.C. § 101.

620. 4 NIMMER ON COPYRIGHT, *supra* note 57, § 15.01[B][2] (footnotes omitted).

621. Other portions of the same omnibus enactment also incline towards interpretive correction:

Competition Assurance Act, rejects the holding of *MAI Systems Corp. v. Peak Computer, Inc.*⁶²² That case held that an authorized purchaser of computer hardware and software could not hire a third party to boot the system in order to debug it.⁶²³ In my view, that decision (like its *Red Baron* predecessor encountered above) reflects an untenably narrow view of implied licenses under copyright law⁶²⁴ and is flawed on other bases as well.⁶²⁵ Congress redressed the decision by adding to section 117⁶²⁶ of the Copyright Act (the provision bequeathed by CONTU)⁶²⁷ a special provision “ensuring that an independent service provider may turn on a client’s computer machine in order to service its hardware components”⁶²⁸ That deliberate limitation to debugging *hardware* fails to correct fully the invidious effect of *MAI v. Peak*.⁶²⁹ Instead, the law should clarify that a party who purchases *software* also incurs

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- Title I, The WIPO Treaties Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998), augments copyright law by setting a new standard significantly different from that which pertained under *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Many legislators commented during the hearings that the enactment of the statute would leave Sony undisturbed. See, e.g., 144 CONG. REC. 25,813 (1998) (statement of Rep. Klug) (“The original version of the legislation threatened this standard, imposing liability on device manufacturers if the product is of limited commercial value. . . . I’m very pleased that the conferees have meaningfully clarified that the Sony decision remains valid law.”); 144 CONG. REC. 26,105 (1998) (statement of Rep. Bliley). Nonetheless, the reality is that the DMCA “alters the landscape fundamentally for the future application of Sony.” 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12A.19[B].
 - Title II, OCILLA, “essentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). In doing so, it overrules those aspects of *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), insofar as that case suggests that such acts by service providers could constitute direct infringement, and provides certainty that *Netcom* and its progeny, so far only a few district court cases, will be the law of the land.” H.R. REP. NO. 105-551, at 76 (1998).
 - Title V, the Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2905, by according sui generis protection to boat hulls, reflects a viewpoint fundamentally different from that underlying *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150 (1989). See *supra* Part IV.B.2.

622. 991 F.2d 511 (9th Cir. 1993).

623. *Id.* at 518 & n.4.

624. See Nimmer, *supra* note 613, at 21–25.

625. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.08[B][1].

626. 17 U.S.C. § 117(c) (2000).

627. See *supra* Part II.C.4.

628. H.R. REP. NO. 105-796, at 76 (1998).

629. I mean to draw no substantive conclusion here about policy considerations. If Congress wishes to revamp the rights of parties in this domain, it is free to do so. By my lights, *MAI v. Peak* seriously misapplied the law that Congress previously enacted, and the Computer Maintenance Competition Assurance Act fails to correct the full extent of those deficiencies.

no liability by hiring an independent service provider to turn on its computer machine in order to debug it.⁶³⁰

These three examples prove that the enterprise of interpretive correction does not, by itself, guarantee a positive outcome. But the predecessor examples prove that success is not only possible, but frequently achieved.⁶³¹ Overall, certainly, the track record of these interpretive corrections is much higher than Congress' scorecard on its other amendments of the past decade.⁶³² This device accordingly should remain in the forefront of our consciousness when attempting to chart a better course into the future.⁶³³

V. LISTENING TO MEL

With such a dismal record of almost fifty amendments sending copyright law down numerous vortices, is there any chance of salvation for the 1976 Act? Indeed there is—the gates of repentance never close to the faithful. The path towards redemption lies in following the Analects of Mel set forth above.⁶³⁴

To recapitulate, they consist of the six MBN Postulates summarized above, plus the Hersey Corollary.⁶³⁵ Armed with these interpretive tools, we can bravely confront the future.

The discussion that follows shines a laser beam on what I consider to be the two most significant issues of recent copyright application, namely the dispute over p2p services exemplified by the recently concluded *Napster* litigation,⁶³⁶ and the ongoing efforts to expand the scope of the Digital Millennium Copyright Act.⁶³⁷ The lessons garnered in the process should nonetheless be taken to be of general implication,⁶³⁸ setting the stage for overarching conclusions about how copyright law can be set back on track.⁶³⁹

A. Mel Nimmer's Napster

The briefest possible description of Napster's by-now infamous technology emerges from an example. Let us imagine that Helen lives in Santa Paula,

630. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.08[D].

631. See *supra* Part IV.G.1.

632. See *supra* Part III.C.3.b.

633. See *infra* Part VI.A.

634. See *supra* Part II.D.

635. See *supra* Part II.D.

636. See *infra* Part V.A.

637. See *infra* Part V.B.

638. See *infra* Part V.C–D.

639. See *infra* Part VI.A.

California, and Saul lives in St. Paul, Minnesota; they do not know each other. Helen logs onto Napster's server in San Mateo, California, at which point the Napster software scans her hard drive and creates a list of the MP3 files resident there.⁶⁴⁰ Note that no music is contained on Napster's server—just a list of song titles.⁶⁴¹ Helen wishes to obtain an MP3 version of *Rocket Man*. She searches various indices on Napster, and thereby learns that someone—his name might be Saul, but Helen need never learn it—has a file so named on his hard drive. Helen sends a request via a File Transfer Protocol (FTP) to Saul's computer, causing bits to travel from St. Paul to Santa Paula. Neither the FTP request nor the music file itself ever gets anywhere near Napster's facilities.⁶⁴² Still, at the end of the transmission, Helen can listen to *Rocket Man* all day long. Meanwhile, while she was logged on, Bob from Boise and Joyce from Jackson, unbeknownst to Helen, might have obtained FTP transmissions from her hard drive of *Frampton Comes Alive* and *Dream Weaver*. Multiplied by enough Sauls and Helens, Napster may have distributed more music during its brief heyday than the entire record industry from the beginning of its existence.⁶⁴³

1. Napster '83

What would Mel think of such a technology? His death in 1985 precludes a definitive answer. But he was nonetheless prescient about the looming "copyright crisis of profound dimensions."⁶⁴⁴ I think we can get a pretty good idea, if we are willing to look sideways in time.

Adventures in Memmilania

Happy to have just ended his 22nd year of teaching, Mel Nimmer sips a glass of Merlot as he celebrates his 60th birthday with the family.

In comes his precocious granddaughter, Emily, announcing that the Internet, which, as everyone knows, has developed quickly since being introduced across homes in America in the late 1970s, now affords a wonderful new service.

640. See *supra* note 533.

641. "The network is the jukebox. Aha! Like many great ideas, this one is so simple that in retrospect it seems obvious." David Post, *His Napster's Voice*, in *COPY FIGHTS*, *supra* note 129, at 107, 108.

642. More precisely, the bits take whatever dynamic course the architecture of the Internet deems best at that instant. That path might adventitiously route through Santa Clara County. It might equally traverse Osaka. The point is that there is no necessary nexus to Napster's facilities.

643. JOSEPH MENN, *ALL THE RAVE* 161 (2003) (quoting a venture capitalist's back-of-the-envelope calculation: "You've distributed more music than the whole record industry since it came into existence").

644. See Nimmer, *supra* note 124, at 931.

The service is called "Napster 1983." It allows anyone to download songs famous and obscure in the mere blink of an eye. Granddaughter Emily demonstrates by promptly grabbing the hip tunes of the day, *Every Breath You Take* and *Sweet Dreams (Are Made of This)* and blasting them over the speakers. "Silly goose," adds her sister, Beth. "You forgot *Billie Jean*!" The girls make copies of all those songs to grandpa's Digital Audio Tape recorder (the most popular home electronics product in America, having gained near ubiquitous status since its first introduction in 1955).

"Hold on a second there, sweetheart," admonishes Professor Nimmer, "We've got a big problem here. Do you know what it is?"

"Sure do," volunteers son Larry. "You hate that type of music."

"That's not what I had in mind. I can't let you continue, because it's *copyright infringement*! But I still love you and will see you soon for our meeting of the Twelve O'Clock Club."

The girls leave. Meanwhile, Mel calls Larry over. "You raised a good point there, Bo. Do you think you could download any Bing Crosby tunes for me before I ban this contraption from the house forever?"

The question becomes how to analyze the conduct in that transverse universe. For current purposes, we will limit ourselves to copyright doctrine actually followed in this universe as of the day that Mel Nimmer actually began his seventh decade on June 6, 1983.

The statute was still pristine then. Congress had not even initiated the beginning of its downfall in 1984.⁶⁴⁵ How does Napster 1983 measure up under contemporary law? The answer is already contained in Professor Nimmer's 1965 testimony. When people can "reproduce entire books at a fraction of the cost of printed copies," the market for books will be "almost totally obliterated."⁶⁴⁶ Gauged by these standards, the case for liability is completely straightforward. It is enough to quote the "granddaddy case" of contributory infringement, *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,⁶⁴⁷ handed down in 1971: "[A party] who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'"⁶⁴⁸ That authority had been followed often by 1983.⁶⁴⁹

645. See *supra* Part IV.B.1.

646. See *supra* note 125 and accompanying text.

647. 443 F.2d 1159 (2d Cir. 1971).

648. *Id.* at 1162 (footnote omitted).

As a case in point, consider *Cable/Home Communication Corp. v. Network Productions, Inc.*⁶⁵⁰ Although slightly beyond our timeline, its sensibility is clearly of the 1983 variety. The Eleventh Circuit held there that a violation of the Copyright Act occurred by selling cable pirate chips used “to descramble encrypted pay television programming.”⁶⁵¹ Unlike the post-1983 Sony standard (discussed below) of being “capable of commercially significant noninfringing uses,”⁶⁵² the court reasoned: “While there may be other uses for some of the devices promoted by Kenny, we conclude that Kenny utilized and advertised these devices primarily as infringement aids and not for legitimate, noninfringing uses.”⁶⁵³ That ruling amounts to an application⁶⁵⁴ of the Digital Millennium Copyright Act *avant la lettre*.⁶⁵⁵

Simply stated, MBN Postulate #2 vouchsafes a pro-plaintiff ruling: “The indiscriminate lumping of . . . duplication under the banner of fair use is unsupportable.” All the more outlandish would it be to deny the plaintiffs’ prima facie case and to maintain that effective duplication of their work in computer nodes across the country, by which millions can listen to songs uncompensated, falls outside the copyright owner’s rights.

Thus far, the *Napster* plaintiffs would undoubtedly cheer. But complete celebration is premature. For the flipside of the foregoing is MBN Postulate #3, recognizing that “the smashing of machines as a means of avoiding technological displacements is a futile gesture,” and that “we should not do so even if we could.” The indications are therefore that my father would have preferred something short of *Napster*’s judicially ordered death, if at all possible.

Confronted with technological progression, Professor Nimmer’s first inclination was to consider the possibility of a compulsory license. In that way, his 1965 testimony adumbrated the current proposal for “free access”—

649. See, e.g., *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247, 1256 (W.D.N.Y. 1983); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 517 F. Supp. 900, 904 (S.D.N.Y. 1981).

650. 902 F.2d 829 (11th Cir. 1990).

651. *Id.* at 835.

652. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

653. *Cable/Home Communication Corp.*, 902 F.2d at 846.

654. A distinction must be acknowledged: The activity at issue in *Cable/Home* was not only circumvention to gain access to a copyright work as, in addition, the facts in that case showed that defendants had copied the copyrighted code in plaintiff’s chips. Absent that factor, the court would have had to strain further to reach the desired result. See *infra* note 780.

655. See 17 U.S.C. § 1201(a)(2)(C) (2000) (creating liability when a service or product “is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title”).

not as in *free beer*, but as in *free speech*,⁶⁵⁶ namely, a scheme to make such works available to all, with appropriate compensation for their use.⁶⁵⁷ His conclusion in particular about home taping of music shows a preference for a legislative solution in this regard, but absent its implementation judicious court action.⁶⁵⁸

Indeed, in its landmark 1981 *Betamax* decision,⁶⁵⁹ the Ninth Circuit cited Professor Nimmer for the exact remedy of holding Sony Corporation liable for copyright infringement via production of its Betamax recorder but declining to enter an injunction and instead ordering the district court to compute an appropriate licensing rate.⁶⁶⁰ Though the Supreme Court subsequently reversed that precise ruling,⁶⁶¹ its ruling in a later copyright case gave the nod to that rationale in a genealogy that traces its lineage back to Professor Nimmer's original proposal.⁶⁶² Congress has also accorded limited recognition to that device in another context.⁶⁶³

656. Richard Stallman is credited with the distinction. "Free software" is a matter of liberty, not price. To understand the concept, you should think of 'free' as in 'free speech,' not as in 'free beer.'" GNU Project, The Free Software Definition, at <http://www.gnu.org/philosophy/free-sw.html>; see LAWRENCE LESSIG, THE FUTURE OF IDEAS 12 (2001).

657. It may be that under the precise *Napster* facts, Professor Nimmer would have inclined otherwise. Certainly, the court ultimately called upon to adjudicate the matter took a different view:

Imposing a compulsory royalty payment schedule would give Napster an "easy out" of this case. If such royalties were imposed, Napster would avoid penalties for any future violation of an injunction, statutory copyright damages and any possible criminal penalties for continuing infringement. The royalty structure would also grant Napster the luxury of either choosing to continue and pay royalties or shut down. On the other hand, the wronged parties would be forced to do business with a company that profits from the wrongful use of intellectual properties. Plaintiffs would lose the power to control their intellectual property: they could not make a business decision *not* to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would take away the copyright holders' ability to negotiate the terms of any contractual arrangement.

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028–29 (9th Cir. 2001); see *infra* Part V.A.3.

658. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.01[D][3] ("[A]bsent such legislation, it would appear to be open to the courts to order a royalty payment to be made in lieu of an injunction."); *supra* note 524.

659. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

660. *Id.* at 976.

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

662. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) ("[C]ourts may also wish to bear in mind that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair uses . . ."). For the full genealogy, see 4 NIMMER ON COPYRIGHT, *supra* note 57, § 14.06[B].

663. As part of the Uruguay Round Agreements Act, Congress resurrected works of foreign origin, thereby creating numerous puzzles. See *supra* Part IV.D. For instance, a film might have synchronized on its soundtrack a public domain Argentinean samba, which later regained U.S. copyright protection. Rather than immunizing continued exploitation of the film (as it did in the different context of termination of transfers, see 17 U.S.C. § 304(c)(6)(A) (2000)), Congress in

2. Napster '99

By contrast to the simplicity of Napster 1983, the actual decision, when it was litigated, was geometrically more complicated. The reasons for that complication inhere precisely in the complexity of Congress' intervening amendments to the copyright statute.⁶⁶⁴ The irony of this progression is that the very features that afforded defendant Napster potent copyright defenses against the record company plaintiffs were those that these same companies and their allies had championed over the years. The roster includes:

- The Supreme Court's 1984 *Betamax* decision, brought as a result of efforts by the motion picture studios to increase the scope of their rights under copyright law.⁶⁶⁵
- The AHRA, pushed by record companies and music publishers to protect themselves from the future onslaught of DAT recorders.⁶⁶⁶
- The NET Act, self-consciously designed by content owners to tolerate "No Electronic Theft."⁶⁶⁷
- The Digital Millennium Copyright Act, spearheaded by a coalition of both motion picture and music interests in order to protect their works from Internet exploitation.⁶⁶⁸

To understand how those circumstances affected Napster 1999, some explanation is in order about each. The exercise here is to determine the law as it stood in 1999, when the company started gaining momentum, but before the various rulings came down in the actual litigation against Napster.⁶⁶⁹

this instance decided to create a right to "reasonable compensation," *id.* § 104A(d)(3)(A). It further provided that "the amount of such compensation shall be determined by an action in United States district court." *Id.* § 104A(d)(3)(B); see 3 NIMMER ON COPYRIGHT, *supra* note 57, § 9A.04 C][4][b][ii].

664. See *supra* Part III.C.3.

665. *Sony Corp. of Am.*, 464 U.S. 417. Note that the studios' subsequent efforts to obtain legislative redress failed. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.01[B].

666. See *supra* Part IV.C.

667. See *supra* Part IV.G.2.

668. See *supra* Part IV.F.

669. Certainly, Napster would have offered favorable financial terms. See MENN, *supra* note 643, at 101 ("[T]he Napster crew considered offering the record labels every cent from the sale of music, while Napster would keep the profits from selling items like rock-'n'-roll merchandise."). In any event, the record companies succeeded against Napster and others, but also suffered set-backs along the way. Compare *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (victory for plaintiffs), with *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003) (defeat for plaintiffs). They also engaged in a highly publicized campaign of suing individual audiophiles. See Patrick Goldstein, *Is Hollywood Failing to See the Big Picture?*, L.A. TIMES, Nov. 9, 2003, at A1.

First, in the *Betamax* decision, the Supreme Court enunciated the standard that liability for contributory infringement arises only when the product in question is not “capable of commercially significant non-infringing uses.”⁶⁷⁰ The evidence in the *Napster* case showed that the overwhelming majority of its uses were infringing. Nonetheless, the architecture of the *Napster* system rendered it potentially capable of substantial noninfringing uses—to the extent that garage bands use *Napster* as their preferred outlet, it could eventuate that noninfringing uses would even exceed infringing ones. Accordingly, it was an open question in 1999 whether the company could prevail based on the Supreme Court’s construction of contributory liability.⁶⁷¹

Second, in the sole case construing the Audio Home Recording Act of 1992,⁶⁷² the Ninth Circuit had issued the pronouncement quoted above that gave its benediction for consumers who wash MP3 files through their PCs:

The Rio merely makes copies in order to render portable, or “space-shift,” those files that already reside on a user’s hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.⁶⁷³

All told, it “took the music business four years—from fall 1999 when *Napster* swept through college campuses, to this month [November 2003] . . . —to develop a legal file-sharing service that had both a diverse selection on music and few onerous restrictions on use.” *Id.* Meanwhile, *Napster* 2.0 had been reborn (under new management) as a “\$1-a-song site.” David Pogue, *State of the Art: Paying the Piper, Round 2*, N.Y. TIMES, Oct. 30, 2003, at G1. But the jury was still out as to whether those “buck-a-track services” would “make much of a dent in the illegal free-song trade.” *Id.*

Thus, even as of today, the basic answers regarding *Napster* and its sequelae remain unanswered. Indeed, most of the what-ifs still pose imponderables about which debate still swirls. See Goldstein, *supra* (“The record industry has been staggered because it was two steps behind its audience, which is bad enough when you’re promoting a new song, even worse when you’re trying to build a new business.”).

670. *Sony Corp. of Am.*, 464 U.S. at 442.

671. Likewise open in 1999 was whether *Sony*’s construction afforded a defense solely to contributory infringement, or whether it acted as a shield as well to vicarious liability.

672. The impetus behind that 1992 Act was the advent of digital copying.

In years past, home taping of long-playing albums undoubtedly decreased overall record sales to some extent. Nonetheless, such copying could not satisfy audiophiles—each time a copy was made, the reproduction process necessarily occasioned a loss in fidelity; making a copy of a copy resulted in further degradation of sound quality. Therefore, a true music buff had the incentive to buy a factory original, rather than settle for a home tape recording.

2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.01[A] (citations omitted); see 138 CONG. REC. H9035 (daily ed. Sept. 22, 1992) (statement of Rep. Collins) (“With analog recorders, as one continues to make copies from copies, the sound quality deteriorates. With digital recorders, on the other hand, multigenerational copies—from the 1st generation to the 15th generation—maintain virtually perfect sound quality.”). The experience of *Napster* obliterated that expectation, as so many others. The district judge’s record-industry consultant had to conclude, “*Napster* has shown two things: that people don’t give a rat’s ass about the quality of the sound when compared to the availability and that the aversion of consumers is not bounded by sound ethical reasoning.” MENN, *supra* note 643, at 284.

673. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (citations omitted).

The tracks of *Rocket Man* and *Frampton Comes Alive* that Saul and Helen had respectively ripped off albums and put on their hard drives are arguably beyond redress given that language. But when they share them with others does their activity become actionable? *RIAA v. Diamond Multimedia* goes further, and quotes from the Senate Report that “the purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.”⁶⁷⁴ The question therefore becomes how to conceptualize the Sauls and Helens of the world. In some sense, the FTP transfer between the two of them is private and noncommercial—the link is between the two of them only, rather than the world in general; it fails to do violence to the term, accordingly, to label it *private*. Moreover, it involves no payment of money, thereby qualifying it as in some sense *noncommercial*. An expansive construction of the dictum from *RIAA v. Diamond Multimedia* would therefore determine their behavior to be noninfringing, hence immunizing Napster itself for vicarious or contributory liability for copyright infringement. The question was open.

Additional ammunition for this viewpoint emerges from explicit congressional action. Confronting the conduct of David LaMacchia, Congress passed The Net ACT so that reciprocal unpaid sharing of copyrightable works would be deemed prospectively to violate the Copyright Act⁶⁷⁵—but limited solely to *criminal* liability.⁶⁷⁶ Because Congress had the opportunity simultaneously to amend the strictures of civil liability but declined to do so, the negative pregnant from that amendment could be that the Napster situation lay outside civil redress, which would translate to defeat for plaintiffs in that case.

Finally, we reach the Digital Millennium Copyright Act. Its Title II, OCILLA, creates four safe harbors for a service provider, which the statute defines as “a provider of online services or network access, or the operator of facilities therefor.”⁶⁷⁷ The service of linking Joyce to Bob and Helen to Saul unambiguously occurs online, thus triggering that definition. The safe harbor implicated by Napster 1999 applies to

Referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link. . . .⁶⁷⁸

674. *Id.*

675. See *supra* Part IV.G.2.

676. “The limitation in that language [of the NET Act] to ‘purposes of this subsection’ serves to limit its function to criminal purposes.” 4 NIMMER ON COPYRIGHT, *supra* note 57, § 15.01[B][2].

677. 17 U.S.C. § 512(k)(1)(B) (2000).

678. *Id.* § 512(d).

While Napster was experiencing its phenomenal growth in 1999, that language was less than a year old. Yet Napster's conduct had by then already far outstripped Congress' expectations. That body crafted OCILLA to deal with Yahoo! and other web search engines that send out spiders to index the content of cyberspace, perhaps every two weeks or even, in an extreme case, every night, which thereafter are pored over by human beings adding value through their subjective decisions.⁶⁷⁹ The links on Napster, by contrast, needed to be dynamically added and deleted by computer in a matter of microseconds.⁶⁸⁰

But despite its lack of foresight to envision the world of a few months ahead, Congress' language in OCILLA was carved into stone for the years and decades to come. That language is broad enough to refer to Napster, whose server in San Mateo did indeed refer Helen to the "online location containing infringing material"⁶⁸¹ on Saul's hard drive by giving her a pointer to get in touch with Saul.

Apparently being facially eligible to qualify for the OCILLA safe harbor, Napster 1999 would still need to vault four more hurdles to qualify. First, if served with a document in proper form called a "notification of claimed infringement,"⁶⁸² the company had to "respond[] expeditiously to remove, or disable access to," the challenged material.⁶⁸³ In a celebrated gesture, Metallica came and served thirteen boxes containing hundreds of thousands of such notifications on Napster, in response to which the company promptly removed access to those links.⁶⁸⁴ It would seem, therefore, that this hurdle was vaulted.

Second, it was not enough to merely eliminate links to those particular songs. In addition, the company had to adopt and reasonably implement "a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."⁶⁸⁵ Napster implemented such a policy, albeit on a belated basis on February 7, 2000, leaving itself open to damages to be determined by

679. The legislative history explains:

The Yahoo! directory, for example, currently categorizes over 800,000 on-line locations and serves as a "card catalogue" to the World Wide Web, which over 35,000,000 different users visit each month. Directories such as Yahoo!'s usually are created by people visiting sites to categorize them. It is precisely the human judgment and editorial discretion exercised by these cataloguers which makes directories valuable.

S. REP. NO. 105-190, at 49 (1998).

680. See MENN, *supra* note 643, at 177 ("From the time Google crawls a website to the time it actually shows up in a search window can take weeks or months. We had to do the same thing in microseconds.").

681. Alternatively, if Saul's material were deemed noninfringing because of the AHRA, then Napster would have already won before even interposing its defense under OCILLA.

682. 17 U.S.C. § 512(c)(3).

683. *Id.* § 512(d)(3).

684. MENN, *supra* note 643, at 144-45.

685. 17 U.S.C. § 512(i)(1)(A).

proof at trial relating to the period prior to that date. Even as implemented, however, that policy did not forever defrock offenders; they could promptly rejoin Napster under a new alias. The question was open, therefore, whether its policy “reasonably implemented” the statutory mandate.⁶⁸⁶

Third, the company could “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”⁶⁸⁷ Given that Napster had no business plan and no revenue—zero from subscription fees, zero from advertising, and zero from any other source—it seemed to qualify as not receiving any benefit “directly attributable to the infringing activity.” Again, however, the matter had never been litigated. Given that Napster was not chartered as an eleemosynary organization, this issue as well was open.

Finally, Napster would lose its OCILLA safe harbor if “aware of facts or circumstances from which infringing activity is apparent.”⁶⁸⁸ The legislative history describes that standard as high, meaning that a “red flag” is waving.⁶⁸⁹ It is a markedly different standard from the one applicable to Title I of the Digital Millennium Copyright Act, in which Congress refers to someone who “was not aware and had no reason to believe” that her activities constituted a violation.⁶⁹⁰ The “red flag” standard demands a far higher quantum of bad knowledge than “had no reason to believe.”⁶⁹¹

The smoking gun in this context is that one of the teenagers who founded Napster 1999 “mentioned the need to remain ignorant of users’ real names and IP addresses since they are exchanging pirated music.”⁶⁹² Viewed

686. Even as of some years later, the contours of this obligation remained disputed, leading to disparate rulings. Compare *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1066 (C.D. Cal. 2002) (stating that “the ‘realistic threat of losing [Internet] access’ that Congress wishes ISPs to impress upon would-be infringers remains just that—a mere threat—unless the ISP decides to implement procedures”), with *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1176–77 (C.D. Cal. 2002) (revealing that the court “respectfully parts ways with the interpretation of 512(i) in *Ellison*, in order to maintain the ‘strong incentives’ for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers, at the very least”).

687. 17 U.S.C. § 512(d)(2).

688. *Id.* § 512(d)(1)(B).

689. S. REP. NO. 105-190, at 44 (1998). This language is some of the densest in the entire Digital Millennium Copyright Act. See Nimmer, *supra* note 581, at 356–75.

690. 17 U.S.C. § 1203(c)(5)(A).

691. See Nimmer, *supra* note 214, at 369.

692. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 n.5 (9th Cir. 2001). There was also lesser evidence, but it falls into the category of constructive knowledge. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918–19 (N.D. Cal. 2000). For the reasons set forth below, such constructive knowledge is an inadequate basis to rule against Napster under OCILLA. See text accompanying *infra* note 723. As a side note, the final result in litigation often hinges in the end on the atmospherics. Youthful exuberance of the sort that led to the statements quoted above might have sealed Napster’s fate. The resolution of the *Betamax* litigation might have been similarly quixotic. According to the Copyright Office, “the testimony of Fred Rogers . . . may have tipped the scales.” JAMES LARDNER, *FAST FORWARD* 270 (1987).

in context, that statement is no more damning than the comparable admission from the files of various executives at Japan's Sony Corporation incident to their impending release of the Betamax technology.⁶⁹³ The question therefore is whether a wholly different result would inure under OCILLA. That question, too, remained open in 1999.

In sum, a plethora of questions that were wide open in 1999 precluded any certainty in hazarding a contemporary answer to the lawfulness of Napster 1999. If it ultimately fared as well as cable television did when subjected to lawsuits for copyright infringement, then it was destined to become a new fixture of the copyright scene.⁶⁹⁴ In that event, the failure of Napster to pay the record companies and recording artists would be no more remarkable than the failure of radio stations in the United States to remit comparable payments.⁶⁹⁵

Moreover, those open questions ramified upon themselves.⁶⁹⁶ The final

693. Sony's files were "full of evidence that they knew they had a copyright problem." LARDNER, *supra* note 692, at 109. In fact, Sony "knew from as early as 1974 that there was a potential copyright problem . . . [and had been] hiding its knowledge from the public." *Id.* at 119 (quotation omitted).

The parallel between Napster and Sony does not end there. When Sony first designed the Betamax, it had no inkling of how successful it would be—like Napster decades later. In addition, it could not know in advance the uses that consumers would make of it. In particular, Sony's expectation was that people would "buy six or eight blank tapes with each machine. Instead, they were buying twelve or fifteen or more. And lo and behold, all the tapes were all gone!" *Id.* at 96. Thus, right from the beginning Sony knew perfectly well that individuals were engaging in "librarying," the very activity that the Supreme Court later held not to be implicated, on which basis it absolved Sony from liability. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 483 (1984).

694. See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (discussed in text accompanying *supra* note 600).

695. See *supra* Part IV.E.

696. An additional point of contention in the litigation revolved around competing surveys of whether Napster harmed the plaintiff record companies. In granting a preliminary injunction, the district found that "Napster use is likely to reduce CD purchases by college students, whom defendant admits constitute a key demographic," even though plaintiffs' expert conceded that college students' use of Napster "helped them make a better selection or decide what to buy." *A&M Records, Inc.*, 114 F. Supp. 2d at 909 (citations omitted). In reply, defendant maintained that Napster actually stimulated record sales. *Id.* at 914. But the court rejected defendant's expert's report based on methodological flaws. *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 20668 (N.D. Cal. Aug. 10, 2000). The effect of Napster on the record companies remains a point of contention. See LESSIG, *supra* note 656, at 200 ("Napster may indeed have helped sales rather than hurt them."); Stan Leibowitz, *Copyright in the Post-Napster World: Legal or Market Solutions*, in COPY FIGHTS, *supra* note 129, at 197, 201 ("The evidence the industry put forward never made the case for the piracy-induced harm that they intended to make."); Mark Lemley & R. Anthony Reese, *Stopping Digital Copyright Infringement Without Stopping Innovation* (forthcoming 2004) (collecting studies); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 869 (2001). Glynn Lunney notes:

[As] long as the level of private copying increases with the popularity of a work, private copying is unlikely to reduce creative input at the margins. Instead, it will simply enable consumers to recapture a portion of the excess incentives otherwise associated with the production of more popular, non-marginal works.

Id. at 869; see also *supra* note 126; *infra* Part VI.B.

open question was whether Napster was “aware of facts or circumstances from which infringing activity is apparent.” Regardless of what Napster’s own legally naïve founders might have said, plaintiffs in the case could not prevail unless “infringing activity is apparent” under the objective circumstances of that case. Yet those circumstances included wrinkles under which not even experts in the field could predict, based on any extant guideposts, whether:

- the final court to which appeal was made would hold that Napster escaped contributory liability based on the capability of its service being put to substantial noninfringing uses;
- that court would hold that the same standard applied to the adjacent domain of vicarious liability;
- it would apply the dictum of *RIAA v. Diamond Multimedia* to vindicate “the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial* use;
- it would determine that Napster received no “financial benefit directly attributable to the infringing activity,” inasmuch as it received no income at all for its service.

Collectively, those circumstances would seem to negate the possibility of scrutinizing the circumstances of Napster 1999 from afar and concluding that “infringing activity is apparent.” To the contrary, they yield the conclusion that “infringing activity is one among many potential resolutions of this case.”⁶⁹⁷

697. Given that intent is not an element of copyright infringement, most cases do not delve deeply into the defendant’s mental state. However, the issue of willfulness is relevant to computation of statutory damages. See 17 U.S.C. § 504(c)(2) (2000). It is therefore pertinent to cite a case from that domain.

In *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), the defendant led a crusade against what he viewed as the wrong-headed view of the courts that had denied a fair use defense to copy shops creating “coursepacks” for students. The district court, following the trend of cases, denied his fair use defense; it further held his infringement to be willful. *Princeton Univ. Press v. Mich. Document Servs. Inc.*, 855 F. Supp. 905, 911 (E.D. Mich. 1994). The Sixth Circuit reversed; subsequently, the full circuit court affirmed the fair use determination. As to willfulness, however, it vacated and remanded. See 99 F.3d at 1393. The full court concluded that “we cannot say that the defendants’ belief that their copying constituted fair use was so unreasonable as to bespeak willfulness.” *Id.*

The lesson from that case is that when legal ferment swirls around an issue, it is erroneous to impute a given mental state. Even more open issues were involved in the Napster dispute as of 1999 than in *Princeton University Press* as of 1996; instead of disagreeing with reported decisions as the defendants in the above case, the *Napster* defendants had to proceed in the absence of any reported

The conclusion follows that, in addition to all of the problems of incoherence, opaqueness, etc., cataloged above, another formal defect attended Congress' various efforts at expanding the rights of copyright content holders: The *law of unintended consequences* made the lot of those owners far more difficult after the Copyright Act had been distended through all sorts of opaque and obscure language.⁶⁹⁸ In other words, by convincing Congress to amend the law to spell out terms purportedly in their favor in tremendous detail, the content industries set themselves backwards in being able to demonstrate the correctness of their position.

3. A&M Records v. Napster

When the case was actually litigated through the courts, the published decisions issued in 2000 and thereafter resolved the open issues one by one in favor of the plaintiffs in the context of rulings on their application for a

cases regarding a slough of controlling issues. As a consequence, it could not be concluded that "infringing activity is apparent."

698. It is apropos, in this context, to note Jack Valenti's famous remark before the *Betamax* case was litigated: "[T]he VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone." LARDNER, *supra* note 692, at 286. Today, by contrast, studios earn more money from videotape sales than from theatrical release. See BETTIG, *supra* note 600, at 181 ("[T]he VCR, like cable, has become one more morsel in the large media conglomerate food chain."); Litman, *supra* note 332, at 46–47.

That remark is often quoted to prove how shortsighted Mr. Valenti was. See, e.g., Lemley & Reese, *supra* note 696. As Lon Sobel points out, however, the actual historical lesson is less pellucid:

Valenti was referring to the off-air record capability of VCRs, not their play-back capability. The circuitry that permits VCRs to record off-air is entirely separate—as a matter of electronics—from the circuitry that permits them to play back pre-recorded tapes. Indeed, eventually, VCR makers began selling cheap play-back-only VCRs that couldn't record. In the *Betamax* case, the movie industry wanted to stop the off-air recording capability—not the play-back capability. The only money the movie industry has made from VCRs is attributable to the industry's sale of pre-recorded tapes; it has not made money from off-air recording by VCR owners. The most that the movie industry's critics can say is that if courts had enjoined the sale of VCRs with off-air recording circuitry, people wouldn't have purchased as many VCRs as fast as they did. I wonder myself whether that would have been so. But that's all I, or anyone, can do: wonder. We have no empirical evidence at all. The closely related evidence we *do* have—namely, evidence about sales of DVD players, which cannot record off-air (or at all)—suggests that people *would* have purchased play-back-only VCRs anyway, even if the movie industry had won the *Betamax* case.

E-mail from Lionel Sobel to David Nimmer, *supra* note 373. I would embroider on those remarks only to add two points: (1) A ruling against the recording function of the *Betamax* player might have tipped the scales against widespread purchase of that new technological device, meaning that the studios might have never reaped the benefit from its widescale acceptance. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8B.01[B]. But as Lon rightly notes, I am now speculating. (2) The trial court in *Sony* actually considered Lon's expedient, but rejected it as impractical. See *infra* note 745.

preliminary injunction.⁶⁹⁹ Specifically, *A&M Records, Inc. v. Napster, Inc.*⁷⁰⁰ ruled that Sony did not apply to vicarious liability; that although Napster was capable of substantial noninfringing uses, its ongoing involvement with customers distinguished it significantly from Sony, which had no further dealings with customers after selling a Betamax machine;⁷⁰¹ that the hope of future capitalization constituted a “financial benefit directly attributable to the infringing activity”;⁷⁰² and that the Audio Home Recording Act afforded no defense.⁷⁰³

It has been posited above that the multiple layers of uncertainty rendered it impossible to determine that “infringing activity is apparent” such as to deny Napster’s OCILLA safe harbor. How did the courts rule on that matter?

The district court found that Napster actually knew about the infringing uses to which its service was being put, given its executives’ references to “pirated music”;⁷⁰⁴ had actual notice of infringement via notices served by the RIAA, trade association for the record companies;⁷⁰⁵ and “[a]t the very least . . . had constructive knowledge of its users’ illegal conduct.”⁷⁰⁶ The constructive knowledge consisted of filing a trademark suit against a rock band that had copied the Napster logo (thereby evincing sophistication in intellectual property matters),⁷⁰⁷ Napster executives’ downloading infringing materials to their own PCs,⁷⁰⁸ and their promotion of a “website with screen shots listing infringing files.”⁷⁰⁹

It is a simple matter to imagine that Yahoo! executives likewise might have filed suit against competitors for trademark infringement, surfed through numerous locales on the Internet including some containing the fruits of

699. Napster’s bankruptcy prior to trial prevented final judgments from resolving this case.

700. 239 F.3d 1004 (9th Cir. 2001).

701. *Id.*

702. 17 U.S.C. § 512(d)(2) (2000) (“Limitations on liability relating to online materials”); *A&M Records, Inc.*, 239 F.3d at 1023.

703. *A&M Records, Inc.*, 239 F.3d at 1024–25.

704. “Napster co-founder Sean Parker mentioned the need to remain ignorant of users’ real names and IP addresses since they are exchanging pirated music.” *Id.* at 1020 n.5 (quoting *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000)). Because plaintiffs failed to authenticate proffered evidence showing that Shawn Fanning wanted to “bypass the record industry entirely” and “bring[] about the death of the CD,” those latter statements did not come in. 114 F. Supp. 2d at 903 n.7.

705. 114 F. Supp. 2d at 918.

706. *Id.* at 919. The Ninth Circuit adopted wholesale these findings of actual and constructive knowledge. 239 F.3d at 1020 n.5.

707. 114 F. Supp. 2d at 919 & n.23.

708. *Id.* at 919; *see id.* at 917 (stating that Napster CEO who “told the press [that] Napster is not about known artists like Madonna” herself had five Madonna files on her computer, which she obtained using Napster).

709. *Id.* at 919.

copyright infringement, and promoted their service with a shot not rigorously vetted to eliminate all cross-references that are themselves infringing. Given that Congress enacted this provision specifically to safeguard Yahoo!,⁷¹⁰ those considerations by themselves do not suffice to impose liability. Yet the district court relied on nothing more when enjoining Napster. Based on such constructive knowledge, Judge Patel dismissed in a footnote Napster's "persistent attempts to invoke the protection" of section 512.⁷¹¹ "Defendant has failed to persuade this court that subsection 512(d) shelters contributory infringers."⁷¹²

The Ninth Circuit rejected that blanket pronouncement.⁷¹³ For it vitiates much of the intent underlying OCILLA,⁷¹⁴ the legislative history for which often refers to the immunity conferred by the instant safe harbors from "direct, vicarious, and contributory infringement."⁷¹⁵ Given that rejection of the district court's refusal to even consider a defense under the instant safe harbor, the Ninth Circuit would accordingly have been expected to address that issue head-on. Yet it declined to do so: "We instead recognize that this issue will be more fully developed at trial."⁷¹⁶ That ruling represents a complete abdication of the court's role to clarify the law.

Initially, a motions panel of the Ninth Circuit (Kozinski & Silverman, JJ.) stayed entry of the preliminary injunction based on "substantial questions of first impression going to both the merits and the form of the injunction."⁷¹⁷ But many months later, the different three-judge panel of that court affirmed the injunction against Napster, modifying only its scope. Based on the early record developed below,⁷¹⁸ the Ninth Circuit concluded that evidence of Napster's "actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the

710. See *supra* note 679.

711. 114 F. Supp. 2d at 919 n.24.

712. *Id.*

713. "We do not agree that Napster's potential liability for contributory and vicarious infringement renders the Digital Millennium Copyright Act inapplicable per se." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1025 (9th Cir. 2001).

714. Prior to Judge Patel's opinion, OCILLA's application to contributory infringers and those held vicariously liable had been taken as a given.

715. For a collection of many such citations, see 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12B.05[C] n.112.

716. 239 F.3d at 1025.

717. *A&M Records, Inc. v. Napster, Inc.*, No. 00-16401, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000).

718. Given that the appeal arose from a preliminary injunction, obviously the ultimate factual record could materially diverge from the initial findings. See 239 F.3d at 1021.

infringing material, and that it failed to remove the material” likely rendered it a contributory infringer.⁷¹⁹ As support, it quoted the opinion below:

Plaintiffs . . . demonstrate that defendant had actual notice of direct infringement because the RIAA informed it of more than 12,000 infringing files. Although Napster, Inc. purportedly terminated the users offering these files, the songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in Schedules A and B of their complaint.⁷²⁰

Besides that purported actual knowledge, it continued that “Napster knew or *had reason to know* of its users’ infringement of plaintiffs’ copyrights.”⁷²¹ The problem with that standard is that it derives from a wholly different statutory provision—the very one that Congress explicitly rejected when adopting OCILLA!⁷²²

Instead of that inapposite standard, the court should have construed the governing law of OCILLA itself. The statutory language in fact disallows the court’s interpretation: more than constructive knowledge (“have reason to know”), it requires actual knowledge or a “red flag.”⁷²³ For the flag to wave red, “an objective standard should be used.”⁷²⁴ Further, the notification regarding 12,000 infringing files is statutorily ineligible to furnish the requisite level of knowledge: OCILLA mandates that when a service provider obtains actual knowledge from a copyright owner’s notification, it avoids all liability by acting expeditiously to remove access to the notified matter.⁷²⁵ Given that Napster responded to the RIAA’s notification regarding infringing files by terminating the 12,000 offending users,⁷²⁶ it did what it needed to do in this respect to successfully obtain the statutory safe harbor.⁷²⁷ By faulting Napster for not making the subject songs otherwise unavailable

719. *Id.* at 1022 (emphasis omitted).

720. *Id.* at 1022 n.6 (quoting *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000)) (citations omitted).

721. *Id.* at 1021 (emphasis added). In the context of an injunction, the panel reiterated that only to the extent it “knows or should know” about infringing files is Napster contributorily infringing. *Id.* at 1027. But it then added that Napster could avoid liability “absent actual notice.” *Id.*

722. See *supra* Part V.A.2 (quoting “had no reason to believe” standard from 17 U.S.C. § 1203(c)(5)(A)).

723. As previously noted, the legislative history explains that the “red flag” test “differs from existing law, under which a defendant may be liable for contributory infringement if it knows or *should have known* that material was infringing.” H.R. REP. NO. 105-551, at 25 (1998).

724. Nimmer, *supra* note 581, at 358 (quoting several committee reports of the Digital Millennium Copyright Act).

725. 17 U.S.C. § 512(d)(3) (2000); see *supra* Part V.A.2.

726. 239 F.3d at 1022 n.6.

727. See 3 NIMMER ON COPYRIGHT, *supra* note 57, § 12B.07[C].

throughout its service,⁷²⁸ the court composed a new law at odds with the one that Congress crafted.⁷²⁹

Judges Kozinski and Silverman of the Ninth Circuit thought in advance of the panel ruling in the case that Napster had “raised substantial questions of first impression going to . . . the merits.”⁷³⁰ Yet the panel itself found liability in part on the tacit basis that “infringing activity is apparent.” That ruling would seem to punish Napster’s management for lacking clairvoyance that the many open issues of first impression would ultimately be resolved adversely to the company. It means that the panel thought it legitimate to punish Napster’s management for being passengers in the same boat as Judges Kozinski and Silverman, that is, for believing (before the panel brought the ship to a never-before-visited port) that their conduct “raised substantial questions of first impression going to . . . the merits.” Left undiscussed is how the panel believed that Napster could be ensnared by “an objective standard” that their brother judges failed to appreciate, or how the subjective factors of Napster’s management cited by the courts met that objective standard.

In sum, as to this one aspect of the case, the courts reached a resolution untrue to the Copyright Act of 1976 as multiply amended. But, one could reply, what is the harm? After all, regardless of the legal niceties, we all know that the plainly right answer is to rule against Napster—indeed MBN Postulate #2 vouchsafes such a conclusion, as it condemns “indiscriminate duplication” as lying outside proper copyright bounds.

The problem is that in so ruling, the courts ran roughshod over MBN Postulate #1: “Surely higher even than the injunction against . . . piracy lies the principle of fidelity to law.” If Title 17 is to govern, it must be followed where it leads. If it has now led to a decision against what those who lobbied for its diverse amendments over the years might have wanted, then a hard object lesson arises in the *law of unintended consequences*. But that circumstance does not excuse the courts from their duty to follow the law as written.

728. See the indented quote above: “[T]he songs are still available using the Napster service, as are the copyrighted works which the record company plaintiffs identified in Schedules A and B of their complaint.” 239 F.3d at 1022 n.6.

729. Imagine, for example, that users A and B maintain unauthorized versions of *Stairway to Heaven* on their PCs. Following a notification in due form from the copyright owner, the service provider might be obligated to purge the links to those particular files maintained by A and B; to “defrock” A and B from the service altogether, if they are repeat infringers; and arguably even to institute safeguards against A and B returning under new identities. But there is no construction of OCILLA that would require the service provider to excise every version of *Stairway to Heaven* found on its system, maintained for example by users C and D.

730. A&M Records, Inc. v. Napster, Inc., No. 00-16401, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000). For Judge Kozinski’s lead on that issue, see MENN, *supra* note 643, at 248–49.

The sad moral is that ultracomplexed statutory schemes fail to serve the interests of even those who draft them and lobby for their adoption. The progression of amendments noted above has bequeathed to the Copyright Act an incoherent body of rules purporting to lay down minute governance for every situation cognizable at enactment, but failing of necessity to contemplate most situations, even ones that in fact started to arise a matter of mere weeks later.⁷³¹ Far preferable would be for Congress to have enunciated less and for courts to have followed it more.⁷³²

4. Napster '04

Based on these considerations, is the water safe for a new Napster to come in swimming? Hardly. The ruminations set forth above turn out to be what physicists call a singularity—an event not replicable under the conditions of this universe.

As to a service to be developed tomorrow called Napster 2004, it would not be able to claim the same defenses as Napster 1999. Most notably, all the questions that were open as to Napster 1999⁷³³ have now been resolved adversely in the actual *A&M Records v. Napster* cases handed down starting in 2000.⁷³⁴ Accordingly, as much as the legal landscape was cloudy in 1999, the fog has cleared in the interim.⁷³⁵ Absent all the open questions that formerly punctuated the legal environment governing Napster, as of today “infringing activity is apparent” as to a party undertaking the Napster methodology. Accordingly, even a court that adopted wholesale the various criticisms set forth above⁷³⁶ should not issue a ruling in favor of Napster 2004.⁷³⁷

Moreover, even as to Napster 1999, it is not clear what the result might have been from a Ninth Circuit reversal on the grounds that plaintiffs had

731. It is essentially impossible to comport one's behavior to law in the absence of any certainty whether the statute on the books will be applied, or instead a contrary one of the court's own device will be specially fashioned.

732. See *infra* Part V.C.

733. See *supra* Part V.A.2.

734. See *supra* Part V.A.3.

735. Naturally, though, controversy continues unabated. See James V. DeLong, *Defending Intellectual Property*, in *COPY FIGHTS*, *supra* note 129, at 17, 19 (arguing that Napsterites' lack of respect for property is simply a natural extension of similar diminutions urged by the Hollywood environmental set).

736. See *supra* Part V.A.3.

737. “[I]t's tough to compete with free,” the recording industry repeated again and again” at a recent congressional hearing. *Senate Panel Assesses Standoff Between File Swappers and Content Owners*, 66 PAT., TRADEMARK & COPYRIGHT J. 617, 618 (2003).

failed to prove that “infringing activity is apparent.”⁷³⁸ After the actual litigation, Napster declared bankruptcy. Had it prevailed under OCILLA, this same result might have eventuated,⁷³⁹ given that such a ruling would have opened the door for the record companies to serve thousands or millions of notifications of claimed infringement on Napster daily, to which it would have been obligated to respond.⁷⁴⁰ But on the other hand, it is possible to imagine that the burden of preparing millions of notifications—and thereafter responding to the counternotifications that the statute authorizes⁷⁴¹—may have exceeded plaintiffs’ stamina,⁷⁴² and that a Napster flush with litigation

738. Addressing conduct in a different context, one court focused on the potential for widespread adoption of defendant’s conduct, and thereupon crafted a different result as to past conduct from its treatment of future activity. “[While defendant’s] use may have been ‘fair’ in the necessarily inchoate world of private ordering, once the historic rights of the parties are balanced by this Court, the very fact of judicial decision affects private conduct in ways that, if continued, will not be fair to [plaintiff].” *Rubin v. Brooks/Cole Publ’g Co.*, 836 F. Supp. 909, 922 (D. Mass. 1993) (citation omitted); see also *id.* at 912 (“It is said that hard cases make bad law. This is a hard case.” (quoting *Scarpa v. DuBois*, No. CIV.A.92-12948-Y, 1993 WL 245655, at *6 (D. Mass. June 24, 1993))). Translated to the *Napster* situation, a court conceivably might have ruled Napster’s historic conduct noninfringing but still enjoined it from continuing to operate in the same mode. See generally Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1 (1989).

739. According to one view, that denouement was inevitable from the company’s internal weaknesses. See MENN, *supra* note 643, at 205 (“[The] business model is terrible, and its software isn’t even all that good” (quoting Stewart Alsop)).

740. See text accompanying *supra* note 684. In this realm of hypotheticals, anything is possible. My imagination at the outset of the suit certainly was not broad enough to encompass the possibility that the record companies would develop the expedient of suing its customer base—or that the strategy might work! See *Survey Reveals Dramatic Decrease in Music File Sharing After Lawsuits*, 67 PAT., TRADEMARK & COPYRIGHT J. 208 (2004); Jeff Leeds, *The Labels Strike Back: One Voice on Piracy*, L.A. TIMES, Sept. 10, 2003, at C1.

741. See 17 U.S.C. § 512(g)(3) (2000).

742. It would be fallacious to reason that (1) the courts actually enjoined Napster; (2) their injunction tracked the OCILLA model; (3) Napster went bankrupt; and therefore (4) it would have gone bankrupt even had it prevailed under section 512, as it would have been subject to the OCILLA model in any event.

The twin fallacies latent in that chain of reasoning are as follows. First, the actual judgment imposed on Napster carried with it the potential for damages amounting to hundreds of millions of dollars, as was imposed in a parallel case involving web exploitation of numerous musical works. See *UMG Recordings, Inc. v. MP3.Com, Inc.*, No.00 CIV. 472(JSR), 2000 WL 1262568, at *64 (Sept. 6, 2000 S.D.N.Y.) (contemplating award at low end of statutory damages exceeding \$118 million). It is not difficult to imagine that the cloud of that award ruined the company’s otherwise viable prospects for raising capital to continue.

Second, the actual injunction imposed, albeit modeled on OCILLA, was considerably more draconian on Napster. See *infra* note 744. Had it been truly subject to the OCILLA model, Napster might have been able to comply and thereby survive. See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1112 (N.D. Cal. 2002) (“When it became apparent to Napster that it could not comply with this court’s injunction, it disabled the ability of its users to share music files.”).

victory would have gathered the necessary capital to slog on (even to potential victory in the litigation).⁷⁴³

What is important for current purposes is not whose ox is gored, but rather whose law is followed: A serious problem afflicts the law of copyright to the extent that the law as enacted is too complicated or too bizarre to actually be followed in one of the most closely watched copyright cases of the generation.⁷⁴⁴ That problem is systemic, regardless of what impact it might have exerted on the litigants to that particular case. The principle of fidelity to law, as enshrined in MBN Postulate #1, remains a sacred obligation that we sacrifice at our peril.

743. Even after suffering adverse rulings in the district court and Ninth Circuit, Napster still had a viable legal defense pending, which conceivably could have caused it to prevail at trial (and thereafter in the marketplace). See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d at 1109 (recognizing that Napster stated cognizable misuse defense against record companies for stifling online music sales: "Even on the undeveloped record before the court, these joint ventures look bad, sound bad and smell bad."). In that vein, note that a member of Congress reports that the Department of Justice instituted an antitrust investigation against those record company plaintiffs for those same joint ventures. See Rick Boucher, *The Future of Intellectual Property in the Digital Age*, in *COPY FIGHTS*, *supra* note 129, at 95, 104–05. Moreover, the district court noted further defects in plaintiffs' case. The court stated that "Napster has raised serious questions as to the validity of plaintiffs' claims of ownership as authors," *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d at 1098, and declined "to allow plaintiffs, merely because of the quantity of music they control, to railroad Napster into potentially billions of dollars in statutory damages without adequately proving ownership," *id.* at 1100. The latter defect arises out of the repeal of sound recordings as eligible to be works for hire. See *supra* Part III.C.3.a (discussing the Work Made for Hire and Copyright Corrections Act of 2000).

744. After the courts rejected Napster's safe harbor under OCILLA, they nonetheless crafted an injunction embodying a notice-and-takedown scheme modeled on that statute's strictures. Compare 17 U.S.C. § 512(j) (2000), with *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096–97 (9th Cir. 2002). But they did so with considerable differences in plaintiffs' favor. For instance, OCILLA disclaims any duty for service providers to engage in monitoring. 17 U.S.C. § 512(m)(1). Judge Patel recognized as much in one of the early *Napster* decisions. *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *27 (N.D. Cal. May 5, 2000) ("Congress did not intend to require a service provider to '... monitor its service or make difficult judgments as to whether conduct is or is not infringing'..."). Yet the Ninth Circuit first held Napster vicariously liable for failing to police its system, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2000), and later ordered it "to adopt reasonable measures to identify variations of the file name, or of the spelling of the titles or artists' name," 284 F.3d at 1096, contrary to the limitations of OCILLA that apply solely as to a specifically noticed work rather than to such spelling variants, see 17 U.S.C. § 512(c)(1)(C). When even that broad injunction still proved permeable to "user-defined variations in file names," 284 F.3d at 1098, the court ordered Napster to achieve zero tolerance through an "audio fingerprinting technology," *id.* at 1097, that goes far beyond anything OCILLA contemplates. Failure to achieve that zero tolerance resulted in Napster's court-ordered closure. *Id.* at 1096, 1098. It is far from clear that the same result would have inured had the courts limited their injunctions to those that OCILLA authorizes. See *supra* note 742.

B. Technological Protection Measures Gone Berserk

The central feature added to the Copyright Act by enactment of the Digital Millennium Copyright Act is section 1201, creating a right of action against "circumventing a technological measure that effectively controls access to a work protected" by copyright.⁷⁴⁵ That language breaks with past practices by targeting not prohibited conduct (reproducing performing, displaying, etc.), but rather devices⁷⁴⁶ that could be used ultimately to gain unauthorized access to copyrightable works.⁷⁴⁷ For instance, it is a violation of that section to distribute software designed to bypass the encryption protections used to protect copyrighted digital motion pictures from unauthorized copying, as the court ruled in *Universal City Studios, Inc. v. Reimerdes*.⁷⁴⁸ The problem arises in that the provision itself is so obtusely formulated as to open the door wide to potential abuses (indeed, to open it as wide as a garage door).

A case in which I represented the defendant illustrates the point. In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,⁷⁴⁹ the controversy concerned garage-door openers. Mel Nimmer probably would not have been

745. 17 U.S.C. § 1201(a)(2)(A). This innovation was not wholly unimagined previously. Even in the context of the famous *Betamax* case, Sony thought about implementing anti-circumvention technology:

The system [which would render the Betamax incapable of recording a program unless the copyright holder affirmatively chose to allow the recording] relied on a simple jamming device that could be installed in a Betamax at a cost, Stumpf was prepared to testify, of less than fifteen dollars a machine. Expert or no expert, Stumpf could not persuade Judge Ferguson that such a thing was workable—or relevant. If he were to order Sony to install a jamming device, "as sure as you or I are sitting in this courtroom today," Ferguson said, "some bright young entrepreneur, unconnected with Sony, is going to come up with a device to unjam the jam. And then we have a device to jam the unjamming of the jam, and we all end up like jelly."

LARDNER, *supra* note 692, at 119–20; *see also supra* note 698.

746. As Rob Kasunic has pointed out to me, the law is much more complex than the Procrustean bed limned in the text—it actually prohibits much conduct, from providing services to gain access to copyrighted works to banning trafficking in certain goods. *See* 17 U.S.C. § 1201(a)(2), (b). But the operative distinction remains that at a high level the DMCA aims to prohibit black boxes themselves, whereas traditional copyright law aims against the conduct of copying.

747. The House Commerce Committee concluded that the digital environment poses a unique threat to the rights of copyright owners, and, as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws. H.R. REP. NO. 105-551, at 25 (1998).

748. 111 F. Supp. 2d 294, 317–18 (S.D.N.Y. 2000) (injunction granted by 111 F. Supp. 2d 346 (S.D.N.Y. 2000), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)).

749. 292 F. Supp. 2d (N.D. Ill. 2003). In addition, Chamberlain filed a separate proceeding against Skylink before the International Trade Commission. *In re Certain Universal Transmitters for Garage Door Openers*, 68 Fed. Reg. 51,301 (Int'l Trade Commission 2003) (investigation terminated Feb. 17, 2004).

surprised to learn that the manufacturer of a garage-door opener could bring a cause of action against a rival for producing a universal remote capable of opening the first manufacturer's garage door. But his reaction undoubtedly would have been shock to be apprised that such a cause of action sounds under Title 17 of the United States Code.

Reduced to its essence, Chamberlain's argument is that it has embedded a code into its garage-door openers and their portable transponders, consisting of a short computer subroutine; that that subroutine constitutes copyrightable subject matter under the CONTU amendments that Mel Nimmer cautiously supported;⁷⁵⁰ and that Skylink's universal garage-door opener, whilst not reproducing or adapting that code, has managed to find a way to circumvent it in order to accomplish the process of opening the subject garage door. It thereupon concluded that all the requisites were present to state a cause of action under section 1201 of the Digital Millennium Copyright Act.⁷⁵¹

As both advocate and commentator, I submit that there are numerous deficiencies with Chamberlain's claim. Chamberlain's counsel explained in court how his client's product operated on a "rolling code" algorithm, which allowed the garage door to open unless the signal was in the "reverse window." My oral argument ran as follows:

Let's go back to Mr. Fink's example of the family that goes on vacation all summer and the [Chamberlain] clicker has been pressed magically [an] amount of times that bring it back within the reverse window. When the family comes home from vacation they will not be able to open their garage door because by bad luck they happen to fall within the rear window of the rolling code algorithm. Now let's imagine that the teenage boy who's a member of the family is technologically adept and knows how to circumvent the technology in order to open up his family's garage door and get the family out of the rain. The question arises: Has that purchaser of the Chamberlain garage door violated the [DMCA] by opening their own garage door?

Section 1201(a)(1) says that a user who circumvents a technological protection measure has violated the DMCA. Section 1201(a)(2) says that anyone who sells a product or a service or a device that helps that user has trafficked in something that violates the DMCA. So the fundamental question before this Court is: Has the teenage boy violated the DMCA by opening up his own garage door? The language that

750. See *supra* Part II.C.3.c.

751. See 17 U.S.C. § 1201(a)(2).

the statute uses in section 1201(a)(2) is exactly the same language used in section 1201(a)(1), "circumventing a technological measure."

So we have to ask, when that family comes home from vacation have they circumvented the technological measure by opening up their own garage door? . . . If Mr. Fink says "yes," then he is claiming that when a family is unfortunate enough to make the decision to buy a Chamberlain garage door, they no longer have access to their own house except at the sufferance of Chamberlain. I would submit that that is an impossible construction.⁷⁵²

The judge accepted the invitation, posing the following question to opposing counsel:

THE COURT: So are you saying with respect to Mr. Nimmer's hypothetical teenage son, the teenage son is in violation of the [DMCA] if he is able to mess around with the remote opener and make it work?

MR. FINK: I am saying probably that's true based on [Section 1201(a)(1)].⁷⁵³

* * *

THE COURT: So in your view any Chamberlain GDO [Garage Door Opener] owner that buys a Skylink . . . transmitter is, in fact violating the Digital Millennium Copyright Act? . . . Isn't it a logical conclusion from your argument that your client's customers are all in violation of 1201(a)(1)? The language is no different [than that of Section 1201(a)(2)]. It's aimed at a different group.

MR. FINK: I would say under the statutory language that's true.⁷⁵⁴

As a consequence of that colloquy, the district court's later ruling rejected Chamberlain's construction of the DMCA:

In this case, Plaintiff sells a GDO to a homeowner who then utilizes the product to access his or her own garage. As pointed out above, there are no limitations placed on the homeowner who buys the Chamberlain rolling code GDO, regarding which type of replacement or additional transmitter he or she purchases to access the GDO. The court notes, further, that there is a history in the GDO industry of universal transmitters being marketed and sold to allow homeowners an alternative means to access any brand of GDO. Furthermore, the homeowner has a legitimate expectation that he or she will be able to access the garage even if his transmitter is misplaced

752. Record at 28–29, *Chamberlain Group, Inc.* (No. 02-C-6376).

753. *Id.* at 49.

754. *Id.* at 62–63.

or malfunctions. During oral arguments on this motion, Plaintiff acknowledged that under its interpretation of [the] DMCA, a garage owner violates the Act if he or she loses the transmitter that came with its Chamberlain rolling code GDO, but manages to operate the opener by somehow circumventing the rolling code. This court agrees with the Defendant that the DMCA does not require such a conclusion.⁷⁵⁵

As gratifying as that particular ruling is,⁷⁵⁶ it does not represent the universal viewpoint. In particular, a district court confronting a parallel claim brought by the manufacturer of computer printer ink cartridges accepted the argument that the DMCA was violated by a rival's sale of compatible ink cartridges.⁷⁵⁷ That matter awaits appellate resolution.

Accordingly, the larger defect remains embedded in the law. To one weaned on traditional copyright doctrine,⁷⁵⁸ it is absurd to imagine that manufacturers of products that adventitiously happen to include computer chips—which today can range from garage-door openers to refrigerators to carburetors to lathes to audio speakers (and tomorrow will undoubtedly embrace everything from dog food to facial tissues)—could obtain effective control over the aftermarket to their products by the expedient of invoking copyright law. Yet the roots for that situation trace back ultimately to Congress' decision to embody CONTU's recommendation that all computer code be subject to copyright protection.⁷⁵⁹

It should be recalled that when my father concurred in CONTU's recommendation, he did so subject to a caveat. He speculated that a distinction “may prove useful in the years to come” if in those future years “protection of all software should prove unduly restrictive.”⁷⁶⁰ In particular, he suggested drawing a distinction between software that controls mechanical processes—“the flow of fuel in an engine”⁷⁶¹ as he invoked or, one might safely add, the opening of a garage door—as opposed to use of a copyrighted work such as a

755. *Chamberlain Group, Inc.*, 292 F. Supp. 2d at 1039–40. Credit goes to Andra Greene, and Rich DeBodo for victory in the case as a whole (of which the DMCA was but a small piece). I must also publicly thank David Djavaheerian for his essential role in securing that victory, as well as for his review of the instant part of this Article.

756. Indeed, it represents one of the few instances in my experience when oral argument proved to be of independent value. But whether it holds is uncertain as of this writing, inasmuch as Chamberlain's appeal to the Federal Circuit is pending.

757. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 970–71 (E.D. Ky. 2003).

758. See *supra* note 231.

759. See *supra* Part II.C.4.

760. See *supra* text accompanying note 210.

761. See *supra* text accompanying note 208.

database or videogame.⁷⁶² As the Digital Millennium Copyright Act now threatens the freefall of all copyright distinctions into an undifferentiated void of protecting computer software everywhere, perhaps it has become timely to pull the ripcord embodied in my father's CONTU parachute. In other words, if section 1201 is to be rehabilitated, its solicitude for technological protection measures should be limited to those that protect independently copyrightable works marketed as such—a videogame, an eBook, a DVD of a movie, or even a software package such as Microsoft Excel or Adobe Photoshop. However, if protection lies, as Chamberlain and like manufacturers would have it, for a technological-protection measure that is itself the putative copyrightable work consisting of a computer program embodying that very technological protection measure, then all boundaries have been erased, and copyright law becomes an all-encompassing monstrosity.

It is not too late to turn back. The path outlined by Professor Nimmer at the very dawn of the era in which copyright protection extended to computer software may be the only road back to sanity. It is time to retrace our steps, if not all the way back to the spiritual limitations proposed by Commissioner Hersey, at least to the practical limitations advocated by Vice-Chairman Nimmer.⁷⁶³ MBN Postulate #5 returns to the fore, limiting protection to "those computer programs which produce works which themselves qualify for copyright protection."⁷⁶⁴

C. Nothing Beats Something

Where does enactment of the all the specialized amendments canvassed above,⁷⁶⁵ culminating with the Digital Millennium Copyright Act,⁷⁶⁶ leave

762. See *supra* note 209.

763. See *supra* Part II.C.3.c.

764. That methodology simultaneously validates the initial round of cases decided under section 1201 and closes the door to its unwarranted expansion. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437–38 (2d Cir. 2001) (affirming injunction where encryption software limits ability to display, copy and manipulate DVD content); *Pearl Invs., LLC v. Standard I/O Inc.*, 257 F. Supp. 2d 326, 350 (D. Me. 2003) (deciding that summary judgment for DMCA defendant inappropriate because encrypted password system may limit viewing of copyrighted data and software); *CSC Holding, Inc. v. Greenleaf Elecs., Inc.*, No. 99 C 7249 2000 WL 715601, at *6 (N.D. Ill. June 2, 2000) (magistrate judge's report and recommendation finding likelihood of success under DMCA against purveyor of "black boxes" for decoding cable television transmissions); *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *2–*3 (W.D. Wash. Jan. 18, 2000) (noting that authentication sequence prevents viewing, listening and copying of video and audio files); *Sony Computer Entm't Am., Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 981–82, 987 (N.D. Cal. 1999) (granting the request for preliminary injunction where protection measure controls user's ability to view and control characters in an audiovisual work contained on CD-ROM).

765. See *supra* Part IV.B–E.

copyright doctrine? As the *Napster* case illustrates, a fact pattern that should have been simply adjudicated under traditional copyright principles⁷⁶⁷ became instead an open question because of the limited thrust of a 1997 amendment,⁷⁶⁸ compounded by an unnecessary 1992 amendment,⁷⁶⁹ which was construed unreasonably broadly in the only decision arising thereunder,⁷⁷⁰ in turn creating enough doubt such that the standards added in a 1998 amendment were no longer satisfied.⁷⁷¹ But the court hearing the case decided to ignore that 1998 amendment, presumably in order to return to traditional principles.⁷⁷² Thus did a series of legislative interventions become so much clutter in terms of governing legal principles.⁷⁷³

Napster arose under OCILLA, which is Title II of the Digital Millennium Copyright Act. Turning to Title I of that same enactment, experience has proven no better. The anticircumvention strictures added thereby have proven useful to copyright owners in such cases as *Universal v. Reimerdes*, but at the cost of distending copyright law to a general statute against competition in the aftermarket for electronic goods.⁷⁷⁴

With such sorry results, it is useful to reflect on the exigency that compelled Congress to adopt the Digital Millennium Copyright Act. The Internet was then very much on Congress' mind. Congress needed to act to bring "U.S. copyright law squarely into the digital age"⁷⁷⁵ by creating "the legal platform for launching the global digital on-line marketplace for copyrighted works [in order] to make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius."⁷⁷⁶ Absent new legal protection, that enterprise stood at risk—or so it seemed.⁷⁷⁷ Something had to be done, right?⁷⁷⁸

766. See *supra* Part IV.F.

767. See *supra* Part V.A.1.

768. See *supra* Part IV.G.2 (discussing The Net Act).

769. See *supra* Part IV.C (discussing AHRA).

770. See *supra* Part IV.C (discussing *RIAA v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072 (9th Cir. 1999)).

771. See *supra* Part V.A.2 (stating that "infringing activity is apparent").

772. See *supra* Part V.A.3.

773. See *supra* Part V.A.4.

774. See *supra* Part V.B.

775. S. REP. NO. 105-190, at 2 (1998).

776. *Id.*

777. The legislative history explains the need as follows:

When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet. In order to protect the owner, copyrighted works will most likely be encrypted and made available to consumers once payment is made for access to a copy of the work. There will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the

Wrong, actually. Congress engaged in no deliberation over whether existing law could have accommodated the new technologies because it was so fixated on the need to do *something*. In fact, there is reason to doubt that corrective action was needed. As set forth above, the record companies could have defeated Napster simply on the strength of old law, such as the 1971 decision in *Gershwin Publishing v. Columbia Artists*.⁷⁷⁹ The language of that case, particularly as applied in such later decisions as *Cable/Home v. Network Productions*,⁷⁸⁰ would seem sufficient to rule against the defendants as well in *Universal v. Reimerdes*.⁷⁸¹

Thus, instead of bequeathing to future copyright generations the impenetrable strictures of the Digital Millennium Copyright Act, Congress had a better option: doing nothing. (Or almost nothing. In order to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty,⁷⁸² Congress needed to amend the Copyright Act to define claimants under those treaties as eligible for U.S. copyright protection⁷⁸³ and to effectuate other miscellaneous changes, such as to modify the Sony standard of "capable of commercially significant noninfringing uses.")⁷⁸⁴

Had Congress chosen that expedient of doing nothing, my estimation is that the plaintiffs in such cases as *Napster* and *Universal v. Reimerdes* still would have been successful. But those results would have unfolded more honestly than under the law as multiply amended⁷⁸⁵—and without the concomitant of having empowered a whole new class of plaintiffs (manufacturers

business of providing devices or services to enable others to do so. A new "Section 1201" to the Copyright Act is required by both WIPO Treaties to make it unlawful to engage in such activity. H.R. REP. NO. 105-551, at 10 (1998).

778. So maybe it was not perfect, as even proponents of the Digital Millennium Copyright Act conceded, but at least it was *something*—and something was emphatically needed, they believed. So their conclusion was that getting *something* enacted, even if not the ideal, was better than nothing.

779. See *supra* Part V.A.1.

780. 902 F.2d 829 (11th Cir. 1990). As previously noted, that earlier Eleventh Circuit case involved defendants who did not simply facilitate unauthorized access to plaintiff's expressive works, but also violated the copyright in the computer code in the chip limiting access to those works in order to do so. See *supra* note 654. Nonetheless, it is easy enough to imagine a later court confronted with the harm in *Universal v. Reimerdes* extending the rationale of *Cable/Home v. Network Productions* to achieve the same result.

781. The subject language makes liable for contributory infringement someone who "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another." It would seem that defendants' distribution of technology designed to obtain unauthorized access to plaintiffs' DVDs would suffice to meet that language.

782. See *supra* note 777.

783. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 102, 112 Stat. 2860 (1998).

784. See text accompanying *supra* note 670; see also *supra* note 621. For a general discussion of these issues, see David Nimmer, *A Tale of Two Treaties*, 22 COLUM.-VLA J.L. & ARTS 1 (1997).

785. See *supra* Part V.A.3.

of garage door openers and the like) to bring meritless claims under the Copyright Act notwithstanding their failure to even fall within light years of the realm of creative expression which copyright is designed to protect.⁷⁸⁶ A happier universe, in short, would have been the result.⁷⁸⁷

But my estimation may, of course, be mistaken⁷⁸⁸—as defendants in that alternative universe, Napster and Reimerdes might have won their respective suits. So perhaps an alternative rationale for Congress' behavior is that the risk of the sky falling was too much to bear in advance, and we needed the Digital Millennium Copyright Act to safeguard against such horrors.

Upon reflection, that rationale also fails. If a concrete decision had been handed down of which Congress disapproved, it could have intervened at that juncture⁷⁸⁹ to safeguard copyright doctrine, as it has done on many past occasions.⁷⁹⁰ In a pinch, it could even make its statute retroactive, as it has also done.⁷⁹¹ Given sufficiently exigent circumstances, the relief from that course of action could come about even more quickly than a court injunction.⁷⁹²

Such an *interpretive correction* need have none of the vices⁷⁹³ of the *akanthology* of copyright amendments previously witnessed.⁷⁹⁴ Instead of being geared

786. See *supra* Part V.B.

787. Legislatures may be able in many instances to refrain from amendment of the copyright statute virtually indefinitely, as the example of another country clarifies:

When I served as a consultant to the Israel Ministry of Justice Copyright Revision Committee, some of the veteran copyright lawyers on the Committee questioned the need to produce a revision and expressed comfort with the Copyright Law of 1911. The 1911 law is far shorter and simpler than the proposed revision and the veteran lawyers knew how judges had interpreted it and applied it to new circumstances and technologies.

E-mail from Neil Netanel to David Nimmer (Dec. 12, 2003) (on file with author).

788. The realm under investigation here is the counterfactual of what would have happened in 2000 had Congress not amended the Copyright Act in 1992 and 1998, for example; of necessity, there can be no empirical citations to bolster either expectation.

789. A further irony about the Digital Millennium Copyright Act is that Congress passed it only after the courts had begun to follow the proper path on the issue of online contributory liability. See *supra* note 621. Congressional intervention into that arena was especially unnecessary.

790. See *supra* Part IV.G.

791. See *supra* Part III.D.4.

792. I promised in an earlier article to explain my disagreement with the proposition that "in a world spinning at Internet speed, we no longer have that luxury of time." Nimmer, *supra* note 439, at 969 n.340. So here it is: (1) After the *Red Baron* decision, which was handed down on July 18, 1989, Congress abrogated it by statute effective via the Computer Software Rental Amendment Act, on December 1, 1990. See *supra* Part IV.G.2. (2) After Napster went into operation in 1999, the record companies filed suit against it, leading to preliminary skirmishes, an entry of a preliminary injunction that was promptly stayed by the Ninth Circuit, a later order to amend the injunction, and further procedures, such that the injunction did not go into effect until March 2001. *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 1087, 1092–93 (N.D. Cal. 2002); see *supra* Part V.A.3. So the notion that courts can spring into action before Congress could possibly do so turns out to be a fallacy.

793. See *supra* Part IV.G.1.

794. See *supra* Part IV.B–F.

at a future that might never dawn, it could be aimed at an actual decision. Accordingly, it could be crafted not in vague and all-encompassing terms, but for the precise purpose of jettisoning a concrete interpretation that Congress wished to reject. It could be terse, specific, coherent, real—in short, all of the things lacking from such blunderbusses as the Digital Millennium Copyright Act.⁷⁹⁵

We revert at this juncture to MBN Postulate #6: “The flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles” is vastly preferable to “a body of detailed rules reminiscent of the Internal Revenue Code.”

There is something better than something—it is nothing.⁷⁹⁶ Doing nothing before its time is a prescription for bringing order and coherence back to the law of copyright. If and when the courts stumble from the statutory base consisting of general principles, there is time enough for Congress to react. Absent such stumbling, there is no need to react. Nothing beats something.

D. CONTU's Better Example

Even with the goal of maintaining a statutory base consisting of general principles, at times amendments to the Copyright Act might still become necessary. At that juncture, how can we avoid the baleful history of deforming amendments? The answer is to keep foremost in our mind MBN Postulate #4, which champions a Presidential Copyright Commission when necessary. That way lies the potential for alighting on judicious recommendations for amending copyright law, as opposed to the bloated methodologies of the past⁷⁹⁷ hung with every type of Christmas tree ornament⁷⁹⁸ that lobbyists can imagine to hang from the Act.⁷⁹⁹

795. See *supra* Part IV.F.

796. Consider the wisdom of Chuang Tzu:

A key principle in realizing our oneness with the Tao is that of wu-wei, or “non-doing.” Wu-wei refers to behavior that arises from a sense of oneself as connected to others and to one’s environment. It is not motivated by a sense of separateness. It is action that is spontaneous and effortless. At the same time it is not to be considered inertia, laziness, or mere passivity. Rather, it is the experience of going with the grain or swimming with the current. Our contemporary expression, “going with the flow,” is a direct expression of this fundamental Taoist principle, which in its most basic form refers to behavior occurring in response to the flow of the Tao.

Ted Kardash, *Taoism—The Wu-Wei Principle, Part 4*, at <http://www.jadedragon.com/archives/june98/tao.html>.

797. See *supra* Part IV.

798. Hilary Rosen, President and CEO of the Recording Industry Association of America, complained to Congress in the context of the Digital Millennium Copyright Act about “Christmas tree hangers.” *The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the House Subcomm. on Telecommunications, Trade, and Consumer Protection*, 105th Cong. 43 (1998).

799. See LESSIG, *supra* note 656, at 202, 210–11, 237.

It should be recalled that my father suggested precisely this expedient in his 1965 testimony, and that Congress had accepted that invitation by 1974, passing the legislation that led to the establishment of CONTU.⁸⁰⁰ The CONTU recommendations led to the first substantive amendment to the 1976 Act, passed in 1980.⁸⁰¹ We therefore now have the benefit of almost a quarter century to evaluate its robustness.

The CONTU amendments pass the test with flying colors. They have proven coherent, terse, real, broad, publicly accountable, nonretroactive, stable—in short, redolent of all the formal attributes of a successful copyright amendment.⁸⁰² The contrast with the later amendments could not be more stark.⁸⁰³ CONTU, in brief, represents the preferred path for copyright amendments.

In fact, there is only one particular in which the CONTU amendments have given rise to less than clear guidance to the courts. The privileges created thereby apply only to “the owner of a copy of a computer program.”⁸⁰⁴ Some decisions, such as *MAI Sys. Corp. v. Peak Computer, Inc.*,⁸⁰⁵ construe that language to be inapplicable to software that is licensed.⁸⁰⁶ Others look to the ownership of the physical medium in which the software is embodied, regardless of whether the intellectual property rights in that software are licensed.⁸⁰⁷ It is submitted that the latter approach better comports with the statutory language.⁸⁰⁸ But the issue has proven sufficiently contentious to

800. See *supra* Part II.C.2.

801. See *supra* Part II.C.4.

802. See *supra* Parts II.C.3, III.C.2.b.

803. See *supra* Part III.C.3.b.

804. 17 U.S.C. § 117(a) (2000).

805. 991 F.2d 511 (9th Cir. 1993).

806. Another decision involving the same party simply misquoted the statute, substituting an ellipsis for “of a copy.” *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 367 (E.D. Va. 1994). The court stated:

Section 117 only permits “the owner . . . of a computer program to make or otherwise authorize the making of another copy” without infringing the copyright if it is “an essential step in the utilization of the computer program.” And MAI customers are not “owners” of the copyrighted software; they possess only the limited rights set forth in their license agreements.

Id. (quoting 17 U.S.C. § 117) (alterations in original).

807. *DSC Communications Corp. v. Pulse Communications, Inc.*, 976 F. Supp. 359, 362–63 (E.D. Va. 1997). The court stated:

[T]he existence of a license agreement between DSC and its customers does not preclude a finding that the RBOCs are “owners of a copy” for the purposes of Section 117. It is necessary to determine ownership of the copy, not whether the transaction with DSC involved a license to use the program

Id. (citations omitted).

808. See 2 NIMMER ON COPYRIGHT, *supra* note 57, § 8.08[B][1].

force Congress to pass a new amendment, Title III of the Digital Millennium Copyright Act, in order to avoid part of the result in *MAI v. Peak*.⁸⁰⁹

What is important for current purposes is to note how the dispute arose between those two lines of cases. The statutory language over which courts take different views is who qualifies as the “owner” of given software. At this point, it is necessary to recall that CONTU itself would have avoided that conundrum. For that Commission recommended that the language “rightful possessor” appear in the statute.⁸¹⁰ It was Congress that, without explanation, substituted the word “owner.”⁸¹¹ Had Congress passed the statute exactly as CONTU recommended, it would have avoided both the current disagreement between two lines of cases and the intervening need for the corrective amendment of the Computer Maintenance Competition Assurance Act as Title III of the Digital Millennium Copyright Act.

The best path, in short, seems to be that, to the extent that issues continue to require legislative redress, more presidential commissions should be chartered to study the problems bedeviling the copyright community. Of course, that particular approach does not exhaust the potential avenues for achieving worthwhile copyright legislation. For instance, at one point, Congress supported a nonpartisan and broad-reaching research arm within its own organizational structure. The Office of Technology Assessment produced many invaluable reports, including some of direct copyright interest. In addition, one can imagine ad hoc groups of interested individuals banding together to propose amendments to the Copyright Act, such as the one that produced *The Digital Dilemma*.⁸¹² To the extent that such groups can save themselves from degenerating into raw lobbying activity and can sustain their activities without any advance indication that Congress will even listen to their recommendations, then that vehicle could also move the copyright world forward. Nonetheless, without the imprimatur of presidential appointment

809. See *supra* Part IV.G.2.

810. See *supra* Part II.C.3.b.

811. See *supra* Part II.C.4.

812. NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE DIGITAL AGE* (2000). Note that that group included Jonathan Tasini of the National Writers Union. See *id.* at v; see also *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001). That group's efforts have affected the academic debate, although they have not won adoption in Congress. See Frank G. Hausmann, *Protecting Intellectual Property in the Digital Age*, in *COPY FIGHTS*, *supra* note 129, at 205, 213 (adopting “middle way” championed by *The Digital Dilemma*). In contrast to that nuanced approach, one view is that “displaying all the temperance of a methadone addict, Congress keeps handing more and more power to copyright owners.” Declan McCullagh, *Foreword* to *COPY FIGHTS*, *supra* note 129, at xi, xi; see Lunney, *supra* note 696, at 872 (noting “the constant clamoring of copyright's propertied class”).

or ongoing congressional funding, it may be difficult to maintain focus on a sustained basis.

Rather than the rough-and-tumble of interested parties clamoring for attention to their pet interest, a more disinterested body can promulgate standards that will achieve formal success.⁸¹³ That success, moreover, can be predicted to be of the long-lasting variety of CONTU's amendment that continues to nourish over two decades later, rather than the special-interest monstrosities that leave one hungry in short order and accordingly give rise to yet more churning of the Act.⁸¹⁴ The best prescription, in brief, seems to be to do nothing unless essential. When amendments to the Act do pass that high bar, then a disinterested body should study the issues and report to Congress in a fashion that is terse, coherent, and lays down general principles.⁸¹⁵ As CONTU's legacy teaches, Congress should be wary of departing from the template presented to it.⁸¹⁶

VI. STRATEGIES FOR MOVING FORWARD

A. Conclusion

The 1976 Act, reflective of a reasonably cogent National Copyright Legislation,⁸¹⁷ together with a mixture of elaborate yet nontoxic extraneous elements,⁸¹⁸ largely retained its character until 1992.⁸¹⁹ Since then, however, it has been almost all downhill.⁸²⁰ Indeed, the downward spiral seems to be feeding off itself as each amendment outdoes its predecessor, not only for incoherence that commands national attention, but for pioneering new

813. Mark Lemley made many helpful suggestions to the manuscript for this Article. On the point above, however, he simply labeled my suggestion naïve and offered his own view that thinking "such a commission would (a) be unbiased or (b) be listened to in Congress if it were strikes me as unrealistic." E-mail from Mark Lemley to David Nimmer (Oct. 24, 2003) (on file with author). I have no rebuttal to him save my faith that things can get better. Undoubtedly, I am correct that CONTU produced disinterested opinions to which Congress listened, and he is correct that such an expedient has not been replicated in over two decades of copyright experience since. Only a new experiment in Congress could validate Mark's prediction or mine.

814. See *supra* Part IV.E (discussing 1995 law, revamped in 1998 revision and corrected by 2002 adjustment).

815. See *supra* Part III.D.1; see also *supra* note 272.

816. If Congress does decide to pass different language from that recommended to it, it should at least specify the basis for its alternative, which Congress failed to do in the CONTU context. See *supra* Part II.C.4.

817. See *supra* Part III.C.1.b.(2).

818. See *supra* Part III.C.1.b.(1).

819. See *supra* Part III.C.2.b.

820. See *supra* Part III.C.3.b.

methods of bringing the legislative process into disrepute.⁸²¹ It was not until 1994 that the retroactivity wall was breached.⁸²² It was not until 1995 that disorder became so great that Congress could no longer keep track of the expiration of interim provisions.⁸²³ It was not until 1997 that so many mistakes had crept into the Act that global technical amendments were required on a regular basis to correct all the errors of the past.⁸²⁴ It was not until 1999 that public accountability went out the window.⁸²⁵ It was not until 2002 that Congress discarded all standards and simply codified gibberish, figuring that its effective reign of only eleven days obviated the need to make the statute comprehensible.⁸²⁶

Based on past experience, it would be foolhardy to predict that worse turns of events cannot occur. Indeed, one can only suspect that matters will continue to get worse. For that reason, the need for corrective action has become extreme.

The way back to sanity, as has been observed, is to follow the trail pioneered by Mel Nimmer.⁸²⁷ His collective postulates contain the ingredients for crafting copyright amendments that can prove successful rather than pointless. His actual drafting as part of the CONTU commission has given copyright law its first and best amendment⁸²⁸—a standard from which recent amendments have been retreating at an alarming rate.

To recapitulate the wisdom of the various MBN Postulates,⁸²⁹ they disapprove of widescale duplication of copyrightable works, even if undertaken by uncoordinated actors all over the country, as the inevitable result is to diminish the potency of copyright protection; at the same time, they recognize that the “smashing of machines as a means of avoiding technological displacements is a futile gesture.” They champion the “flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles” and concomitantly decry “a body of detailed rules reminiscent of the Internal Revenue Code.” As a consequence, they lead to the sensibility that technological progression per se is no reason to amend copyright law—the old principles can continue to govern even in the

821. See *supra* Part IV.C–F.

822. See *supra* Part III.D.4.

823. See *supra* Part III.D.5.

824. See *supra* Part III.D.3.

825. See *supra* Part III.D.2.

826. See *supra* Part IV.E.3.

827. See *supra* Part V.

828. See *supra* Part II.C.4.

829. See *supra* Part II.D.

new domain;⁸³⁰ to the extent that the courts take a wrong turn, at that precise point it is appropriate for Congress to intervene with a corrective amendment.⁸³¹ But to the extent that such an amendment is necessary, the current methodology of mad scrabbling by interested lobbyists is bound to produce a dismal state of affairs (as indeed it has).⁸³² Better by far would be to turn to an independent Presidential Copyright Commission to formulate judicious recommendations for amending copyright law. If such a commission recommends protection for computer software, for example, then that is an experiment worthy of undertaking—but not as a perpetual straightjacket. If future events reveal problems with that approach, its abandonment should be seriously entertained.⁸³³ Finally, bestriding all the other postulates is an unflagging commitment to integrity: “surely higher even than the injunction against . . . piracy lies the principle of fidelity to law.” Thus, to the extent that Congress has ignored one or all of the salient goalposts, the solution is not to simply sweep inconvenient amendments under the carpet; instead, the responsibility is to follow the law as written, and to seek future amendments sobered by the effects of past irresponsibility.⁸³⁴

To paraphrase the prophet Micah, It hath been told thee, O Man, what the Great Copyright Sage demands. The only remaining question is whether we are up to the task of implementing his vision. Given the perilous juncture to which ignoring his advice in the past has brought us at present, the future of copyright depends on it.

B. My Petition for More John Herseys

Looking back at the dozens of amendments to the Copyright Act, there was one ingredient present at the start which has never again been replicated. When CONTU convened at the outset of the Act’s effectiveness, it included in its deliberations one representative not steeped in copyright per se, but rather an eminent thinker who brought to bear extralegal concerns. In particular, Commissioner John Hersey wrote an elegant dissent from CONTU premised on his notion of the incompatibility of a single legal scheme protecting the sublime fruits of human creativity with the mechanical workings of computer processes.⁸³⁵ His dissent altered the timbre of the entire

830. See *supra* Part V.C.

831. See *supra* Part IV.G.1.

832. See *supra* Part IV.B–F.

833. See *supra* Part V.B, D.

834. See *supra* Part V.A.

835. See *supra* Part II.C.3.c.

CONTU report.⁸³⁶ Though not actually adopted into practice, it serves as a valuable reminder of the greater issues at stake.⁸³⁷ Even a quarter-century later, his ruminations are worth rereading and bearing in mind.

The Hersey Corollary respects the sacred nature of human creation, presumptively opposing assimilation of functional processes into the realm of law consecrated to protecting works of authorship. That sensibility deserves, if not immediate embodiment into the Copyright Act, at least consideration before the next massive amendment to that law takes place.

Though the CONTU recommendations have withstood formal challenges for the better part of a generation (except to the extent that Congress tinkered with the language that the Commission recommended),⁸³⁸ there may be reason to reconsider the Hersey dissent. Granted, members of CONTU's majority continue today to adhere to the correctness of its approach; one, for instance, "concludes that the path chosen by CONTU and Congress years ago, although rocky and somewhat indistinct in places, seems correct, and that subsequent events do not require a remapping of the terrain."⁸³⁹ But other eminent commentators take the opposing substantive position.⁸⁴⁰ One thoughtful judge remarked in a celebrated software case that "[a]pplying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit."⁸⁴¹ Certainly, copyright law today reflects a computer-soaked sensibility.⁸⁴² It does not augur well for Title 17 to observe its processes dominated ever more by technical disputes among rival manufacturers that are closer to the domain of patent law than to defining the rights to works of authorship.⁸⁴³

Putting aside substance, what lies beyond dispute is that the formal criteria adopted by CONTU remain those to which future amendments must aspire. Rather than special interests championing a fix to their own problems without taking cognizance of the balance of the Act, all of copyright law must be scrutinized to ensure that the pertinent changes are coherent when

836. See *supra* note 201.

837. See *supra* note 422.

838. See *supra* Part V.D.

839. Miller, *supra* note 161, at 980.

840. Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994).

841. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring).

842. One could magnify instances, but a single example suffices: In *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003), the court confronting a claim of copyright protection in a sculptural work reasons from *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994).

843. See *supra* Part V.B (recounting dispute regarding garage door openers).

viewed in the context of the whole.⁸⁴⁴ Rather than adopting opaque and unreadable verbiage, the resulting amendments must be sufficiently terse to be comprehensible. Rather than aiming one's sights at a problem over the horizon, study must be undertaken of current phenomena in order to craft a law that hits real phenomena on the head. Rather than cluttering Title 17 with special-interest dispensations for a few, the law adopted must have nationwide application. In all of these particulars, CONTU's handiwork shines as exemplary, in pointed contrast to more recent amendments to copyright law.

As opposed to CONTU's inclusion of John Hersey as President of the Authors League of America, no eminent composer sat at the table to craft the Audio Home Recording Act of 1992. No opera diva or pop chanteuse participated in crafting the Digital Performance Right in Sound Recordings Act of 1995. No Authors League delegate participated in the deliberations for protecting eBooks via the Digital Millennium Copyright Act. Indeed, the record since 1980 has been bereft of such popular participation.⁸⁴⁵

I, for one, lament the loss. Hence this petition for more John Herseys.⁸⁴⁶ In that spirit, let us muse about what it might be like to revitalize the old methodology and to start yet a new Presidential Copyright Commission to consider copyrightable subject matter, including on it great artists, scientists, and thinkers whose fame arises other than through their expertise in copyright law.

To do so requires one last foray⁸⁴⁷ into the realm of fiction.⁸⁴⁸

844. Judge Easterbrook's ruminations about efficient rules should again be borne in mind here. See Easterbrook, *supra* note 272, at 408.

845. What about the fact that National Writers Union President Jonathan Tasini helped formulate *The Digital Dilemma*? See *supra* note 812. It proves the point, inasmuch as that body's recommendations have not been adopted into law.

846. See HERSEY, *supra* note 232.

847. When the *Napster* studies are cited below, see *supra* note 696.

848. Bearing in mind, as always, that reality is stranger than fiction. Consider two examples:

[1] He told an anecdote about an unnamed "respected" person in Utah, who committed some acts in violation of his better judgment, not specified by Hatch. These transgressions, Hatch said, were caused by viewing of pornography on the Internet.

Senator Hatch Warns of Wave of Litigation if IT Industry Fails to Address P2P Problems, 66 PAT., TRADEMARK & COPYRIGHT J. 641, 641 (2003).

[2] [T]he audience was stunned into silence. Destroying hacker's computers "may be the only way you can teach somebody about copyrights," thundered the committee chairman, Republican Orrin Hatch of Utah. . . .

. . . .

But Hatch got caught in a flap the minute he completed his statement in the Senate. A network administration in Houston examined Hatch's Web site and found that the honorable senator uses a drop-down menu application without paying for it. In addition, one of the links on his site points to another site, MyUtahSearch.com, which is not an innocent search engine, but one of the most hard-core porn sites on the Net.

Yuval Dror, *The Song of Orrin Hatch*, HAARETZ, June 25, 2003, available at <http://www.haaretz.com>.

THE GAZETTE

Memmilania, Gm.; Jan. 14, 2018. The most recent Presidential Copyright Commission (otherwise known as CONTU-XVI) submitted its report today in this beautiful coastal resort. The subject matter, as has widely been reported in previous articles in THE GAZETTE, is copyright protection for pornography.

Having commissioned eight preliminary surveys of the effect of the facts on the ground, the commissioners learned that pornography has only expanded from being already fifteen years ago "the single most profitable industry on the Internet," PHILIP YANCEY, RUMORS OF ANOTHER WORLD: WHAT ON EARTH ARE WE MISSING? 106 (2003) (recounting seven deadly sins), resulting in a surfeit of infringement litigation even then. See, e.g., *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001), *Sefton v. Jew*, 201 F. Supp. 2d 730 (W.D. Tex. 2001), and *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1165 (C.D. Cal. 2001) (stating that the protection of pornographic copyrights "is consistent with the public interest"). As of 2016, the Supreme Judicature Budget Office estimates that the federal government has been supporting the pornography industry to the tune of \$2 billion *per annum* by providing the forum, judicial salaries, resources, enforcement, etc., for their copyright infringement claims.

The Commission received testimony that inability to protect copyright over their images would drive many pornographers out of business. Citing surveys commissioned as a follow-up to the *Napster* litigation, those industries concluded that "it's tough to compete with free" and that the availability of unrestrained copying would drive them out of business. Other economists disputed that proposition, maintaining that the profusion of advertiser-sponsored free sites would ensure continuation of the installed base and that the lack of copyright protection would not vindicate the industry's dire predictions.

A majority of the commissioners accepted the gloom-and-doom predictions that the industry would be bankrupted by loss of copyright protection. On precisely that basis, they voted to withdraw copyright protection for pornography.

"This is a win-win situation," said Commission President Xps5f. "If the pornographers go out of business through loss of copyright protection, I will celebrate by relinquishing control of our personal computer from the living room and accede to the kids' wish that it be located in their bedroom. On the other hand, if the economic predictions do not come to pass, then we will have finally learned that the basis on which the *Napster* surveys were premised was flawed."

Several passionate dissenters registered opposition to drawing any content-based distinctions. Although conceding that a denial of copyright protection for legally obscene material might pass First Amendment scrutiny, they maintained that the broad language of the proposed recommendations, denying protection alike to hard-core, soft-core, and other sexually explicit images, was not so limited. They also lamented the slippery slope by which in the future, they predicted, "Copyright law would also be withdrawn from the worst of television shows." See CONTU FINAL REPORT at 26.

The majority seemed unimpressed with that rationale. Indeed, a few of its members seemed eager to embark down that path; some say it is part of a larger agenda to deny copyright protection to all television shows. One concurring opinion quotes at length from JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* (1977).

(Meanwhile, a renegade faction is seeking to "unleaven copyright doctrine." Based on the early work of Guy Pessach on copyright and pornography, see *Copyright Law As A Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL L. REV. 1067, 1103 (2003), they cite society's "limited mental shelf space" in order to blast "broad intellectual property protection[, which] establishes a circular dynamic . . . leveraged and maintained by its related nonmedia commodified products." *Id.* at 1094, 1102. Fisticuffs have broken out more than once between proponents of this view and "propertarians.")

After submitting its final report, the Commission disbanded. Taking up residence of its offices next week will be the newly formed Presidential Copyright Commission on Garage Door Openers.

And, God knows best.⁸⁴⁹

849. See ABOU EL FADL, *supra* note 234, at 32, 56, 271.
