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Oops!... I Infringed Again: An Analysis of U.S. Copyright and its Intended Beneficiaries

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Abstract

Federal copyright has existed in the United States since the late 1700s, with the creation of the Copyright Act in 1790. Adopted from the first copyright law ever created, the English Statute of Anne (1710), the Copyright Act was meant to protect citizens from piracy in a world where the risk of such a thing was rapidly increasing. The stated objective of the Copyright Act was to encourage learning by securing the copies of printed works, and to give authors the sole right to print, reproduce, publish, and vend those works for a limit of fourteen years. Over time, this act has been amended to include protections for different media, as well as to extend copyright duration and to modify its objectives. Today, copyright protects essentially all physical expressions of works of authorship and lasts for up to 70 years after the creator's death; a term much greater than the original term of 1790. This paper seeks to establish the reasons why federal copyright protection was created, discuss the shifts in reasoning behind major amendments, and explore its effects on copyright holders and the public, with a slight focus on the music industry.

Why was the law created?

The United States' Founding Generation believed that promoting the creation of new works was essential to the preservation of a free constitution. In 1790, President George Washington addressed Congress and argued that the promotion of "science and literature" deserved the patronage of the people ("History of the Proceedings"). The Senate responded in agreement, stating that these were essential elements in upholding the U.S. Constitution, and that that it was up to the federal government to ensure the American public had fair rights over their works ("History of the Proceedings").

These sentiments were evident in the 1787 version of the U.S. Constitution. Article 1, Section 8 states: "… Congress shall have power… to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." These words clearly created the foundation on which subsequent U.S. copyright laws developed. This section of the Constitution states the federal government's reasons for providing copyright in the first place. However, the act does not discuss any specifics, such as copyright term length or what kind of works the federal government should protect. The first U.S. Copyright Act, passed in May 1790, specified these terms, while also maintaining the Constitution's message.

What were the original terms? Where did they come from?

Although the protection granted by the first U.S. Copyright Act only applied to American citizens, it drew its terms and reasoning from the English Statute of Anne. Both documents limited copyright terms to 14 years, included the option of rights renewal for the creator, and applied to works created before the year 1790 ("8 Anne, c. 19"). According to the Copyright Act of 1790, the U.S. exclusively covered the copies of maps, charts, and books, and owners were

granted the “sole right and liberty” of printing, reprinting, publishing and vending their content. Additionally, in order to obtain copyright for works, creators were obligated to formally register their works. As the U.S. Copyright Office did not exist at the time, formal registration included depositing a copy of the work with the office, paying a fee to receive an official certificate of authentication, and publishing said certificate in “one or more of the newspapers printed in the United States” (Copyright Act of 1790). This last step in registration existed to make the public aware that the work possessed a legal, federal copyright.

The 1790 act also laid out penalties for pirating copyrighted content. Offenders who printed, duplicated, published, or imported protected content were forced to destroy their illicit copies and pay a fee to the proper rights holders. The goals of this act are explained in its body. The first line of text explicitly states that the act intends to encourage learning by securing intellectual property rights. By giving citizens control over the use and distribution of their works, the act provided an incentive to authors, artists, and scientists to create original content. At the same time, the term limit of 14 years limited this control in order to stimulate creativity among contemporaries and the public. Once the copyright expired on a work, it would then be automatically placed in the public domain. The idea behind this was that allowing the public to freely use formerly copyrighted content would advance "science and the useful arts" (Copyright Act of 1790).

The 1831 Amendment

The first major amendment to U.S. Copyright law occurred in 1831. A result of intensive lobbying, this act altered protection terms and renewal rights, and added protection for a new medium: printed music (Bracha, O.). Despite these major changes, the overall intent of the law remained in alignment with that of the first federal U.S. Copyright Act: to benefit the public.

Noah Webster, a proponent of strict copyright laws, acted as the primary lobbyist in modifying federal copyright law. He and his Congressional agents insisted that America extend the duration of its copyright protection in order to place copyright holders on par with recent extensions made in European countries (Bracha, O.). As such, the new copyright act extended copyright to 28 years, with the option of a 14-year renewal (Rudd). This extension applied to existing works as well as new ones. According to a Judiciary Committee report made in 1829, this extension was intended to "enlarge the period for the enjoyment of copyright," place American authors "more nearly upon an equality" with those of other countries and, most importantly, "present every reasonable inducement" to encourage citizens to utilize their talents to the advancement of society. This last element of the act's purpose aligns with the 1709 Copyright Act's interest in encouraging the creation of woks.

The next two amendments of the 1831 Act considered musical compositions and more generous renewal rights. Before the act, musical compositions obtained protection merely against reproduction as printed music. Although this may appear groundbreaking, its inclusion under protected media did not actually represent any significant development. Extending copyright protection to musical compositions may have been intended only as a way to modernize American copyright law and remain on-par with the copyright laws of other nations at the time (Bracha, O.). Regarding copyright renewal, this act also extended the ability to renew copyright to the family of deceased copyright holders.

The change this act presented regarded the ability for copyright owners to sue for the improper use of their works. The new act included a statute of limitation period of two years from infringement; twice as long as the previous term.

The purpose of the law begins to change

The aims of subsequent amendments to U.S. copyright shifted the focus from trying to promote the production of works to protecting the rights of authors and their families. The 1909 amendment and the circumstances surrounding it exemplify the first inklings in this shift of purpose for copyright protection.

In his December 1905 State of the Union Address to Congress, President Theodore Roosevelt urged Congress to update and modernize American copyright law. He called the law "imperfect" in definition, "inconsistent" in expression, and entirely out of date. Roosevelt argued that the law imposed hardships on copyright holders, and pushed for a revision that would fix these problems (Roosevelt, Theodore).

Congress responded by reiterating their Constitution-given right to grant copyright, as well as by stating their own purposes for creating copyright laws. They claimed that any law they passed would aim to "promote the progress of science and useful arts," and would always keep the people's' best interests in mind ("United States Copyright Law"). The House, specifically, believed that when debating copyright law, the following two questions should be considered. First, how much will the legislation stimulate producers and so benefit the public? And second, how much will the monopoly granted to creators be detrimental to the public? ("United States Copyright Law").

Additionally, the Senate believed that copyright law should aim for three goals. The first was to assure to the author provision for their old age. The second was to assure the community the benefit of the works as long as the creator lives. The third was to enable creators to provide for their children until the children reached an age where they were likely to be self-supporting (U.S., Congress, Cong. Senate).

Congress and President Roosevelt believed exclusivity to be an essential right that the law must protect. However, the congressional idea of providing copyright holders with a monopoly over their works proved somewhat controversial at the time. With the advent of sound recording, Congress found it necessary to compensate music composers. Before this amendment, only the producers of recording devices enjoyed copyright protection; neither composers nor musicians received compensation for their work. Congress proposed giving composers a monopoly over their compositions, but fears arose over whether this monopoly would be disadvantageous for consumers. Congress responded to these concerns by claiming that the U.S. antitrust legislation at the time would not allow for "rich corporations" to purchase popular compositions and disadvantage their competitors. According to Congress, the composers' power over their works constituted a "right of private contract" (U.S., Congress, Cong. Senate). Further, the strong protection granted by this would supposedly encourage other composers to create works, and such a large market of musical compositions would prevent monopolies from forming.

The Copyright Act of 1909 came into effect on July 1st, causing published works to be protected and remain the exclusive property of their authors, artists or owners (Copyright Act of 1909). Regarding musical works, this act granted rights owners the power to arrange, perform, and collect royalties on their creations. The Act also listed penalties for copyright infringement and specific fees that the infringing parties must pay (Copyright Act of 1909).

The increased protections for copyright holders that this act provided only constitute half of its aims. This amendment also provided significant benefits to the public in the form of more strict rules on how works obtained copyright protection. Works only received protection when published and affixed with an official notice of copyright (Copyright Act of 1909). State

copyright law governed protection for unpublished works, but federal law governed published works, whether or not they contained a notice of copyright. If a published work did not have a copyright notice, this 1909 Act provided no copyright protection and the work became part of the public domain (Copyright Act of 1909). Understandably, this provision benefited the public more than individual copyright holders, and it motivated creators to formally register their works.

The terms of the 1909 Copyright Act demonstrate a slight shift in the federal government's reasoning for copyright protection. Congress began to deviate from benefiting the public to benefiting content creators with the induction of the exclusive rights provision. In the 1970s however, Congress amended U.S. copyright twice more, with each law drastically benefiting rights-holders more than the public.

The 1971 Amendment

The 1971 Amendment to U.S. copyright extended copyright protection to sound recordings. Congress saw the need for such an addition due to the prevalence of "record piracy" problems that developed throughout the U.S., resulting from the growing availability and use of inexpensive cassette and cartridge tape players (U.S., Congress, Committee on the Judiciary). Previous federal law only protected the owners of musical copyright from unauthorized and uncompensated duplication. Due to this, record pirates engaged in the widespread and unauthorized reproduction of phonograph records without violating federal copyright. The protection given to owners of musical copyright at the time was considered "limited," and Congress hoped to rectify these shortcomings in two specific ways.

The first method to restrict piracy involved creating a limited copyright for sound recordings. This criminalized the unauthorized reproduction and sale of copyrighted sound recordings fixed, published, and copyrighted on or after January 1, 1975 (U.S., Congress, Committee on the Judiciary). The second method involved creating penalties for illegally using copyrighted musical works. Any unauthorized person found using copyrighted works could be charged with copyright infringement and possible criminal prosecution if they engaged willfully, or received a profit (U.S., Congress, Committee on the Judiciary).

Congress felt it was necessary to enforce stricter laws on musical copyright infringement because of the substantial negative impact piracy posed to record manufacturers, artists, and musicians. The House estimated that in 1970, legitimate prerecorded tape sales accrued an annual value of approximately $300 million (U.S., Congress, Committee on the Judiciary). At the same time, the annual volume of piracy in the same market exceeded $100 million. This immense deficit deprived legitimate record manufacturers of substantial income, deprived

federal and state governments of tax revenue, and denied artists and musicians of not only royalties, but also contributions to pension and welfare funds.

Congress also believed the available remedies for the unauthorized reproduction of sound recordings to be insufficient and unfair to copyright holders. At the time, if producers paid the statutory mechanical royalty required by the Copyright Act to use copyrighted music, no federal remedy existed to combat their unauthorized reproductions. Only eight states had active statutes intended to suppress record piracy, but in the rest of the U.S., the only remedy available for copyright holders was to seek relief through the theory of unfair competition (U.S., Congress, Committee on the Judiciary). Even when copyright holders successfully won these lawsuits, Congress believed that the remedies available were "limited" (U.S., Congress, Committee on the Judiciary). By extending copyright protection to sound recordings, Congress hoped to strengthen the rights of copyright holders and reduce the piracy of sound recordings.

Further evidence of Congress aiming to benefit copyright holders over the public can be found in their rejection of a compulsory license for sound recordings. Compulsory licensing occurs when a government allows for the reproduction of protected works without the permission of rights-holders. American manufacturers engaging in the unauthorized reproduction of sound recordings wrote to the Senate requesting this law so that they could legally reproduce records upon payment of a statutory royalty (U.S., Congress, Committee on the Judiciary). Such a provision in U.S. copyright law would give the public more leniency in the reproduction of copyrighted sound recordings. Supporters argued that a compulsory license clause would be similar to the mechanical royalty compulsory license already provided in the Copyright Act (U.S., Congress, Committee on the Judiciary). The Senate rejected this proposal on the grounds that the two situations were not parallel. They argued that the existing compulsory license only

provided access to the “raw” copyrighted musical composition. Performers, arrangers, and recording experts could take this raw composition and create ornate, “finalized” recordings. The compulsory license that the manufacturers requested only applied to these finalized recordings. As the Senate saw a significant difference between the two, they concluded that there was no justification to grant a compulsory license for the copying of finished products (U.S., Congress, Committee on the Judiciary).

Congress also believed such a license would negatively impact the market for sound recordings. According to the House, a compulsory license would have “drastic effects” on the structure of the music industry, even if a fair royalty rate and division and distribution of royalty receipts were established (U.S., Congress, Committee on the Judiciary). Congress feared that records produced with the proposed license would interfere with the producer's market for profitable recordings, while also leaving producers to suffer losses from unsuccessful recordings. Finally, Congress also believed that this act strengthened penalties for copyright infringement. If found guilty, infringing parties could receive an injunction to halt their unauthorized reproduction, and the plaintiff could be entitled to recover damages in the form of royalties (U.S., Congress, Committee on the Judiciary). The elements of this 1971 amendment makes it clear that Congress believed the hard work and earnings of those who created finished sound recordings should be strictly protected from piracy under copyright law.

The 1976 Act

The Copyright Act of 1976 reshaped the fundamentals of American copyright law, and remains the primary basis of copyright law in the United States. This Copyright Act introduced many new provisions that strengthened the rights of copyright holders, as well as the rights of the public. However, amendments such as the Digital Millennium Copyright Act (1996) and the Copyright Term Extension Act (1998) changed the structure of the act, making it substantially more supportive of the rights of copyright holders than those of the public.

Support for this act developed from two main stimuli: the involvement of the U.S. in international copyright treaties, and the need for the U.S. to keep up with technological advances. Regarding the first stimulus, in 1886, an international treaty called the Berne Convention was created to regulate international copyright law. The U.S. did not initially take part in the treaty, and instead joined forces with several Latin American countries to create a separate international copyright agreement called the Buenos Aires Convention in 1910. In 1952, the U.S. entered into another international copyright treaty called the Universal Copyright Convention. The Buenos Aires and Universal Copyright conventions each possessed traits that aligned with the copyright goals of the U.S. more than did the regulations in the Berne Convention. America's involvement in these treaties inspired the creation of the 1976 Copyright Act. This section will illustrate the differences in these treaties, explain America's participation, and discuss their influence on U.S. copyright law.

The Berne Convention

The Berne Convention is an international agreement governing copyright that was first adopted in Berne, Switzerland in 1886 (“Summary of the Berne Convention”). It is based on three basic principles, and contains a series of provisions stating the minimum protections it grants, as well as special provisions available to developing countries that want to make use of them. The three main principles are as follows:

> (a) Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment").
>
> (b) Protection must not be conditional upon compliance with any formality (principle of "automatic" protection).
>
> (c) Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases. (“Summary of the Berne Convention”)

The rights copyright holders incurred for their works under the Berne Convention were similar to those in the U.S.: the right to translate, make adaptations, perform, recite, broadcast, and reproduce. However, the Berne Convention established a different provision for the length of copyright protection. In this treaty, the general rule was that copyright protection must be granted until 50 years after the author's death, with exceptions for anonymous and pseudonymous works

("Summary of the Berne Convention"). In these situations, the term of protection would expire 50 years after the work was lawfully made available to the public, except if the pseudonym left no doubt as to the author's identity or if the author disclosed their identity during that period; in the latter case, the general rule applied ("Summary of the Berne Convention"). The Berne Convention also included the concept of "moral rights." Moral rights, in this context, are the rights to claim authorship of works. Owners have the ability to object to any "mutilation, deformation or other modification" of copyrighted works that are "prejudicial to the author's honor or reputation" ("Summary of the Berne Convention").

Although American copyright law and the Berne Convention shared some similarities at the time of the treaty's creation, significant differences between the two prevented the U.S. from entering into the agreement. At the turn of the century, U.S. copyright law relied on the 1909 Copyright Act, which focused more on benefiting the public. As the Berne Convention included moral rights, removal of the general requirement for registration of copyright works, and the elimination of mandatory copyright notice, the U.S. did not see that such an agreement aligned with its own copyright goals.

Nevertheless, because it still wanted to provide mutual, international recognition of copyrights to content creators, the U.S. instead became involved in the Buenos Aires Convention, and later the Universal Copyright Convention.

The Buenos Aires Convention

The Buenos Aires Convention was a copyright treaty signed in Buenos Aires, Argentina, on August 11, 1910 ("Buenos Aires Convention"). This treaty was originally created as an alternative international copyright agreement for countries that did not wish to join the Berne Convention. A significant difference between the two treaties regards their laws on copyright

term duration. In the Berne Convention, international copyright terms are generally limited to the life of the author, plus an additional 50 years after their death. In the Buenos Aires Convention, copyright terms followed the "rule of the shorter term" ("Buenos Aires Convention"). This provision allowed signatory countries to limit the duration of copyright they gave to foreign works to "at most" the copyright term granted in the country where the work originated. In other words, member countries did not have to extend a longer term of protection than the works receive in the country where they were first published. The Buenos Aires treaty also provided looser requirements for statements of copyright reservation. According to the agreement, countries were only required to include the phrase "all rights reserved" on works in order to validate an international copyright ("Buenos Aires Convention").

The Universal Copyright Convention

The Universal Copyright Convention (UCC) was adopted in Geneva, Switzerland in 1952 ("Universal Copyright Convention"). Developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO), this act also served as an alternative for countries that disagreed with aspects of the Berne Convention but still wished to participate in a form of international copyright protection. Countries involved in the creation of this agreement included developing countries, the U.S., and most of Latin America ("Universal Copyright Convention"). The UCC was mainly created as a way for these countries to circumvent the copyright duration provisions of the Berne Convention, and its law of granting copyright without formal registration. All parties to the UCC were permitted to retain their individual fixed copyright protection terms.

What sets the 1976 Act apart?

The U.S. government was slow to update copyright law to conform to UCC standards after adopting it in 1955. Over time, Congress members began to draft a new copyright act to improve on the 1909 act. Congress commissioned studies on a general revision of copyright law and published multiple reports between the late 1950s and the mid-1970s (United States… Copyright Office). After extensive hearings, drafts, and revisions, the Copyright Act of 1976 was finally drafted. The bill significantly changed federal copyright law in regard to the duration of copyright protection, copyright registration and qualifications for copyright protection, fair use, and the compulsory license. Many of the law's major changes allowed copyright holders new advantages, but some provisions, like fair use, aided the public more than they did the copyright holders themselves.

The length of copyright protection

Previous federal copyright law limited the duration of copyright protection to 28 years with a possibility of a 28-year extension, for a maximum total of 56 years. The 1976 Act, however, substantially increased this protection term. The "basic term" of the act extended copyright for works created after January 1, 1978 to the life of the author plus 50 years after their death (United States… Copyright Office). For anonymous or pseudonymous works, the term extended to 75 years from the year of first publication, or 100 years from the year of its creation, depending on which expired first. Further, works made for hire were extended to 75 years from first publication, or 100 years from creation, also depending on expiration. These extended terms clearly served to better protect the rights of the author. Congress defended these extensions by claiming the following:

> 1. 56 years is not long enough to insure an author and his or her dependents the fair economic benefits of the work. Also, life expectancy has increased substantially.
>
> 2. Tremendous growth in the communications media has substantially lengthened the commercial life of many works. A short term discriminates against serious works whose value may not be recognized until many years after its creation.
>
> 3. There is no particular benefit to the public of a short term. The price of public domain works is usually no less than that of copyrighted works. In some cases the lack of copyright protection restrains dissemination since publishers cannot risk investing unless they are assured of exclusive rights….
>
> 6. It places the United States in conformity with most of the international copyright community. It eliminates a major barrier to U.S. adherence to the Berne Copyright Union. (United States… Copyright Office)

Evidently, Congress was concerned with ensuring that authors would benefit from their work; it was also interested in adapting to modern technologies and communications, and keeping up with international copyright standards. In acknowledging the absence of a public benefit for short-term copyright protection laws, Congress indicated as well that they did not want to completely disadvantage the public. Overall, this addendum to federal copyright law aimed to benefit the copyright holder and, to a lesser degree, the public.

Copyright Registration

With this act, copyright holders no longer needed to formally register works with the U.S. Copyright Office to receive copyright protection. According to Congress, this section of the Act was included to ameliorate the forfeiture problem that arose from “comparatively trivial errors”

made in copyright forms. Congress acknowledged the benefits of formal registration, claiming that the process recognizes four principal values of a copyright notice: (1) putting published material that no one is interested in protecting into the public domain; (2) showing whether or not a work is under copyright; (3) identifying the copyright owner; and (4) showing the year of publication (United States… Copyright Office). These admitted benefits protect the rights of copyright holders and the public. However, in an effort to fix the technical form problems, Congress decided to create more flexible standards for copyright registration.

While formal copyright registration is still encouraged, Congress created two exceptions that would still allow a work to receive copyright protection. According to the official Congressional Guide to Copyright, the omission of any formal notice does not invalidate copyright if either one of the following two conditions is met:

> (1) If "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or
>
> (2) If registration for the work has previously been made, or is made within five years after publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the U.S. after the omission is discovered. (United States… Copyright Office)

Congress also created other fail-safes to protect copyright for works registered with the U.S. Copyright office that incurred errors. For instance, absent or incorrect names and dates on registration forms does not affect the ability of a work to receive copyright protection (United States… Copyright Office). The only situation in which a work would be denied protection would be if the names and dates were “too widely separated for their relation to be apparent,” or

if uncertainty was created by the presence of other names or dates in the form (United States… Copyright Office). This provision clearly aims to benefit copyright holders.

Though this copyright act made it so registration is not required for a work to be protected by copyright, section 411 does require registration before a copyright holder may sue for copyright infringement. Copyright owners who have not registered their works may still have a valid cause of action against an infringer, but the rights-holder cannot enforce their rights in court until they have registered their claim.

Section 412 of the law encourages registration by granting the owners of registered works a broader range of remedies. Remedies available to copyright holders are tied to the date of registration. If an infringement occurred before registration, the copyright owner would be entitled to the ordinary remedies of injunction and actual damages. If infringement occurred after registration, the owner would be entitled to the extraordinary remedies of attorney's fees and statutory damages (United States… Copyright Office).

Qualifications for copyright protection

Under section 102 of the new Act, copyright protection extends to "original works of authorship fixed in any tangible medium of expression" (United States… Copyright Office). This is notable because previously, copyright protection only extended to published works with federal notices of copyright affixed. By only requiring works to appear in a tangible form, this copyright act broadened the scope of copyright protection.

Fair Use

The aforementioned additions to copyright law protect the rights of the copyright holder more than they protect the rights of the public. However, this Act also included a provision that gave the public newly significant power. According to the previous law, copyright holders had

the exclusive right to reproduce, crate derivatives, distribute, publicly perform, and display their works. However, section 107 of the 1976 Act lays out exceptions to these rights under the protection of "fair use."

At the time this act was created, fair use already existed in practice, as a defense created by state courts. The federal government does not strictly define the term, but it recognizes fair use as the act of copying without permission from or payment to copyright owners, where the use is "reasonable and not harmful" to their rights (United States… Copyright Office). Congress initially opted to leave the federal definition of fair use vague, as instances of its use vary greatly, and prescribing specific regulations would make it difficult for the defense to be successfully used in court. According to Congress, fair use includes uses such as criticism, commentary, news reporting, teaching, scholarship, and research (United States… Copyright Office). The federal law sets out the four following factors to be considered in determining whether or not a particular use is fair:

> 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 amount and substantiality of the portion used in relation to the copyrighted work as a whole;
>
> 3. The nature of the copyrighted work; and
>
> 4. The effect of the use upon the potential market for or value of the copyrighted work (United States… Copyright Office)

The criteria above are not necessarily the only ones that courts may consider when deciding the verdict of a fair use case. Section 107 of the law states that the courts may simply

"include" the aforementioned criteria, and section 101 defines the word "including" as "illustrative," and not limiting (United States… Copyright Office).

The law does not provide any specific tests to judge whether or not the use of a work is technically "fair." According to Congress, the fair use doctrine is an "equitable rule of reason," for which no generally applicable definition is possible (United States… Copyright Office). Therefore, each lawsuit that raises the question of fair use must be decided by its own facts on a case-by-case basis.

The fair use doctrine was amended in later years to include more specific guidelines for review that comparably benefitted both copyright holders and the public. However, this particular instance of the law gave substantial advantage to the public. Although it is exclusively up to the courts to decide whether or not a use is fair, fair use's inclusion in the law is still notable. This 1976 Act gave the public legal rights to use copyrighted content more freely; something that was never previously formally codified.

The Compulsory License

The compulsory license provision of the 1976 Copyright Act advantaged both the public and copyright holders. This version of the compulsory license was introduced as a way to keep up with changes in technology and ever-evolving ways that the American public consumes media. With the rapidly increasing popularity of entertainment forms such as cable television, Congress sought a way to ensure the proper payment of transmission royalties to copyright holders. Section 111 of the 1976 Act is directed primarily at cable systems and the terms and conditions of their liability for the retransmission of musical and visual copyrighted works (United States… Copyright Office).

Congress recognized cable systems as commercial enterprises with basic retransmission operations built upon the communication of copyrighted content. Congress believed that royalties should be paid by cable operators to the creators of such content, but they also acknowledged that it would be too burdensome and impractical to require cable systems to negotiate with each owner of the copyrighted content they broadcast (United States… Copyright Office).

Previous federal copyright law granted owners of musical compositions the exclusive right to license the first recording of their works (Copyright Act of 1909). After a composition was licensed, any member of the public was allowed to make a similar use of the work. The 1909 Act included a compulsory license provision that required licensees to notify copyright owners of their intent, send a copy of said notice of intention to the U.S. Copyright Office, and pay the statutory royalties at appropriate times. When revising the law and creating what became the 1976 Act, debate arose over whether or not to retain the compulsory license.

The U.S. Copyright Office originally wanted the compulsory license provision to be eliminated, but their proposal was met with opposition by record producers and some copyright proprietors who favored some form of its existence (United States… Copyright Office). The Federal Register of Copyrights believed that an invaluable segment of the nation's musical heritage had become inaccessible to musicologists and other scholars, who could not access it for scholarly purposes. Several major recording companies responded to this concern by granting blanket licenses to the Library of Congress, allowing it to make single-copy duplications of sound recordings and maintain them in the Library's archives for research purposes. This process was fairly complicated, and all parties involved sought an easier way for non-copyright holders to license finished sound recordings.

Congress agreed to involve a compulsory license in the Copyright Act of 1976, and their reason for doing so was heavily motivated by the needs of composers. The House Judiciary Committee determined the 1909 compulsory licensing system to be "unfair and unnecessarily burdensome on copyright owners," and observed that the statutory rate was too low ("United States Copyright Law"). Although the law does give the public increased reign over using copyrighted musical works, it also protects and enhances the rights of copyright holders.

The compulsory license created in this 1976 law held three essential qualifiers. The first was that the license would become available only when the copyright owner of the music distributed their work to the public in the United States, the second was that the distribution had to be authorized by the copyright owner of the music. The third was that the compulsory license was available only if the licensee distributed their versions to the public for private use (United States… Copyright Office). The third qualifier garnered criticism because it was viewed as discriminating against background music systems. Since the provision would prevent producers of background music from making recordings without the express consent of copyright owners, it was argued that this could put the producer at a great competitive disadvantage with performing rights societies. Congress determined, however, that the purpose of the compulsory license did not extend to manufacturers of phonorecords that are intended for commercial use (United States… Copyright Office). Thus, this recognition slightly limited the rights of licensees.

The compulsory license provision, which has not changed, also recognizes the practical need for a restriction on the musical arrangements that can be made with it. According to a 1976 Congressional report, the law forbids music created under it from being "perverted, distorted, or travestied." Arrangements are permitted so long as they do not change the basic melody or fundamental character of the work. The clause also prohibits licensees from claiming their own

copyrights for arrangements as “derivative works” under fair use without the express consent of the copyright owner.

The concept of the compulsory license benefits the public. Nuances in the approval process, however, more directly benefit copyright holders. In order to obtain a compulsory license, users must serve a notice of intent to the copyright owner before the phonorecords have been distributed, and within 30 days after they have been made (United States… *Copyright Law*). Failure to do this forfeits the compulsory license, and the user may be held accountable for copyright infringement. Once all is approved and the user successfully obtains the license, he or she is required to pay royalties to the copyright holder. Previous law required copyright owners to file a “notice of use” in order to collect royalty payments. However, in many cases, owners did not follow this step, and were consequently unable to receive payment. To amend this, the 1976 Act dropped this condition, and merely requires that copyright holders be identified in the public records of the federal Copyright Office to successfully receive royalties (United States… *Copyright Law*).

The 1976 Act also changed royalty rates to better-serve licensees. Under the old statute, royalties were made payable on each manufactured phonorecord, regardless of whether or not it was distributed to the public. Congress recognized that this was unfair to licensees, because the law required payment even for records that were destroyed or placed in inventory; records for which the producer received no economic benefit (United States… Copyright Office). To remedy this, the law of the 1976 act was changed the so that royalties under compulsory licenses were only paid for records that were “made and distributed” (United States… Copyright Office). However, as a way to protect copyright proprietors against economic harm from licensees that

may refuse or fail to pay royalties, compulsory licensees are also be required to make a detailed cumulative, CPA-certified annual statement of their accounts.

Jukeboxes: Staying up-to-date and making things fair

Although the copyright law surrounding jukeboxes and "coin-operated phonorecord players" does not seem relevant to the law of today, its inclusion in the 1976 Copyright Act is notable. The handling of jukeboxes and their relation to public performance laws illustrates Congress' attempt to ensure that the owners of musical copyright received fair payment.

The 1909 copyright law stated that the reproduction or rendition of musical compositions by coin-operated machines did not constitute public performance, unless a fee was charged for admission to the place where the reproduction or rendition occurred (Copyright Act of 1909). Allegedly added to the law "at the last minute, with virtually no discussion," this provision quickly became widely condemned. Referred to as the "jukebox exemption," this law was considered a historical accident, and became associated with terms such as "unconscionable," "indefensible," "totally unjustified," and "grossly discriminatory" (United States… *Copyright Law*).

From the law's inception, Congress repeatedly met to try and amend this provision. Congress believed that the law created a disservice to copyright holders and was unfair to other members of the public who had to pay royalties for public performances. When creating the 1976 Act, Congress recognized the significant technological and industry differences that transpired over the years since the law's inception. They acknowledged that, due to the profound success of the music industry, the jukebox industry grew exponentially and appeared to be taking a "free ride" on the hits created and developed by authors and publishers (United States… *Copyright Law*). Congress also argued that the jukeboxes of the 1970s were not comparable to the old

player pianos and penny parlor mechanisms used in 1909. The unanticipated effect of the original law — creating a blanket exemption for what became a large industry based on the use of copyrighted material — represented what Congress called a "core defect" in copyright (United States… *Copyright Law*).

Jukebox operators and manufacturers attempted to dissuade Congress by making arguments that related to the issue of royalties and the rights of copyright holders. They claimed that the original law was fair because composers and authors receive mechanical royalties from other sources that, at the time of the law's creation, were expected to tremendously outweigh any royalties received from public performances (United States… *Copyright Law*). People in the industry also believed that removing the exemption would be a form of discrimination, as jukebox operators provided the public with "incidental entertainment," since the music the jukeboxes played was not the primary focus of these establishments.

Another point that jukebox owners brought up concerns the idea of promotion. Owners argued that jukeboxes typically used hit records, rather than hit compositions, and compositions are usually not the most important factor in the success of a record. Essentially, they claimed that jukeboxes represented an effective "plugging medium" that promotes record sales and the mechanical royalties from which composers and authors get the majority of their revenue (United States… *Copyright Law*). Ultimately, Congress rejected the jukebox industry's claims, eliminated the 1909 provision, and made jukebox owners pay an annual compulsory license fee of $8 per box.

Through this dispute, Congress showed concern for the rights of copyright owners. The 1976 Copyright Act has provisions that advantage copyright holders, as well as the public. Its differences with the Copyright Act of 1909 represents a drastic shift towards increased protection

for content creators. Since its enforcement, the 1976 Act has undergone several changes. The two most significant amendments to the act that directly influenced the rights of copyright holders were the Copyright Term Extension Act, and the Digital Millennium Copyright Act.

The Copyright Term Extension Act

In 1989, the U.S. finally joined the Berne Convention, which significantly changed the US copyright system. Their ascension to the treaty provided greater protection for proprietors, new copyright relationships with foreign nations, and the elimination of the requirement of copyright notice for copyright protection. This newfound sense of unity with foreign nations influenced the United States' decision to extend copyright in the '90s.

Signed into law on October 27, 1998, the Copyright Term Extension Act extended the length of protection given to copyrighted works by 20 years, thus lengthening the amount of time it takes for a work to enter the public domain. According to the Senate, the amendment aimed to ensure "adequate copyright protection" for American works in foreign nations, as well as the continued economic benefit of "a healthy surplus balance of trade" in the exploitation of copyrighted works (United States… Kastenmeier). The Senate believed this extension would provide trade benefits by placing U.S. copyright law on par with the copyright law of the European Union, while also ensuring fair compensation for American creators. Ideally, the act would not only stimulate the creation of new works, but also provide economic incentives to preserve existing works, thus enhancing the long-term "volume, vitality, and accessibility" of the public domain (United States… Kastenmeier). Although Congress claimed that this amendment would substantially benefit the public, its terms overwhelmingly support copyright holders.

Congress cited previous extensions to US copyright law as a primary reason for extending the law again. Since the first federal copyright act in 1790, copyright terms all over the

world had undergone extensions. At the time that this law was proposed, works under U.S. copyright were protected for a maximum of 75 years from the date of publication, or 100 years from creation, with a preference for the lesser term (United States… Kastenmeier). This duration became the prevailing international standard of protection. It became mandatory for members of the Berne Convention to comply with this standard by 1948, and by 1976, it had been adopted by a majority of foreign nations (United States… Kastenmeier). However, changes in international law that extended copyright protection in nations abroad placed the U.S. at a disadvantage.

In October 1993, the European Union ordered its member states to harmonize their copyright laws by adopting a term of protection equal to the life of the author plus 70 years. Under this directive, member states were also to apply the rule of the shorter term to countries outside the Union. Because of this, works copyrighted in the U.S. would remain protected only for the lifetime of the author plus 50 years; 20 years less than that of European nations (United States… Kastenmeier).

Congress also pushed for this legislation because of the unforeseen technological advances that occurred between the passage of the 1976 Act and the mid-90s. The advent of digital media and the development of the National Information Infrastructure and the Global Information Infrastructure dramatically enhanced the marketable life of creative works, as well as incentives to preserve existing works (United States… Kastenmeier). Congress argued that video cassettes gave “new life” to movies and television, and claimed cable television and the Internet created a rapidly evolving demand for content. The Senate Committee observed that copyrighted works moved across national borders faster and more easily than virtually any other economic commodity. With advances in technology, particularly with the creation of the Internet, this movement become both “instantaneous and effortless” (United States…

Kastenmeier). As a result, it became imperative that the length of U.S. copyright conform to standards set throughout the rest of the world.

Congress also pushed for this extension out of concern for the heirs and family of copyright holders. Copyright law provides that creative works are of proprietary interest to the families of authors. According to Congress, this exists to give creators an incentive to "advance knowledge and culture" by reaping the economic benefits of their creations (United States… Kastenmeier). Ideally, copyright should "protect the author and at least one generation of heirs;" a concept also supported by the Berne Convention and the European Union Directive (United States… Kastenmeier). This concept relies heavily on the idea that royalties obtained through copyrights serve as important sources of income for composers and authors.

Most of the reasons why Congress wanted to amend the Copyright Act of 1976 clearly stem from their support of copyright holders and their ability to collect royalties on their creations. The copyright extensions provided by the Act generated much criticism from members of the general public, and in an attempt to counter this, Congress tried to spin the amendment as being advantageous to the public as well.

According to Congress, proprietary interests should be balanced with the interests of the public at large. This is the reason they believed intellectual property was the only form of property with ownership rights restricted to a number of years. To balance these competing interests, Congress claims to always ensure that creators can maximize their returns on their works by affording them ample opportunity to exploit them throughout the course of their marketable lives (United States… Kastenmeier).

Congress believed that extending the duration of copyright protection would, in turn, increase the production of copyrightable content throughout the nation. They believed the

promise of additional income would incentivize the creation of new and derivative works. Further, since many authors exploit their works by selling their rights to others, authors are able to bargain for prices reflective of the projected income of their works. With a longer copyright term, copyright holders would be able to sell their rights for more money, which may incentivize artists to create more works.

Controversy

Since it was first proposed, the CTEA garnered much support from American companies like The Walt Disney Corporation, Time Warner, Universal, Viacom, and major professional sports leagues (Ota, Alan K.). Disney in particular put forth extensive lobbying efforts to persuade Congress to pass the law, as it would delay the company's earliest Mickey Mouse movies from entering the public domain. Lobbyists from large corporations influenced and supported all of the reasoning Congress used to defend the copyright extension. However, despite the attempts of Congress and the entertainment corporations to illustrate the public benefits of the amendment, the amendment was not widely accepted by the public.

The main arguments against CTEA regard its constitutionality and effect on the public domain. Several Supreme Court cases challenged the act, including the 2003 case Eldred v. Ashcroft. Like many others who disagreed with the amendment, the plaintiffs in this case argued that the CTEA failed to sustain the intermediate level of scrutiny test afforded by the First Amendment (Grzelak, Victoria A.). According to this provision, for a law to be constitutional, it must aim to further a "compelling governmental interest." In this case, the Supreme Court ultimately decided the CTEA was constitutional, and that the length of copyright protection should be left to the discretion of Congress.

Other contesters of the CTEA argued that its passage would negatively affect the public. They feared that that extending the term of copyright protection would impose substantial costs on the American public, without supplying any public benefit (Karjala, Dennis). They believed the bill represented a departure from the U.S. philosophy that intellectual property legislation should serve a public purpose.

Another argument made against the CTEA countered an apparent fear Congress held about works entering the public domain. It seemed to contenders that Congress was concerned that works would lose their value once they entered the public domain. To counter this, these contenders argued that when works entered the public domain, the public could afford to use them freely, which then gave the works renewed value.

The CTEA also gained notoriety as an act of "corporate welfare" (Karjala, Dennis). Contenders argued that works receive the majority of their profits during the first few years of publication, and thereafter get pushed out of the market. Because of this, they believed economic incentives for extending copyright terms only exist for those who own successful franchises, like the Walt Disney Corporation. Further, contenders viewed this extension as the beginning of a slippery slope towards perpetual copyright, something that voids a copyright's intended effect and violates the language of the U.S. Constitution.

The Fairness in Music Licensing Act

The Copyright Term Extension Act provided creators and proprietors with an undeniably substantial advantage in the world of copyright. However, one of its elements, the Fairness in Music Licensing Act, provided some members of the public with a win in the world of royalties. A companion bill to the CTEA, the Fairness in Music Licensing Act increased the number of

bars and restaurants that were exempt from needing public performance licenses to play music or television programs during business hours.

U.S. law gives copyright owners the exclusive right to publicly perform their works. Many copyright holders typically give independent Performance Rights Organizations (PRO's) the ability to collect upon public performances of their works. These organizations provide blanket licenses to venues like restaurants, bars, arenas and stadiums at a fee, which in turn grants them the permission to play music for their customers. According to the Copyright Act of 1976, venues did not have to pay for public performance licenses if they played music on sound systems typically used in private homes and did not directly charge customers to listen to said music. Over the years, this provision has been interpreted in a variety of ways, leading to uncertainty for venue owners who played music on their premises (Nimmer, David).

As a result of this, interest groups such as the National Restaurant Association and the National Licensed Beverage Association began lobbying for a more favorable exemption in the early 1990s. Their attempts were strongly opposed by PRO's, who argued that music played in bars and restaurants drew customers in, and songwriters deserved to be compensated for the use of their works.

Despite the opposition, the bill was ultimately successful, and was passed with the CTEA in 1998. The new provision kept the "homestyle" exemption of the 1976 provision, but it also included specific exemptions based on the establishment type, size, and the kind of equipment used to play music. It is estimated that the Act exempts around 70% of eating and drinking establishments, and 45% of retail establishments throughout the U.S. (Dinwoodie).

The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) was signed into law October 28, 1998 as an effort by Congress to implement U.S. international treaty obligations and move the nation's copyright law into the digital age (Digital Millennium). This act addresses a number of significant copyright-related issues and implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also heightened penalties for copyright infringement on the Internet. It criminalized the production and dissemination of technology used to violate copyright, and it limited the liability of online service providers for copyright infringement by their users. The Librarian of Congress is charged with examining the DMCA periodically and recommending exemptions as appropriate.

Congress felt the need to create this law for several reasons. They acknowledged that copyright law inherently struggles to keep pace with emerging technology. In a world where technology is constantly evolving, the law must also constantly adapt to make digital networks safe places to disseminate and exploit copyrighted materials (Digital Millennium). Title I of the bill provided this protection and created a legal platform for "launching the global digital online marketplace" for copyrighted works. The act aimed to make movies, music, software, and literary works available on the Internet. Congress considered these works to be "the fruit of American creative genius," and therefore wanted them to have the utmost protection online (Digital Millennium).

While Congress debated ways to protect U.S. copyrighted works in the digital age, parallel action proceeded on the international front. This began shortly after the U.S. ratified the Berne Convention in 1989. The Berne Union called upon WIPO to form a committee of experts

concerning a possible supplementary agreement to the Berne Convention that would clarify the existing provisions and explore the scope of the treaty (United States… The Digital).

Congress recognized that because digital works can be copied and distributed worldwide through the Internet very easily, copyright owners had become hesitant to make their works readily available online without reasonable assurance that they would be protected against mass piracy (United States… The Digital). At the same time, online service providers felt uneasy about expanding their networks and providing good service to the American public without clarification of their liability. Congress hoped to ameliorate these problems and increase the efficiency and quality of the Internet through the DMCA.

To protect online service providers from copyright infringement by users, Congress created what are known as "safe harbors." These give providers limited liability and protect them against lawsuits from copyright holders. To be eligible for this exemption, the service provider must meet a few conditions. First, the service provider must not be aware of the infringing behavior. Second, the service provider must not receive a direct financial benefit from the infringing activity. Third, if the service provider is made aware of infringing content on their service, they must quickly remove it (Digital Millennium). This aspect of the law is highly controversial, because it has the ability to both hurt and harm copyright holders and members of the general public.

If a copyright holder sees that their work is being illegally shared online, they may file a DMCA takedown notice to a service provider. These providers can be anything from video hosting sites like YouTube, to web-hosting services that simply list websites. On the other hand, users who receive takedown notices may file a counter notice, claiming that a mistake was made. If the party who filed the original notice takes no further action, the work may be restored after

ten business days (Digital Millennium). Many large entertainment corporations use automated programs to detect the illegal use of their copyrighted content. Due to the nature of their algorithms, it is not unusual for programs to incorrectly detect content that is completely legal, such as ambient sounds or karaoke covers. The incorrect detection of content inconveniences members of the public and may prevent them from sharing their original content online.

The DMCA has directly shaped the way that American-owned content is shared online. The law remains extremely controversial, in part because of the potential it creates for preventing the otherwise lawful use of material through rights management software and encryption.

Orphan Works

Orphan works are copyrighted works with owners who are impossible to identify or contact and were an unforeseen consequence of the 1976 Copyright Act and the passage of the CTEA and DMCA. The 1976 Act made obtaining and maintaining copyright protection substantially easier than ever before, since creators no longer needed to formally register works to receive protection. This undercut the former recording system of tracking and identifying copyright holders, and made it difficult for members of the public to contact copyright holders. The inability to access copyright holders and request permission to use their works leaves users at risk of copyright infringement. Many potential users of orphaned works are often not willing to take on this risk; this discourages the creation of new works that incorporate existing works (Varian, Hal R.). Congress has spoken on the topic, stating that orphan works do not serve the objectives of the copyright system and constitute a “major cause of gridlock” in the digital marketplace (“Orphan Works”). However, no substantial legislation has been passed to amend this.

Conclusion

The goals of American copyright law have significantly changed since the first law was passed in 1790. America's Founding Generation envisioned a law that would equally benefit both copyright holders and members of the public. However, unfathomable changes in technology and society have molded the law to the wants of the people. Today, a struggle for power between copyright holders and the public exists. Congress, an institution imagined to be an unbiased mediator, seems to have fallen to the will of copyright-owning corporations. This is evident the copyright legislation of today, which overwhelmingly protects the rights of creators over those of the public. Provisions like fair use and the compulsory license were created to give the public ways to legally use copyrighted content, but copyright holders still have power over these uses.

The struggle over copyright between holders and the public has also affected the digital sphere. By nature, copyright law is difficult to change. This poses a challenge in a world where the continuous and instantaneous evolution of technology creates opportunities for copyright infringement. Although the federal government has created fail-safes to mitigate this problem, their attempts are far from perfect. Issues exist between copyright holders and users of copyright over the fairness of the current law.

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