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**of the USA**



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*Note:* There was a delay in publishing 70(3), and the issue was not published until October 2024. The articles are up to date as of the end of July 2024 and reflect the developments over the delayed period.

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**FROM THE DESK  
OF  
THE EDITORS-IN-CHIEF**

This issue marks a transition from one editor to another. Alfred Yen began this issue, and Elizabeth Townsend Gard completed it. We are very proud of the work we have done. Also note, this issue is being published in August 2024, instead of December 2023. We have updated all of the articles to reflect this delay.

In this issue, we begin with a heartfelt tribute to Marybeth Peters, the former Register of Copyrights, that was conducted over Zoom in March 2023, after her passing in September 29, 2022, at the age of 83. Although neither Fred nor Elizabeth had the privilege of knowing her well, the statements left here by those of us who did establish the incredibly significant and positive impact she made on the field of copyright. Her personal warmth makes the hole left by her passing even more significant. To that end, we have transcribed the event, and added footnotes for reference. The event brought together some of the most important and key people in copyright, all to pay their respects and tell stories about their time with Marybeth. Marybeth was a contributor and friend to the Copyright Society. When she retired, we published tributes then as well. This included written tributes from President George H.W. Bush, President Jimmy Carter, and President Bill Clinton. *See* 58 J. Copyright Society 1. We imagine this is not the last time that we will look back on her remarkable career and impact on copyright.

In Part II, Articles, we turn to Jessica Silby's "A Matter of Facts: The Evolution of the Copyright Fact-Exclusion and Its Implications for Disinformation and Democracy." This thorough article traces the development of copyright doctrine on the concept of fact-exclusion. She went back to look at *Feist*, the 1976 Copyright Act's legislative history, and even canonical cases including *Baker v. Seldon*, *Burrows-Giles v. Saroni*, and *Wheaton v. Peters*, where she found a debate about not only facts, but the role of human labor, social progress, and technology. She believes that we need further doctrinal clarity for the digital age when it comes to fact-exclusion, which will lead to a richer public domain, something key to the "stabilization of societal institutions, such as law, science and a free press—that are critical for sustaining U.S. democracy."

Additionally, we are pleased to feature two works offering different perspectives on the Copyright Claims Board. In one, "Assessing the Copyright Claims Board after Two Years," Katie Fortney and David Hansen provide a brief evaluation of the CCB, looking at the first two years of accepting claims. They caution that it is perhaps too early to make definitive statements about what is happening, but they express concern that CCB system is challenging and slow for unrepresented claimants to navigate. They report and provide an interpretation on the statistics and offer suggestions on how we might interpret this early data.

In the other, “Copyright Boundaries, Or Making Quilts in the Shadow of the Copyright Claims Board,” Professor Elizabeth Townsend Gard (before she was EIC) offers us a unique perspective through the eyes of an active creator who is extremely familiar with copyright. She shows us how so many of copyright’s fundamental doctrines like the idea/expression dichotomy or the basic standard of originality are extremely difficult for even skilled copyright academic to apply as creator. These problems are even more challenging for lay creators. If copyright is supposed to regulate future creators by guiding them away from infringement and towards creativity, it is fair to wonder whether copyright’s doctrines are really up to the task. Professor Townsend Gard uses the backdrop to ask questions about the CCB. She wonders whether the CCB can work as advertised, and using the Final Determinations, she gleans the potential role of the CCB from the perspective of creating works.

We are also pleased to bring back the feature of updates, what we are calling “Out in the World,” with reports from the U.S. and Canada by Bijou Mgbojikwe, and from Canada, by MacKenzie Stewart. We hope in the coming months to expand to worldwide coverage. If you would like to contribute to worldwide coverage, please email Elizabeth at [eic@copyrightsociety.org](mailto:eic@copyrightsociety.org)!

**Fred:** As always, I hope that our readers will enjoy the articles presented in the Journal. For me, this issue will be bittersweet because it will be the last that I work on as Editor-in-Chief. It has been my honor to guide the Journal, but I am a firm believer that any academic journal benefits when many people have the opportunity to help choose and develop its content. Our next Editor-in-Chief will be, in fact, Elizabeth Townsend Gard, and I am really looking forward to the energy and ideas that she will bring.

**Elizabeth:** I am grateful for the opportunity to take on this next challenge, and for the support that Fred has shown to do this. The Journal of the Copyright Society has been an important part of the copyright community now for more than 70 years. And I am honored to be part of this legacy. To that end, we have brought on a number of people to assist with this issue, and I want to thank them as well. To the Tulane Law School law students, who are serving as our inaugural Copyright Society Fellows, who have worked on each of these pieces: Brijan Kana, our Articles Editor and Co-Managing Editor; Veronica Catanese, our Managing Editor; Tess Bradley, our Senior Research Editor; Kristin Ivey, our Senior Editor and Podcast Producer (coming soon); Rachel Lewis, our Journal and Copy Editor; and the rest of our lovely Copyright Society Journal Fellows.



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And to our new Peer Working Board, who tirelessly stepped in to work on each piece as well: Brian Frye, Zvi Rosen, and Zahr Said. And to Bill Mantz, who helped with this transition with his knowledge and patience. And finally, to outgoing Copyright Society President Casey Chisick and the incoming Copyright Society President Daniel Cooper, for this opportunity. And to Kaitland Kubat and her team, Thais Soalleiro, and Jennifer McGhee, who make this all go.

*Alfred Yen*

Professor of Law and Dean's  
Distinguished Scholar  
Boston College Law School  
alfred.yen@bc.edu

*Elizabeth Townsend Gard*

John E. Koerner Endowed  
Professor of Law  
Tulane University Law School  
townsend@tulane.edu  
eic@copyrightsociety.org



**PART I**

**MARYBETH PETERS TRIBUTE**



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**A CELEBRATION OF THE COPYRIGHT LEGACY OF REGISTER  
MARYBETH PETERS**

*Organized by* MARIA PALLANTE AND REGAN SMITH

Held: March 1, 2023 on Zoom

The Copyright Society, in coordination with the Copyright Office, presents a celebration of the copyright legacy of Register Marybeth Peters. Featuring colleagues and friends of the distinguished Register.

*With Tributes by:*

Fritz Attaway  
Jon Baumgarten  
June Besek  
Bob Brauneis  
David Carson  
Jacqueline Charlesworth  
Casey Chisick  
Richard Dannay  
Laura Gasaway  
Mitch Glazier  
Paul Goldstein  
Francis Gurry  
David Israelite  
Joe Keeley

Art Levine  
David Nimmer  
Maria Pallante  
Shira Perlmutter  
Mary Rasenberger  
Catie Rowland  
Eric Schwartz  
Jule Sigall  
Kate Spelman  
Regan Smith  
Winston Tabb  
Karyn Temple  
Nancy Wolff  
Michele Woods

*INTRODUCTION*

On March 1, 2023, the Copyright Office and the Copyright Society came together to celebrate Marybeth Peters' life. Eric Schwartz called it "Marybeth Fest." And indeed, from the transcript below, you can see how impactful and loved Marybeth Peters was.

After a long life in copyright, Marybeth Peters passed away on September 29, 2022, at the age of 83.<sup>1</sup> She served as the 11th Register of Copyrights from 1994 to 2010. But these brief biological facts tell none of the full story of Marybeth. Upon her retirement, the Journal of the Copyright Society had paid tribute to her, with an outpouring of love and remembrances of what she had done (and how she had influenced, inspired, and mentored) in copyright throughout her career.<sup>2</sup> Now, the Copyright Society and the Copyright Office gathered to pay tribute to Marybeth once again.

The Journal is proud to publish the transcript. We've added footnotes to contextualize and help the reader. In doing so, we quickly recognize the enormous impact Marybeth made in the field of copyright. For Copyright Society members and those who also knew her, we hope it brings back memories. And for those that did not, we hope this gives you a glimpse into the behind-the-scenes and very human element that is our copyright system.

Gathered that day was a room filled with the powerhouses of copyright. What is amazing as you read it, is not the professional accomplishment, but the personal stories and remembrances of their time with Marybeth. The tribute is like a painting, a glimpse of a life well-lived, and the impact both professionally and personally on so many lives, and copyright too.

This tribute was conducted by Zoom on March 1, 2023. Note the journal's editorial team added footnotes to help with references that the contributors spoke to. These are meant as resources and not directly supplied by the contributors.<sup>3</sup>

The Journal is proud to publish the transcript and grateful to the tribute organizers: Maria Pallante, who served on Marybeth's executive team and succeeded her as Register of Copyrights, and Regan Smith, who chairs the DC Chapter of the Copyright Society and is a former Copyright Office general counsel.

- Fred Yen and Elizabeth Townsend Gard, Editors-in-Chief

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<sup>1</sup> Marybeth Peters, June 12, 1939-September 29, 2022.

<sup>2</sup> See 58 J. Copyright Society 1 (2010).

<sup>3</sup> Special thanks to the Tulane law students who worked on this transcript including Tess Bradley (J.D. expected 2025), Kristin Ivey (J.D. expected 2026), Veronica Catanese (J.D. expected 2026), Brijan Kana (J.D. expected 2026), and Rachel Lewis (J.D. expected 2026).

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*THE TRANSCRIPT*

**Regan Smith:**<sup>4</sup> Welcome, everybody. I think we're going to get started. My name is Regan Smith. As the Copyright Society's DC chapter co-chair, I'm delighted and honored to open up today's tribute to the life and legacy of distinguished Register of Copyrights, Marybeth Peters. Today's event is a joint program by the Copyright Society in conjunction with the Copyright Office of the United States. And before we begin, I'd like to recognize, honor, and sincerely thank our program co-host, former register Maria Pallante, who really has been the driving force in bringing everyone together for today's celebration.<sup>5</sup>

Maria and I will facilitate remarks from so many who knew Register Peters as well and who will speak to her incredible professional and personal impact. The remarks will be recorded and intended to be included in an upcoming volume of the journal of the Copyright Society of the USA. It is really a testament to Marybeth's indelible impact on the global copyright community that so many have lined up to share their memories of her today.

And I know we will still not come close to capturing her contributions as a forceful thinker in copyright law and policy, a cherished personal friend to many, and an inspiring leader to still many others. Maria, is there anything you would like to say, or shall we get started? Okay. As we get on, a brief note about format, to ensure our program runs smoothly. We have a lot of speakers here today. We will ask each speaker to pass the baton to the next speaker, if they remember - but Maria or I will be here to facilitate if there's any issues and [to] please each introduce themselves briefly.

So, if we could have those who are in the first set of speakers turn their cameras on and be ready to participate in the first session. So, this will be Casey,<sup>6</sup> Shira,<sup>7</sup> David Carson,<sup>8</sup> Maria,<sup>9</sup> Francis Gurry,<sup>10</sup> Karyn,<sup>11</sup> and Joe.<sup>12</sup> If you forget your order, don't worry. We'll give you a little nudge. But to start, we're very excited to turn this over to Casey Chisick, the President of the Copyright Society.

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<sup>4</sup> Regan Smith serves as the Copyright Society's DC co-chair. Smith Law Professor at George Washington University. She is also Senior Vice President and General Counsel of News Media Alliance. Smith is the former Head of Public Policy in Spotify's Government Affairs Group. *Regan A. Smith*, THE COPYRIGHT SOCIETY, <https://copyrightsociety.org/bio/regan-a-smith> (last visited June 17, 2024).

<sup>5</sup> See Maria Pallante *infra* note 27.

<sup>6</sup> See Casey Chisick *infra* note 13.

<sup>7</sup> See Shira Perlmutter *infra* note 15.

<sup>8</sup> See David Carson *infra* note 20.

<sup>9</sup> See Maria Pallante *infra* note 27.

<sup>10</sup> See Francis Gurry *infra* note 42.

<sup>11</sup> See Karyn Temple *infra* note 47.

<sup>12</sup> See Joe Keeley *infra* note 50.

**Casey Chisick:**<sup>13</sup> Thanks, Regan, and on behalf of the Copyright Society, I want to take this opportunity to welcome everyone to this special tribute to the life and work of our dear friend, Marybeth. Marybeth enjoyed a distinguished career in copyright law that spanned more than four decades and that culminated in more than 16 years as the 11th US Register of Copyrights. She retired from that position with great distinction at the end of 2010.

Others here are in a much better position than I am to discuss her innumerable contributions to U.S. copyright law, and I know they'll do exactly that today. But, as an outsider looking in all the way from Canada, I can tell you that her influence extended much broader than just the United States. Marybeth was a giant of the copyright world, full stop. Her advice and insight helped shape copyright law in practice the world over.

At the Copyright Society, we pride ourselves on the community we create for and with our members, and Marybeth was a huge part of that community. She was a mainstay of our national meetings. And her annual address, *The View from the Copyright Office*, was always hugely informative and reliably entertaining.<sup>14</sup> It was always standing room only when Marybeth got up to speak. And her participation didn't end there. She would listen attentively to every speaker and panel with that distinctive laugh punctuating many a presentation. Her warm smile would light up the room.

She seemed to take genuine joy in every word that was said at those meetings. And, at receptions and dinners and in the hallways between sessions, she could always be in animated conversation with anyone and everyone who wanted to spend just a little time with her. And the time Marybeth spent with people was never perfunctory. She had a genuine interest not just in copyright law but in copyright lawyers. In fact, I sometimes have the impression that Marybeth thought everyone should be a copyright lawyer.

I don't think I was alone in that impression either. Marybeth wanted her legacy to reflect that commitment to the copyright community. And to help make sure of that, she left a transformative bequest to the Copyright Society when she passed. We plan to put that gift to good use, including by helping support and encourage the next generation of copyright lawyers around the world. I really believe she would have wanted it that way.

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<sup>13</sup> Casey Chisick served as President for the Copyright Society, June 2022-June 2024. Chisick is a Partner at Cassels in Toronto and acts as co-chair for the firm's Intellectual Property and Sports & Entertainment practices. He has previously worked as a law professor, jazz promoter, and musician. Chisick is certified as a Certified Specialist in Intellectual Property by the Law Society of Upper Canada. *Casey M. Chisick*, THE COPYRIGHT SOCIETY, <https://copyrightsociety.org/bio/casey-m-chisick/> (last visited June 17, 2024).

<sup>14</sup> *The View from the U.S. Copyright Office* is an annual event put on by the Copyright Society to update IP professionals on recent developments and upcoming initiatives. Generally, the speakers are Registers or Associate Registers.



Marybeth was a wise and dedicated mentor, an inspiring role model, and a personal friend to so many of us. I was thrilled to have the opportunity to get to know her just a little bit over the years with the Copyright Society. We miss her, and we'll always cherish her memory. And we're so thrilled to have the opportunity to help pay tribute to her today. And with that, I'm honored to introduce to you the 14th Register of Copyrights, Shira Perlmutter.

**Shira Perlmutter:**<sup>15</sup> Thank you so much, Casey. I have to start by saying the outpouring of affection and respect for Marybeth is obvious from this lineup of speakers. It's truly remarkable. I don't think I've ever seen quite this collection before. And I know that each of us will be talking about Marybeth's unmatched professional expertise and also about her wonderful personal qualities, not to mention inimitable shriek of joy that was her laughter.

Most of us never get to hear these types of tributes in our lifetimes, but Marybeth was lucky in that respect because the Journal of the Copyright Society published an issue honoring her on the occasion of her retirement in 2010, with over 100 pages from a long list of copyright luminaries.<sup>16</sup> And I highly recommend going back and reading them. They provide a real sense of who Marybeth was and recreate vividly many amazing moments that people shared with her.

In the few moments I have today, I wanted to provide the particular perspective of someone who is today privileged to sit in Marybeth's former office and follow her as Register of Copyrights. Marybeth was, of course, the 11th Register but only the second woman. She followed in the footsteps of Barbara Ringer, who broke that glass ceiling, although only after she had to sue to obtain the position.<sup>17</sup> It was really a different world at the time. And Barbara was my opera companion toward the end of her career when she had returned to the Copyright Office after her initial retirement. And I remember very well her pleasure when she told me that Marybeth had been selected as the next Register.

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<sup>15</sup> Shira Perlmutter serves as the Register of Copyrights and Director of the U.S. Copyright Office, a position to which she was appointed to in October 2020. Prior to her appointment, Perlmutter served as Chief Policy Officer and Director for International Affairs at the United States Patent and Trademark Office. Perlmutter has also previously worked for the International Federation of the Phonographic Industry, Time Warner, the World Intellectual Property Organization, and as a law professor. *Shira Perlmutter*, THE COPYRIGHT SOCIETY, <https://copyrightsociety.org/bio/shira-perlmutter-2/> (last visited June 17, 2024).

<sup>16</sup> See generally 58 J. COPYRIGHT SOC'Y 1, 1-105 (Stacey Dogan & F. Jay Dougherty eds., 2010).

<sup>17</sup> In 1971 the Librarian of Congress passed over Barbara Ringer for the position of Register of Copyrights in favor of a less-qualified man. See Alison Hall, *Barbara Ringer: Beyond the* ©, LIBRARY OF CONGRESS BLOGS (Nov. 19, 2019), <https://blogs.loc.gov/copyright/2019/11/barbara-ringer-anniversary/>. Ringer sued the Library of Congress for discrimination on the basis of sex and won her suit in 1973. *Id.* In 1973, Ringer was awarded her position as the 8th, and first female, Register of Copyrights. *Id.* For more information on Barbara Ringer see *infra* note 148.

Barbara was a teacher, a mentor and a friend for Marybeth, who then carried forward that role for me and for Maria and for Karyn when each of us came to the Office. What did Marybeth inherit from Barbara? An international perspective, a balanced approach to the copyright system, a concern for the less powerful, and uncompromising standards of excellence.

What did she add to that inheritance? She added her own trademark warmth, and ebullience, and approachability, and empathy. It was that combination that drew me into the policy world, and then government service, after I first encountered Marybeth in the late 1980s when I was a young lawyer practicing in New York City. It's that combination that continues to inspire me when I come into work every day.

Now, Marybeth earned a place in history as the Register who shepherded the Office and the copyright system into the digital age. She oversaw the introduction of the first-ever electronic registration system.<sup>18</sup> And I was fortunate to work for her while the United States took its initial steps to address the copyright challenges that were posed by the new technologies. It was an exciting time. We were tremendously busy crafting legislative drafts and treaty proposals, preparing congressional testimony and reports, and all of that laid the groundwork for the 1996 WIPO Internet Treaties and the Digital Millennium Copyright Act.<sup>19</sup>

With Marybeth at the helm in the midst of all of this, we safeguarded the Office's long-standing role in policy and international affairs through an amendment to the Copyright Act.

Marybeth met each crisis that arose with calm, humor, and equanimity. And she shared some valuable wisdom that I've drawn on ever since. Just keep

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<sup>18</sup> See generally U.S. Copyright Office Releases New Technology to Process Applications Online: eCO and New "Form CO" with 2-D Barcode Technology Goes Public July 1, LIBRARY OF CONGRESS (2008), <https://www.loc.gov/item/prn-08-115/> (last visited June 17, 2024).

<sup>19</sup> In 1996 the World Intellectual Property Organization (WIPO) created the WIPO Copyright Treaty and the WIPO Performance and Phonogram Treaty (collectively known as the "Internet Treaties") to establish international standards "aimed at preventing unauthorized access to and use of creative works on the Internet or other digital networks." *WIPO Internet Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, [https://www.wipo.int/copyright/en/activities/internet\\_treaties.html](https://www.wipo.int/copyright/en/activities/internet_treaties.html) (last visited June 17, 2024). The purpose of these treaties was to update and supplement other major treaties on copyright in order to best respond to new technological developments, such as the distribution of protected materials over digital spaces. *Id.* This purpose led to the treaties being referred to as the "Internet Treaties." *Id.* The Digital Millennium Copyright Act (DMCA) was passed in 1998 by Congress to amend copyright law in wake of the digital age. *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/dmca/> (last visited June 18, 2024). The main purposes of the DMCA was to establish protections for online service providers in case their users engaged in copyright infringement, provide protections for copyright owners whose digital works were accessed unauthorized, and to make it unlawful to provide false copyright management information. *Id.*

producing excellent work, and people will come to you for more. And I'm proud to say that to this day, the Copyright Office follows her advice. With that, I will turn the virtual mic over to David Carson.

**David Carson:**<sup>20</sup> Thanks, Shira. I was Marybeth's General Counsel for eleven years and her Associate Register for Policy and International Affairs for two. So, I was fortunate enough to be able to work closely with her for most of the time she was Register, apart from the first three years. I was looking at the list of attendees yesterday, and it struck me that most of you probably knew her, or at least have met her.

And many of you could easily have been added to the list of speakers if we only had a few more hours, but I'd like to single out a couple of you. Judy Saffer, you were one of Marybeth's favorite people and a longtime friend from the Copyright Society and a former Copyright Society president.<sup>21</sup> Roberta Bren, you were more than a professional colleague.<sup>22</sup> You continued to keep in touch with Marybeth after her retirement, and she often told me about her visits from you and Beth, which really cheered her up. I could go on and talk about a lot of other people who are here, but I'm here to talk about Marybeth. So, that's what I'm going to do.

Working for Marybeth was undoubtedly the greatest professional experience I've ever had, but it was also immensely rewarding on a personal level. She was my supervisor, but she treated me like a colleague, and she was a friend. I first

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<sup>20</sup> David Carson serves as a member of the Copyright Claims Board. He previously served at the Copyright Office as General Counsel for thirteen years and Associate Register for Policy and International Affairs for two years. More recently, he served as Senior Counsel and Director of the Copyright Policy Team in the Office of Policy and International Affairs at the U.S. Patent and Trademark Office and as Executive Vice President for Global Legal Policy at the International Federation of the Phonographic Industry. *About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/about/> (last visited June 17, 2024).

<sup>21</sup> Judith 'Judy' Saffer served as the President of the Copyright Society from 1996 through 1998. Throughout her career, Saffer held senior positions at the American Society of Composers, Authors and Publishers and Broadcast Music Inc., and previously served as the 100th President of the American Intellectual Property Law Association. As a result of her impressive career the U.S. State Department asked Saffer to speak about IP piracy in various countries around the world. *Judith M. Saffer*, THE COPYRIGHT SOCIETY, <https://copyrightsociety.org/bio/judith-m-saffer/> (last visited June 18, 2024).

<sup>22</sup> Roberta Bren is a leading professional in the world of trademark, copyright, and other niche IP sectors, such as trade dress and unfair competition. See Roberta S. Bren, MUNCY, GEISSLER, OLDS & LOWE, <https://www.mg-ip.com/mg-ip-professionals/roberta-s-bren/> (last visited June 27, 2024). Starting her illustrious career off as an Examiner at the USPTO, she has provided practical advice to clients and frequently lectured on topical issues in the field for over 25 years. *Id.* Additionally, she is known for co-authoring *A Legal Strategist's Guide to TRADEMARK TRIAL AND APPEAL BOARD PRACTICE*. *Id.* This is a revered guide to navigating the difficult trademark terrain through practical insights and commentary, even including a checklist for each stage of the Board Proceedings regarding *what* a lawyer should consider. *Id.*

met her 32 years ago in Dayton, Ohio, of all places, at a conference on protection of databases where I was speaking.<sup>23</sup> Marybeth was also on the program, and I had already heard wonderful things about her from my partners including Richard Dannay<sup>24</sup> and June Besek,<sup>25</sup> who you'll hear from soon.

At the time, she was a policy planning advisor to the Register of Copyrights. That sounded pretty impressive to me, but it wasn't her title that got my attention. What did impress me was that not only did she seem to be a very knowledgeable, dedicated public servant and a great public speaker, but she was also a very warm, welcoming person with a great sense of humor who didn't take herself too seriously. I was a mere nobody attending a conference at which just about everyone except me seemed to know everyone else except me, but Marybeth immediately welcomed me into the fold.

And although I had no right to think so at that point, I immediately felt that I had found a friend. I suspect that those of you who knew or met her felt the same way. It's no exaggeration to say that Marybeth was almost universally beloved in the copyright world. She was also an advocate for copyright and, in particular, for authors.

At another tribute to Marybeth 17 years ago, celebrating 40 years of her service at the Copyright Office, Jack Valenti said that when you go before Congress and testify on copyright, you just have to hope and pray that Marybeth isn't going to ruin it all by disagreeing with you and making you feel like she just stuck a hot poker up your behind.<sup>26</sup> Mr. Valenti knew what he was talking about.

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<sup>23</sup> See *News Release*, THE UNIVERSITY OF DAYTON, COPYRIGHT PROTECTIONS SYMPOSIUM SPONSORED BY UD LAW SCHOOL (Oct. 21, 1991).

<sup>24</sup> Richard Dannay is Counsel at Cowan, Liebowitz, & Latman, P.C. focusing on copyright, publishing, trademark, libel, privacy, publicity, and related matters. Dannay served as President of the Copyright Society of the U.S.A from 1984-1986, and has been a Honorary Trustee since 1986. *Richard Dannay*, THE COPYRIGHT SOCIETY, <https://copyrightsociety.org/bio/richard-dannay-2/> (last visited June 18, 2024).

<sup>25</sup> June Besek worked as a lecturer and executive director of the Kernochan Center for Law, Media, and the Arts at Columbia Law School until her retirement at the end of the 2023 academic year. See Fall 2022, COLUMBIA UNIVERSITY: KERNOCHAN CENTER NEWSLETTER, <https://kernochan.law.columbia.edu/content/newsletter> (last visited July 23, 2024). As Director, she was instrumental in expanding Kernochan into the renowned center for IP law and arts academia that it is known as today. *Id.* She was named the Chair of the Intellectual Property Law (IPL) Section of the ABA, serving from 2020-2021. See *News*, KERNOCHAN CENTER FOR LAW, MEDIA, AND THE ARTS, <https://kernochan.law.columbia.edu/content/news> (last visited July 23, 2024). Aside from this, she is also a leading mind in copyright policy. *Id.* She was instrumental in the initial drafting and commentary surrounding the ALI's Copyright Restatement Project. *Id.*

<sup>26</sup> After celebrating 40 years of service, Peters was presented with a Lifetime Achievement Award from the Los Angeles Copyright Society. David Carson noted that Peters "has drawn the praise of congressional leaders in the field of intellectual property from both sides of the aisle, and from the House and Senate," highlighting the complete IP powerhouse Peters was. *Register of Copyrights Marybeth Peters Receives Lifetime Achievement Award*, LIBRARY OF CONGRESS (Mar. 27, 2006),

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Marybeth earned the respect and admiration of virtually all the members of Congress on both sides of the aisle who dealt with copyright legislation and policy.

So many members of the House and Senate Judiciary committees who disagreed on just about everything else were able to agree on copyright issues, and they relied on Marybeth for her expertise and guidance. Over the course of her career, Marybeth heard a lot of people, including a lot of important people, praise her to the heavens. Those of us who worked with her might have been forgiven if we worried that all this praise might give her a swelled head, but one of the things you quickly learned about Marybeth was that she was about as unegotistical as a person can be.

Now, it's true that there was that time in Brazil when she thought she could walk on water, but that was really out of character. What was in character was that Marybeth enjoyed such a rare combination of self-assurance and humility that she was more than willing to recount any numbers of stories about herself which, if you or I had told them about her, might be considered rather impertinent.

In those stories, she was usually the butt of the joke, whether it was walking into a rooftop pool en route to practice at a hotel in Rio de Janeiro while she was mesmerized by the view of Sugarloaf Mountain or being locked in the only women's restroom in a Saudi Arabian government building in the 1980s. It takes someone with a great sense of humor and humility to be able to tell such stories about herself. And one thing you learned about Marybeth when you spent any amount of time with her is that she had a truly wonderful sense of humor.

Quite literally, a day didn't go by in the Register suite when you didn't hear Marybeth's inimitable laugh, no matter where in the suite you might be. For thirteen years, I had the best job in the copyright world. Being Copyright Office General Counsel is one of the best jobs a copyright lawyer could want, but being Marybeth's General Counsel was an unparalleled opportunity. Can you imagine being Marybeth's legal advisor on copyright issues? It's a little like being Aristotle's personal philosopher or the Dalai Lama's spiritual advisor. She didn't really need my advice.

She pretty much knew it all, but she always professed to be grateful for it. And I certainly benefited from her advice. I learned volumes from her about copyright law, about legislation, about the administrative process, and about getting things done despite all the best efforts of the bureaucracy to thwart your every desire. For thirteen years, there wasn't a day when I didn't look forward to coming into the Office, and the reason for that was Marybeth. Working with Marybeth wasn't work. It was fun. I miss those days. But every time I think about Marybeth, it brings a smile to my face. I'll now turn it over to Maria.

**Maria Pallante:**<sup>27</sup> Thank you, David. Aristotle’s personal philosopher, that’s incredible. Before I say a few words about Marybeth, I want to join my co-host Regan Smith in welcoming everybody who’s tuned in today to take time to celebrate Marybeth and also our long list of distinguished speakers. It’s an honor to be on the screen with all of you.

Marybeth was a magnificent person, as you’ve already heard and will hear for the next hour. I feel very fortunate that I had a chance to work for her twice when she was Register – briefly at the beginning of her tenure during the WIPO Treaty negotiations, that Shira, her first Associate Register, mentioned, and then later during her last four years as Register. Marybeth was very respectful of authors and their place in society, and she was a lifelong music fan. She was brilliant, kind, humble, and diplomatic. And she had that joyful sense of humor that everybody treasured.

She had some adversity in her life and sometimes in her career, but she was strong, and she was serious about what mattered most to her, both issues and people. For me, many honors come to mind: The great fortune of meeting her when I was a new attorney, the honor of supporting her as deputy general counsel and then head of policy and international affairs later in my career, the honor of building upon her instrumental achievements when I became Register, and the privilege of helping her after she retired.<sup>28</sup> She became ill, but she was always, always asking about the copyright community, especially the Copyright Office.

Marybeth was admired, and she was vastly popular. I remember at a Copyright Society meeting long ago at the Sagamore in which the President introduced Marybeth by noting that no last name is necessary. “Like Madonna,”

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<sup>27</sup> Maria Pallante is the President and Chief Executive Officer of the Association of American Publishers and a lecturer in copyright law at the George Washington University Law School. From 2011 through 2016, she served as the Register of Copyrights and Director of the United States Copyright Office, during which she worked closely with Congress on a comprehensive review of the Copyright Act, advised on agency modernization, and overhauled the Compendium of Copyright Practices into a transparent digital resource. From 2007-2011, Pallante was the Copyright Office’s Deputy General Counsel and then Associate Register for Policy and International Affairs. Earlier in her career, she was in-house counsel with the global Guggenheim Museums and in private practice. She has delivered numerous distinguished copyright lectures and is a former Trustee of the Copyright Society. *Maria A. Pallante*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, <https://www.law.gwu.edu/maria-pallante/> (last visited October 11, 2024); *Maria A. Pallante, 2011-2016*, COPYRIGHT.GOV, <https://www.copyright.gov/about/register/pallante/pallante.html> (last visited June 18, 2024).

<sup>28</sup> Maria Pallante was Director of Policy and International Affairs in the U.S. Copyright Office. *Maria A. Pallante*, GEORGE MASON UNIVERSITY, <https://cip2.gmu.edu/about/advisory-board/maria-a-pallante/> (last visited Jul. 18, 2024); *Maria A. Pallante, 2011-2016*, COPYRIGHT.GOV, <https://www.copyright.gov/about/register/pallante/pallante.html> (last visited June 18, 2024).

he said. It was true. Just say “Marybeth,” and everybody will know who you mean, at least in copyright circles. And by copyright circles, I mean the whole world. One of my lasting impressions of public service is finding myself in Asia or Africa and having somebody say, “Do you know Marybeth?” I think everybody that’s worked for the Copyright Office and who has traveled has had that experience.

Marybeth’s achievements were significant and unique as a legal expert, public official, and a chief executive. Although many will recall her warmth and humility, we should not lose sight of the fact that she was an outstanding technical lawyer. And she wasn’t above correcting people, albeit gently, including prominent practitioners who sought to fudge a fact or two in a meeting or a roundtable.

Remarkably, she implemented both the 1976 Copyright Act and the DMCA.<sup>29</sup> She led the Office during many critical copyright developments. One of those was the Google Books settlement – the Google Books case – just before she retired.<sup>30</sup> Always the impartial public servant and expert, she could not

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<sup>29</sup> The 1976 Copyright Act governs exclusive rights, limitations and exceptions. When enacted after decades of work by the Copyright Office and Congress, it simplified and completely overhauled the 1909 Act and moved the United States closer to international standards while maintaining important balances and safeguards. Among other amendments, it addressed automatic federal protection for both published and unpublished works fixed in a tangible medium, extended the general term of protection to the life of the author plus 50 years, codified the judge-made fair use doctrine, and largely preempted the smattering of state common law copyright rules still in existence at the time. For an analysis from 1978, the year of implementation, see Robert Gorman, An Overview of the Copyright Act of 1976, available [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6925&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6925&context=penn_law_review). See also Marybeth Peters, GEN. GUIDE TO THE COPYRIGHT ACT OF 1976, U.S. COPYRIGHT OFFICE (1977), <https://www.copyright.gov/reports/guide-to-copyright.pdf>. The Digital Millennium Copyright Act (DMCA), which implements the 1996 WIPO Internet Treaties, became law in 1998. It amended U.S. copyright law to address important parts of the relationship between copyright and emerging, commercial internet. There were three main updates including: (1) establishing safe harbors from liability for online service providers under certain circumstances, through a new “notice and takedown system”; (2) ensuring legal protections and incentives to copyright owners for digital formats and transmission; and (3) making it unlawful to provide false copyright management information or to remove or alter that information. See *The Digital Millennium Copyright Act*, *supra* note 19.

<sup>30</sup> *Authors Guild, Inc. v. Google, Inc.* concerned whether it was fair use for Google to scan millions of print books from library collections in their entirety for the purpose of creating and enhancing Internet search functionality and publicly displaying “snippets” without payment or permission to the author or rightsholder. Among other terms, the proposed settlement agreement would have allowed Google Books to continue digitizing books, while paying for previously scanned books, creating a revenue program for future books as part of its the search engine, and allowing authors and publishers to opt out (not in). After the District Court rejected a proposed settlement and attempted revised settlement, the case went to trial. In upholding the District Court’s fair use determination, the United

support the settlement that authors, publishers, and Google wanted.<sup>31</sup> She famously called it a judicially sanctioned compulsory license that would benefit one company and which, in any event, would impinge on the powers of Congress.<sup>32</sup>

The House Judiciary Committee took notice of her remarks, which I believe were at Columbia University, and they called a hearing.<sup>33</sup> The Department of Justice took notice of the hearing, and they quoted her congressional testimony in their brief to the court.<sup>34</sup> Judge Chin agreed with the DOJ and rejected the proposal.<sup>35</sup> In other words, so influential and admired an expert was Marybeth in her last years of service that three branches of government came together to heed her advice.

I first met Marybeth in 1991 when she was a policy planning advisor, and I was a year out of law school working at the Author's Guild.<sup>36</sup> She was speaking

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States Court of Appeals for the Second Circuit agreed with the district court that Google's copying was "transformative." *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

<sup>31</sup> Although it recognized some of the benefits of what the parties were attempting to craft, the District Court ultimately rejected the proposed settlement as well as a revised Amended Settlement for a variety of reasons consistent with the concerns of the U.S. Department of Justice and amici, including the settlement's departure from established copyright rules and its monopoly benefits to Google. *See also \$125 Million Settlement in Author's Guild v. Google, THE AUTHOR'S GUILD*, (Oct. 28, 2008), <https://authorsguild.org/news/125-million-settlement-in-authors-guild-v-google/>.

<sup>32</sup> Statement of Marybeth Peters. "As a matter of copyright policy, courts should be reluctant to create or endorse settlements that come so close to encroaching on the legislative function. Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored. Here, no factors have been demonstrated that would justify creating a system akin to a compulsory license for Google – and only Google – to digitize books for an indefinite period of time." <https://www.copyright.gov/docs/regstat091009.html>

<sup>33</sup> *Id.*

<sup>34</sup> Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors, Guild, Inc. v. Google, Inc.*, No. 1:05-cv-08136-DC, (S.D.N.Y. Sept. 18, 2009).

<sup>35</sup> *See generally, Court Rejects Google Settlement. Noting Benefits, Judge Chin Urges Revision*, THE AUTHORS GUILD (March 22, 2011), <https://authorsguild.org/news/court-rejects-google-settlement/>.

<sup>36</sup> The Authors Guild is the nation's largest and oldest professional organization for published writers. The Guild advocates on behalf of writers to protect freedom of expression, freedom of speech, author's copyrights, fights for fair contracts and livable wages, and provides a community for writers and translators of all genres of literature. The Authors Guild also provides free programs to teach authors about the business side of writing and organizes programs to highlight the importance of American literary culture. *Who We Are*, THE AUTHORS GUILD, <https://authorsguild.org/about/> (last visited June 18, 2024).



at a seminar in New York. I think it was a PLI program.<sup>37</sup> And she was intimidating and charismatic. When I approached her after, she treated me with friendliness and respect as though somehow, what I had to say about copyright was much more interesting than her complete mastery of the Copyright Act. It was an exchange that I've never forgotten, and I later learned that many, many people have had that experience, from senators to interns.

I worked for Marybeth twice, first as a policy advisor for a year, but I had a young family at the time and Washington didn't work out for us for a number of reasons. She was very magnanimous about it – she really was a progressive boss when it came to family matters. And although she devoted her own career to government, she did not expect that of everyone. On the contrary, she often said that lawyers should try to serve both government and the private sector. She thought it was a win-win for the profession.

One of Marybeth's many gifts was making complex issues really clear. I still remember a House hearing in which Marybeth testified, during which Howard Berman, Democrat from California, and Howard Coble, Republican from North Carolina – we called them “The Howards” – competitively questioned her for their own purposes with each calling her out as his absolute favorite witness.<sup>38</sup> Marybeth, who respected the halls of Congress immensely, but enjoyed people even more, let her trademark laugh ring out. And no one has ever left a copyright hearing in such a good mood.

When she retired, she received letters from U.S. Presidents.<sup>39</sup> George Bush wrote, “American people deserve the best that federal agencies can provide. You

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<sup>37</sup> Practicing Law Institute (PLI) is a non-profit organization dedicated to keeping professionals and attorneys at the forefront of expertise and knowledge. PLI provides accredited legal and professional continuing education programs delivered by over 4,000 volunteer faculty including lawyers, judges, U.S and International government officials and regulators, and corporate bankers, accountants, and counsel. *About PLI*, PLI, <https://www.pli.edu/about> (last visited June 18, 2024).

<sup>38</sup> The “Howards” were bipartisan leaders on copyright policy for a long time. Howard Berman was a Member of Congress for 20 years, serving until 2013. He was an active member of the House Judiciary Committee, including chairing the IP Subcommittee, and was both Chair and Ranking Member of the House Foreign Affairs Committee. *The Honorable Howard L. Berman*, PACIFIC COUNCIL ON INTERNATIONAL POLICY, <https://www.pacificcouncil.org/about/network/profile/howard-l-berman>. Howard Coble was as a member of Congress for 30 years until 2015, serving on the House Judiciary Committee throughout his long career, including as chair of the IP Subcommittee. Matt Schudel, *Howard Coble, North Carolina Republican in U.S. House, dies at 84*, THE WASHINGTON POST (Nov. 4, 2015, 7:02 PM), [https://www.washingtonpost.com/politics/howard-coble-north-carolina-republican-in-us-house-dies-at-84/2015/11/04/ceae9b64-8313-11e5-9afb-0c971f713d0c\\_story.html](https://www.washingtonpost.com/politics/howard-coble-north-carolina-republican-in-us-house-dies-at-84/2015/11/04/ceae9b64-8313-11e5-9afb-0c971f713d0c_story.html).

<sup>39</sup> Marybeth Peters received letters from Presidents Jimmy Carter, George H.W. Bush, Bill Clinton, and Barack Obama recognizing her for her decades of public service. *Official Obituary of Marybeth Peters*, DE VOL FUNERAL HOME, <https://www.devolfuneralhome.com/obituaries/Marybeth-Peters?obId=26015312> (last visited June 18, 2024); Letter from George Bush to Marybeth Peters (Sep. 21, 2010) in 58

have been the best.” Jimmy Carter wrote, “You have exemplified the loyalty, dedication, and expertise that should be the essence of all public servants.” And Bill Clinton wrote that, “With your tenure in this role coinciding with the rise of the internet, you have truly forged a path into a vast new frontier. Your example is inspiring.”

We know that Marybeth has left us a large and lasting body of work, from her congressional testimony to her many speeches, and she will be quoted for a long time to come. But I want to say that Marybeth loved copyright law, but as Casey said, she loved copyright people even more. She kept track of people that she met and worked with in government service and the private sector, and she absolutely treasured the Copyright Society.

Not everyone may realize that the Copyright Society was launched by the Copyright Office in 1952 by Register Arthur Fisher.<sup>40</sup> He realized that the copyright bar needed a private sector organization, in part to take over his copyright bulletin.<sup>41</sup> Marybeth personified this symbiotic respect between the Copyright Office and the copyright bar and the joy of professional friendships.

She was extremely important to me personally. She was a brilliant colleague and a treasured mentor, and she became like family. But to everyone listening today, I want to say that if you have fond memories of working with Marybeth or even simply meeting her, she very likely was inspired by you, too. And in her genuine, humble manner, she was very proud to be your colleague. Thank you. And over to my colleague, Francis Gurry.

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J. OF THE COPYRIGHT SOC<sup>Y</sup> OF THE U.S.A. 1, 1 (Stacey Dogan & F. Jay Dougherty eds., 2010); Letter from Jimmy Carter to Marybeth Peters (Dec. 31, 2010) *in* 58 J. OF THE COPYRIGHT SOC<sup>Y</sup> OF THE U.S.A. 1, 3 (Stacey Dogan & F. Jay Dougherty eds., 2010); Letter from William J. Clinton to Marybeth Peters (Oct. 8, 2010) *in* 58 J. OF THE COPYRIGHT SOC<sup>Y</sup> OF THE U.S.A. 1, 5 (Stacey Dogan & F. Jay Dougherty eds., 2010).

<sup>40</sup> Arthur Fisher was an attorney who served as Secretary of Interior under President Taft. In 1946, he joined the staff of the Copyright Office as Associate Register. He became Acting Register in May of 1951 and Register of Copyrights in September of 1951. As Register of Copyright, Fisher helped to found the Copyright Society in 1952. Arthur Fisher, 1951-1960, COPYRIGHT.GOV, <https://www.copyright.gov/about/registers/fisher/fisher.html> (last visited June 18, 2024).

<sup>41</sup> During the 1950s, the Copyright Office compiled monthly publications called the *Bibliographic Bulletin*, which was an internal bulletin for employees of the Office. *See* Maria Pallante, *The 60th Anniversary of the Copyright Society of the U.S.A.*, THE JOURNAL OF THE COPYRIGHT SOCIETY 677, 679 (2013). In 1952, Fisher sent copies of this Bulletin to several members of the copyright bar, where it was subsequently disseminated to the copyright community at large. *Id.* After positive reviews, Fisher realized that it would be preferable to start an independent organization to encourage publication on a regular basis. *Id.*

**Francis Gurry:**<sup>42</sup> Thank you very much, Maria. And thanks, Maria and Regan, for including me in this really wonderful celebration and honoring of the life of Marybeth Peters, a dear friend to all here present but to so many more people across the globe. Marybeth was a highly respected, well-loved, and outstanding actor on the international stage.

Her contributions were manifold as a delegate and representative of the United States of America, as a member of the secretariat of the World Intellectual Property Organization during her secondment at the beginning of the 1990s<sup>43</sup> as the Register of Copyrights who, as Shira has mentioned, recognized the importance of international relations by establishing the Office of Policy and International Affairs within the Copyright Office,<sup>44</sup> as the convenor of capacity-building training courses for officials from developing countries; and, above all perhaps, as the magnetic personality whom so many delegates and specialists from around the world found so easy to approach and so accessible.

The platform for Marybeth's success internationally was her open and warm personality expressed through her engaging smile and her infectious laugh, as has been mentioned. It created the basis for establishing relationships of trust in an environment where distrust is often the default position. And that foundation of trust enabled dialogue and, eventually mutual understanding.

As Shira has also mentioned, much of Marybeth's tenure as Register of Copyrights took place in the 1990s, which sparked the rather tumultuous start of the unfolding of digital transformation in the creative industries. Marybeth was a key figure in translating thinking and approaches from the international to the national and vice versa. The implementation and embellishment of the WIPO Internet Treaties of 1996 in the Digital Millennium Copyright Act, a massive process and mediation, took place while Marybeth, of course, was Register.<sup>45</sup>

And her conviction of the inevitability of digital transformation also saw Marybeth as the mover of the Electronic Registration System in the Copyright

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<sup>42</sup> Francis Gurry is the former Director General of the World Intellectual Property Organization (2008-2020). *Director General Francis Gurry*, WIPO, [https://www.wipo.int/about-wipo/en/dg\\_gurry/](https://www.wipo.int/about-wipo/en/dg_gurry/) (last visited June 18, 2024).

<sup>43</sup> Marybeth Peters was a consultant on copyright law at the World Intellectual Property Organization in 1989-1990. *Marybeth Peters*, WIPO, [https://www.wipo.int/meetings/en/2010/symp\\_ip\\_auth/bios/peters.html](https://www.wipo.int/meetings/en/2010/symp_ip_auth/bios/peters.html) (last visited June 19, 2024).

<sup>44</sup> The Office of Policy and International Affairs ("PIA") assists the Copyright Office with domestic and foreign policy analyses, legislative support, and trade negotiations. *International Affairs*, COPYRIGHT.GOV, <https://www.copyright.gov/international-issues/> (last visited June 18, 2024).

<sup>45</sup> The WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty, also known as the WIPO Internet Treaties, set down international norms aimed to prevent unauthorized access and use of creative works on the internet. *See WIPO Internet Treaties*, *supra* note 19.

Office.<sup>46</sup> I'm sure that I can speak on behalf of everyone from outside the United States of America, but also within, of course, in expressing our deep gratitude to Marybeth for the professional and personal gifts that she gave us throughout her lifetime.

It was a pleasure and a privilege to know Marybeth. And you live on in our hearts. So, thank you. And I now have the privilege to be able to pass the word—I'm speaking in French now, sorry – to Karyn Temple, the former register. Karyn, please.

**Karyn Temple:**<sup>47</sup> Thank you, Director General Gurry. And thank you, definitely, Maria and Regan and the Copyright Office for putting this on. As mentioned, I was the 13th Register of Copyrights.<sup>48</sup> So, everyone has a Marybeth story, as you've heard and are gonna continue to hear. Sometimes, it's about her boisterous laugh. Sometimes, it's about her self-deprecating humor. Sometimes, it's about her mentorship. And sometimes, it's about her almost encyclopedic knowledge of copyright law.

My story today is about her generosity, her warmth, and her inclusivity. Marybeth had the ability to make everyone who crossed her path, no matter how different in background, feel welcomed and nurtured. I first met Marybeth prior to becoming a true "copyright lawyer" or copyright nerd, as those of us in the Copyright Society like to refer to ourselves, while still working to make copyright my full-time field. It was many years ago. And unlike others, I won't actually say how many years ago it was to age myself, but many years ago.

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<sup>46</sup> The Electronic Registration System allows users to register copyright claims for basic works including, "(1) a single work, (2) multiple unpublished works if they are by the same author(s) and owned by the same claimant, and (3) multiple published works if they are all first published together in the same publication on the same date and owned by the same claimant." *U.S. Copyright Office Releases New Technology to Process Applications Online*, LIBRARY OF CONGRESS (June 25, 2008), <https://www.loc.gov/item/prn-08-115/>.

<sup>47</sup> Karyn Temple is Senior Executive Vice President and Global General Counsel for the Motion Picture Association. See *Karyn A. Temple*, MOTION PICTURE ASSOCIATION, <https://www.motionpictures.org/people/karyn-a-temple/> (last visited June 18, 2024). As one of the leading authorities on copyright, she has served as the Register of Copyrights, Associate Register of Copyrights, and senior counsel for policy and international affairs for the Copyright Office. See *Karyn A. Temple, 2019-2020*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/registers/temple/temple.html> (last visited June 18, 2024). Spearheading several training programs and international copyright treaties, Temple has been a prominent voice for emphasizing modernization in the field, extending outreach efforts, and expanding disability access for published works. *Id.* In 2018, she even established the Copyright Modernization Office in an effort to reengineer her various initiatives. *Id.*

<sup>48</sup> Karyn Temple was the Register of Copyrights from March 2019 to January 2020, overseeing the modernization of the Copyright Office and provisions of the Copyright Act. Additionally, she was Acting Register of Copyrights from October 2016 to March 2019. *Id.*

And I somehow found myself as chair of the Copyright Committee for the DC Bar Association's Intellectual Property Association, even though I was barely a copyright lawyer and had very little knowledge of that area. One of the main events for the IP section was, of course, a lunch with, you guessed it, the Register of Copyrights, Marybeth Peters. I was told I must contact her and get her agreement to do the lunch, and then [I] would be introducing her at the luncheon.

Needless to say, I was terrified and intimidated. Here I was, this very junior no-name lawyer, contacting one of the, if not actually the, pillar of the entire copyright community. Of course, everyone who knows Marybeth knows how this story ends. There was no reason for me to be worried or intimidated. Maybe it was because of her own hard work, starting out as a music examiner<sup>49</sup> while going to law school at night and being one of the few female copyright lawyers at the time, but Marybeth had a unique ability to relate to everyone.

She has talked publicly about her own struggle in the profession and that when she first became Register, people were often expecting to see a man, and that initially, she struggled with the fact that she had to act like a man rather than allowing herself to be who she truly was. And as we all know, who Marybeth truly was was a people person. Marybeth had a warmth, graciousness, and real amount of caring that wrapped you in a bear hug and just never let go, even for those, as I said, no-name junior lawyers like myself.

So, then and there, I determined on that day I would become a true copyright lawyer and would work for Marybeth at the Copyright Office. This is a true story. It became my goal and dream job. Of course, life had other plans. When I finally got called for a coveted interview for a position at the Copyright Office a couple of years later, I was eight and a half months pregnant. So, I went to the scheduled interview just to say hello. But needless to say, at that time, the timing wasn't quite right.

I kept in touch with Marybeth and others at the Copyright Office. And finally, timing was a little bit in my favor because I got the job, but Marybeth had just announced her retirement. So, we missed each other just by chance. But you remember that bear hug. It had truly never let go. Little did I know that Marybeth saw the entire Copyright Office as not just as employees but as family and treated them as such. I continued to learn and grow from Marybeth throughout my entire time at the Copyright Office as one of her zillion mentees.

And I knew when I became Register, there was absolutely no way I would ever be able to fill her shoes to be able to replicate that connection with everyone you meet and that familiarity that comes from working side by side and day by day, but she was an inspiration to me to try just a little. So, thank you, Marybeth,

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<sup>49</sup> A music examiner in the Copyright Office is a specialized Registration Examiner, focusing on applications relating to the music field. *See generally* Ashley Tucker, *The Life of a New Registration Specialist*, LIBRARY OF CONGRESS BLOGS (June 3, 2019), [https://blogs.loc.gov/copyright/2019/06/day\\_in\\_the\\_life\\_registration\\_specialist/](https://blogs.loc.gov/copyright/2019/06/day_in_the_life_registration_specialist/).

for inspiring me, nurturing me, and, yes, wrapping me in that giant bear hug and never letting go. She was truly an inspiration. Thank you.

**Joe Keeley:**<sup>50</sup> Thank you, Karyn. My name's Joe Keeley. I'm currently on the Senate Judiciary Committee, but I had the pleasure of first directly working with Marybeth on the House Judiciary Committee in 2004 before I joined the Copyright Office in 2007. And I know this may come as a shock to everyone, but not every member of Congress is an expert on copyright law or, quite frankly, most things. So, having someone like Marybeth was critical for American copyright policy.

She's able to channel her vast knowledge of copyright law and policy with her personal skills in dealing with difficult people, which – surprise, surprise – includes many members of Congress. I've staffed numerous member meetings and hearings that involved Marybeth, and there was a universal respect for her on both a personal and professional level on both sides of the aisle. When Marybeth walked into a hearing or a meeting on The Hill, she commanded the room. No one tried to pull a fast one on her, and she wasn't going to try to pull a fast one on anyone else. That, honestly, is quite rare in D.C.

So, my personal tribute to Marybeth is a statement that she was a living embodiment of two key phrases: Respect is earned, not given. And don't make noise; make a difference. Marybeth earned her respect, and she always made a difference. Sadly, there aren't many like her these days, but I think we were all fortunate to have her as long as we did. Thanks. And I'll turn it back over to Maria.

**Maria Pallante:** Thank you so much, Joe, and thanks to everybody on the first panel. At this point, if I could ask the second panel to turn your cameras on? So, Jon, Art, Winston, Kate, Richard, and Eric. And then we're gonna go in order, Jon, then Art, then Winston, then Kate, then Richard, then Eric. Over to you, Jon Baumgarten.

**Jon Baumgarten:**<sup>51</sup> Thank you, Maria. To state the obvious, Marybeth had a long, distinguished career in the United States and on the world stage. But today,

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<sup>50</sup> Joe Keeley is a leading IP expert currently with Michael Best & Friedrich LLP in their IP and federal strategies teams. *See* Joe Keeley: Practitioner in Residence, GEORGE MASON, ANTONIN SCALIA LAW SCHOOL, <https://cip2.gmu.edu/about/our-team/joe-keeley/> (last visited June 18, 2024). He is also a Practitioner in Residence at George Mason University's Center for Intellectual Property x Innovation Policy. *Id.* Esteemed in the community, he is known for being the only person to serve as the Chief Intellectual Property Counsel for the U.S. House of Representatives *and* the U.S. Senate. *Id.* Guiding the enactment of many IP reform policies and legislative packages, he has been instrumental in the Music Modernization Act and the Defend Trade Secrets Act, as well as ending the Section 119 compulsory satellite license. *Id.*

<sup>51</sup> Jon Baumgarten was appointed General Counsel of the U.S. Copyright Office in the late 1970's by the renowned Register of Copyrights Barbara Ringer. *See* Jon A. Baumgarten, FORDHAM IP INSTITUTE, [https://fordhaminstitute.com/wp-content/uploads/2017/04/Baumgarten\\_Jon\\_Bio2017.pdf](https://fordhaminstitute.com/wp-content/uploads/2017/04/Baumgarten_Jon_Bio2017.pdf) (last visited June 18, 2024). During this time, he was a leading mind in the final formulation and drafting of the

I want to focus on one relatively brief but critical period during her 44 years in the Copyright Office. In the first week of January of 1976, almost 20 years before she became Register, I left New York and arrived in Washington as general counsel of the Copyright Office. Marybeth was an attorney on my staff.

It is important to understanding this period of Marybeth's career, and her unique contribution to copyright law, that it recognizes context. To some of you, this will be familiar, but to many, it may not. Upon passage of the 1976 Act, not only did we in the Office have to embark on the public notice and comment program far beyond anything the Office had previously undertaken, but literally every single practice forum's circular conclusion understanding the Office had adopted in the many decades before.<sup>52</sup>

Essentially, everything the Office had thought, said, or done had to be carefully studied and measured to the new law. In the end, virtually all had to be replaced by an entirely new task, and principles had to [be] implemented. In addition, we had to establish an entirely new licensing division and deal with several court actions brought against us<sup>53</sup> while the copyright industries clamored for explanations of the new law and our impending practices.

And the international copyright forums – State Department, UNESCO, and WIPO – excited by the new law's signals to the world community, also demanded our time and attention. This cumulative effort was often exhausting and near[ly] overwhelming. Marybeth was a vital key player as we labored, puzzled, debated, and occasionally laughed along the way. And the Office succeeded, but underlying that success was the need for someone to perform a unique and critical task.

It was essential to conduct a massive yet prompt, intensive education program for the entire office staff with respect both the broad principles and implementing details of the new Copyright Act and the changes it demanded. Barbara and I easily agreed Marybeth was the answer. Marybeth readily accepted the challenge and performed far beyond already highest expectations. At that point, I lost a staff member, but the Office as a whole gained a mentor, and I retained a valuable resource and a friend.

Marybeth was always proud of her earlier days as a school teacher in Rhode Island.<sup>54</sup> She was, as we should all be, equally and deservedly proud of her time

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Copyright Act. *Id.* Returning to private practice in 1980, he was a key figure in some of the most foundational copyright cases. *Id.* “[H]e was a leader in the development of trade-based international copyright standards... and he counseled and led teams... in the development, negotiation, and litigation of cross-industry technical standards and solutions for content protection.” *Id.*

<sup>52</sup> COPYRIGHT ACT OF 1976, *supra* note 29.

<sup>53</sup> See generally U.S. Copyright Off. Licensing Div., *Copyright Office Launches New Licensing Division Website*, The Living Connection (2014), <https://www.copyright.gov/licensing/tlc/fall2014.pdf>.

<sup>54</sup> After attending Rhode Island College, Marybeth Peters became a social studies teacher for a couple of years. See Copyright Notices, *Special Edition: Marybeth Peters 1939-2022*,

during the late 1970s as the Copyright Office's, if not the copyright world's, educator in chief. I now will turn it over to my old friend, Art Levine.

**Art Levine:**<sup>55</sup> I just gave the winning lottery number for today, but I guess none of you heard it. What's quite clear at this point is that we are all on this program, not merely because we so respected Marybeth's amazing talent, but because we hold her with such affection in our hearts for the fun, warm, kind, happy person that she was. And I am thrilled that Regan and Maria and the Copyright Society staff decided to put this program on.

I met Marybeth Peters the day she began her copyright career in 1966.<sup>56</sup> I had been working in the Copyright Office for about three years before that. And suddenly, into the Office came this lovely, redheaded, beautiful woman with this Rhode Island accent that was at times incomprehensible, but for the most part, we understood. She worked in the music section as an examiner.<sup>57</sup> And I will mention the two people that she worked for, because they deserve [to be mentioned]. One was Penny Keziah, who was the head of the section,<sup>58</sup> and the other was Felicia Healy, the assistant head.<sup>59</sup>

And they took her on as kind of a younger sister and nurtured her through her first time in the Copyright Office. She worked in this large room, and I mention it only because [of] what has already been described as a laugh, but I think more appropriately by Shira as a screech or shriek, rather, that suddenly came out of nowhere and awoken a number of the examiners that were probably dozing after lunch. I was fearful that the library police would come to see what was wrong in the Office, but that never happened.

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U.S. COPYRIGHT OFFICE (SPECIAL ISSUE), <https://www.copyright.gov/about/registers/peters/peters-bio.pdf> (last visited June 18, 2024). She was then asked by her alma mater to become a trainer of student teachers. *Id.* In her own words, "I actually loved being a teacher. I loved teaching geography and history and civics and all of those things." *Id.*

<sup>55</sup> Arthur ("Art") Levine began his long and successful career at the Copyright Office in 1963, initially as an examiner in the Miscellaneous Section. *See* Copyright Notices, *Special Edition: Barbara Ringer 1925-2009*, U.S. COPYRIGHT OFFICE (SPECIAL ISSUE) (Apr. 2009), <https://www.copyright.gov/docs/barabara-ringer-special-edition-2009-04.pdf>. Three years later, he was promoted to assistant chief of the Examining Division. *Id.* In 1971, he left the Copyright Office and entered into private practice. *Id.*

<sup>56</sup> Marybeth Peters became a musical examiner in 1966. *Special Edition: Marybeth Peters*, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> Dorothy "Penny" Keziah is a retired head of the Music Section. *See* Copyright Notices, *Special Edition: Barbara Ringer 1925-2009*, U.S. COPYRIGHT OFFICE (SPECIAL ISSUE) (Apr. 2009). She worked closely on the Revision Coordinating Committee in 1997 to develop a new classification system, make preparations to implement the new Administrative Procedure Act, and various other vital policy decisions and rulemaking. 80TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, at 13 (1978).

<sup>59</sup> Felicia Healy assisted Peters in these projects with Keziah. *Id.*



George Cary was the Deputy Register of Copyrights at the time.<sup>60</sup> George became Register for a day before Barbara Ringer successfully won her lawsuit and became Register.<sup>61</sup> And George taught copyright law at GW as an adjunct, and Marybeth was one of his students.<sup>62</sup> And George told me one day that Marybeth was the best student he had ever had in his class, and that doesn't come as a surprise, I don't think, to any of us.

I noticed in all of the pictures that were shown one constant, and that is Marybeth always smiling. The Marybeth I met in 1966 was the same Marybeth I knew 50 years later, in 2016. Her successes never went to her head. She was always the same wonderful person, the same friend. I, on occasion, would have the opportunity to go [to] the Copyright Office on some business or other while she was Register, and I would pop into her office. She always had time to chat. We would talk about copyright issues, or we would reminisce, or we would gossip a little bit about things in the copyright world.

This week, I decided, when you're retired, you have plenty of time to do all sorts of things. And so, I put on a YouTube presentation that Marybeth gave. I then learned, I guess from Maria, that it was probably at Columbia, and it was on the Google Books settlement.<sup>63</sup> And there was this wonderful, wonderful Marybeth, and her passion for authors' rights and copyright just came through. I

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<sup>60</sup> George Cary served as Deputy Register for the Copyright Office from 1961 to 1971. See *George D. Cary, 1971-1973*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/registers/cary/cary.html> (last visited June 18, 2024). He was subsequently appointed Register of Copyrights, where he was a prominent figure in the Office's efforts to the copyright law revisions of 1976. *Id.*

<sup>61</sup> See *Ringer v. Mumford*, 355 F. Supp. 749, 751 (D.D.C. 1973). (Ringer brought this suit against the Librarian of Congress on the claim that the appointment of the new Register was discriminatory on the bases of sex and race. This suit resulted in her eventual appointment as the first female Register. Since she was passed over by the "old boys' network," it was concluded that she had been denied the job "as the result of discrimination for reasons of sex and race." The basis for race was due to her avid advocacy for "the rights of blacks in the Copyright Office.").

<sup>62</sup> Marybeth Peters received her law degree from George Washington University Law School in 1971. *Special Edition: Marybeth Peters*, *supra* note 54.

<sup>63</sup> This is in reference to the landmark decision in *Authors Guild, Inc. v. Google Inc.*, concerning whether copying entire copyrighted texts into Google's full-text search function should be protected under the fair use defense. 721 F.3d 132, 133 (2d Cir. 2013). The Court agreed that this search function "augments public knowledge by making available information about [p]laintiff's books without providing the public with a substantial substitute for matter[s] protected by the... copyright interests in the original works." *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015). This ruling has been considered to make information "just... a little more free." Robinson Meyer, *After 10 Years, Google Books Is Legal*, THE ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/technology/archive/2015/10/fair-use-transformative-level-google-books/411058/>.

guess Jon was on the panel, too.<sup>64</sup> But Jon, unfortunately, they didn't show you on this YouTube, maybe on another one.

I just wanna finish by thanking Maria and David Carson for being the wonderful friends they were to Marybeth in the last years of her life. Many of you probably don't know this, but they really just were dedicated to Marybeth and took wonderful care of her. And for that, I think we can all be very, very grateful. I'll now pass it on to Winston Tabb.

**Winston Tabb:**<sup>65</sup> Thank you. I really adored Marybeth, and I'm proud to say that as probably, I think for sure, the only librarian speaking today. Not every librarian would necessarily agree. A few library colleagues had the chance to know and work with Marybeth in the ways that I was so privileged to do. Marybeth was smart. She was fun. And she was a dream colleague whom I had the good fortune to work with in multiple roles during my years as chief of the information and reference division in copyright and then as the Associate and Deputy Librarian of Congress.

I first met Marybeth when she was assigned around 1980 to work with colleagues in the Library of Congress on the development of the optical disc project.<sup>66</sup> How quaint this effort sounds today from today's perspective, but it was a pioneering attempt by the Library Congress to begin using evolving technologies to make library content more widely accessible, but, of course, within the parameters of existing copyright law.

What impressed me then and really always was how Marybeth always started our conversations by asking, "What would you like and be able to do?" rather than by declaring that the whole idea of copying and making content accessible electronically was dead on arrival or, at least, so discouraging and problematic that we probably shouldn't even proceed. She really was a problem solver.

Marybeth's love of copyright was so infectious, so jubilant, that when I saw the position of chief of the Copyright Office Information and Reference Division posted, I thought, "I'd really like to go over to the Copyright Office and learn more about this fascinating topic."

Of course, I realize in retrospect that, ordinarily, the role might more logically have gone to someone like Marybeth, a predecessor to the chief who was prepared to convey expertise rather than gain it, but I was young and curious and naïve, and

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<sup>64</sup> Jon A. Baumgarten, *supra* note 51.

<sup>65</sup> Winston Tabb served as Sheridan Dean of University Libraries, Archives, and Museums at Johns Hopkins University before his retirement. *Winston Tabb of Johns Hopkins University to Retire in 2022*, NISO, (Dec. 2021), <https://www.niso.org/niso-io/2021/12/winston-tabb-johns-hopkins-university-retire-2022>. Prior to joining Johns Hopkins, Tabb worked at the Library of Congress for 30 years. *D. Winston Tabb*, INSTITUTE OF MUSEUM AND LIBRARY SERVICES, <https://www.ims.gov/d-winston-tabb> (last visited June 19, 2024).

<sup>66</sup> See THE REGISTER OF COPYRIGHTS OF THE U.S., LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108), REPORTER OF THE REGISTER OF COPYRIGHTS 106 (1988).

Marybeth really encouraged me to go for it. So, I did and was really quite astounded but then elated when the Register of Copyrights David Ladd called to offer me the position.<sup>67</sup>

I will never forget my first day at the Copyright Office when, as I was waiting at the elevator to go to lunch, a person totally unknown to me accosted me and yelled, “You are everything that’s wrong about the Copyright Office. You librarians are...” And I hastily escaped into the elevator before I heard the rest of the sentence, wondering what I had gotten myself into.

As soon as I returned from lunch, I called Marybeth to tell her what had happened. And I shall never forget her big laugh, mentioned by so many already today, as she said to me, “Oh, that was probably X. He doesn’t like me either.” And in fact, it turned out that it was X.

I have many, many wonderful memories of my four years in the Copyright Office, but absolutely the most rewarding and substantive are the lectures about copyright that Marybeth gave for the non-attorney staff every Thursday afternoon. She was a natural teacher who took us to school so engaged by her subject that we were swept along, learning while laughing, as she made copyright seem like the most enthralling subject imaginable.

In due course, I became the Deputy Librarian of Congress at the very time when we needed to select a new Register of Copyrights.<sup>68</sup> As head of the search committee, I had the privilege of recommending to the librarian that he appoint Marybeth to the position she had spent decades preparing for. And the rest is history. I am very fortunate and proud to have been part of as we gather here today to celebrate this extraordinary woman. And I’d now like Kate Spelman to speak.

**Kate Spelman:**<sup>69</sup> Thank you, Winston. Wow. Maria really nailed it when she said there was an element in Marybeth of being intimidating and charismatic, and you don’t usually get that in one person without it having to be something of an oxymoron. With Marybeth, it was not an oxymoron. It was completely coherent and consistent. My variety of stories that could be told are huge. I’m loving

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<sup>67</sup> David Ladd was appointed Register of Copyrights upon the retirement of Barbara Ringer. See David Ladd, 1980-1985, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/registers/ladd/ladd.html> (last visited June 18). He was the first Register who also served as Commissioner of Patents. *Id.* He was also the first Register to ever visit the People’s Republic of China, where he hosted their National Publishing Administration and presented a number of lectures. *Id.* He famously delivered a lecture at New York University, where he noted that the First Amendment and copyright were “indispensable” in fostering the “freedom of authors, publishers, and the public.” *Id.*

<sup>68</sup> *Winston Tabb, supra* note 65.

<sup>69</sup> Katherine (“Kate”) Spelman is a leading voice on the progress of emerging copyright and digital publishing. See *Katherine C. Spelman*, PRACTICING LAW INSTITUTE, <https://www.pli.edu/faculty/katherine-c.-spelman-i456315> (last visited June 24, 2024). Her experience has spanned from assisting clients with Open Source licensing issues to representing large digital publishing companies. *Id.*

hearing so many. We obviously each had consistency in our experience with Marybeth.

I've assigned myself the task to focus on her stellar educating, and her as an agent of inclusion. First, as an educator, as we're hearing today, we all benefited from her clarity of understanding and her clarity of seeing complexity without having it be inconsistent except when it was. She understood the 1909 Copyright Act<sup>70</sup> and the 1976 Copyright Act<sup>71</sup> with unparalleled detail, and she could catch us all if we had any eliding of information or merging of things that should be kept separate. She was remarkable.

I first met Marybeth in the early days of early continuing education. I was at the Michigan Bar Association seminar at Boyne Highlands Resort in 1983. You can imagine what that looked like. There were under 50 as registrants. I was the only woman, and there were two women on the panel as faculty. One was Marybeth, and the other was Margaret Muth Laurence of the Patent Office.<sup>72</sup> When I arrived, I had just moved from a big, giant law firm by those estimated days, Pillsbury Madison & Sutro, to the oldest law firm, patent-focused, west of the Mississippi.<sup>73</sup>

I was there, the first woman and the first non-PhD scientist. They assigned me the nickname – I was the “Double Non.” And upon hearing that I was not a

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<sup>70</sup> Derived from the U.S. Constitution, “[t]he 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,” the 1909 Copyright Act granted copyright protection. U.S. CONST. art. 1, § 8, cl. 8. This Act required proper notice and deposit of copies to the Copyright Office. *See generally* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed by Copyright Act of 1979). While foundational for the expansion of protection for works of authorship, this Act only applies to works created and published prior to the enactment of the Copyright Act of 1976 (where copyright protection arises automatically once the work is fixed in a tangible medium). *Id.*; COPYRIGHT ACT OF 1976, *supra* note 29.

<sup>71</sup> COPYRIGHT ACT OF 1976, *supra* note 29.

<sup>72</sup> Margaret Muth Laurence was an expert in copyright and trademark law, pioneering the IP field for women. *See* Margaret Muth Lauren, *Michigan Women's Hall of Fame Timeline*, MICHIGAN WOMEN FORWARD, <https://miwf.org/timeline/margaret-muth-laurence/>. She became a self-taught expert in the field after becoming a secretary at a patent law firm. *Id.* Despite not having a college degree, she passed the Mississippi Bar in the top 5 percent and began her practice in Washington, D.C. *Id.* There, her expertise became internationally renowned and she was appointed as the Assistant Commissioner for Trademarks by President Carter. *Id.* She spent nine years as the Assistant Commissioner of Trademarks following her appointment in 1979. *Id.* In addition to her respected work as Assistant Commissioner, she founded multiple national women's organizations to help bolster the efforts for the Equal Rights Amendment. *Id.*

<sup>73</sup> Pillsbury Madison & Sutro has undergone restructuring regarding the specific business enterprise election and is now known in the field as Pillsbury Winthrop Shaw Pittman LLP., a “pillar of the business community since its founding in 1874.” *See* SAN FRANCISCO OVERVIEW, PILLSBURY WINTHROP SHAW PITTMAN LLP, <https://www.pillsburylaw.com/en/offices/san-francisco.html> (last visited June 18, 2024).

man and not a PhD scientist, I decided that the thing to do was roll with it. And I would say to people, “Yes. Well, two negatives make a positive.” And that seemed to work a while.

At this conference in Michigan, I was having some serious doubt as to whether or not I really wanted to be in the intellectual property community and whether I wanted to do trademarks or copyrights. Like Karyn Temple, I committed at that seminar to become a copyright lawyer based on Marybeth. She made it clear. She made it accessible, and she made a very big welcome for me.

It was a time of bar associations as we do not see them anymore, thankfully. It was a time when people were making it a point to make obfuscated conclusions about intellectual property. We began to call it intellectual property, for starters. When I joined my firm west of the Mississippi, it was a patent firm, and they had these little ancillary practices of trademark. I was to begin the copyright practice.

The more I got to know Marybeth, the more I found her to be plucky, resilient, and tirelessly willing to educate whether it was in airports, whether it was in forums of conferences, or whether it was shared cabs where someone would ask a question. And she would take the time to carefully detail the point of copyright misunderstanding or to celebrate creativity and to talk about how copyright really made the difference.

Marybeth touched thousands. She changed life trajectories, as you’ve heard now twice today. She made the world of copyright a better place. She had the unique knack of making individuals feel welcome and heard. As my practice expanded into international representation, I would arrive wherever it would be – Sweden, Switzerland, China, Japan – and people, upon learning that I was from the United States, would ask, “How is Marybeth?” And no one ever had to use a last name.

There was never a misunderstanding about whom they were asking. And they all knew I didn’t work at the Copyright Office, but they all wanted to know how she was. So, it was a little like, as it’s been mentioned, knowing Madonna. It was, for me, a very nurturing experience to know Marybeth over the 40 years, but let us not just celebrate and mourn the passing of Marybeth. Let us in this meeting take on the legacy ourselves to commit to being agents of inclusion and to being educators of copyright and celebrators of creativity. I thank you. Let me now pass this over to Richard Dannay.

**Richard Dannay:**<sup>74</sup> Thanks very much, Kate. We all know what a great expert Marybeth was in domestic and foreign copyright. And many of you, Jon included, have talked about her remarkable gift for teaching and communicating at every single level. But I have one example myself, even though it’s about 45 years old now. And that’s the General Guide to the Copyright Act of 1976, which

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<sup>74</sup> See Richard Dannay, *supra* note 24.

bears the date of September 1977.<sup>75</sup> A lot of you will remember it but, as I said, it's 45 years old.

Marybeth, then Senior Attorney Advisor, undertook in the Copyright Office, as Jon indicated, a massive training of the staff, internally. And with her teaching and legal background, she created this intensive course, which is embodied in this publication. She had a course – to cite the statistics – on the new law for 260 staff members in 15 sessions of an hour and a half each, and then another 125 staff members in a more modest course. She prepared all the instructional materials. She designed both of the courses. And her materials were so popular and in such great demand that the Copyright Office had to issue this booklet to satisfy that demand.<sup>76</sup>

It's a marvelous book, historically, a kind of Bible for introduction to the new law – over 100 pages in plain English covering every single topic. But it has a little footnote that I kind of relish.<sup>77</sup> A footnote to her Section 203, Termination Effect, which many of you will remember.<sup>78</sup> Because this publication illustrated, even in 1977, what later became known as the termination gap, an issue that got lost for about 35 years until around 2013, when many authors and songwriters said they first became aware of the infamous gap when asserting their own 203 rights.<sup>79</sup>

Well, Marybeth was well ahead of all of them because they obviously hadn't read about this gap, not that she called it that, but she described it perfectly in her 1977 guide and gave specific examples.<sup>80</sup> So, wherever everybody else was, Marybeth was well ahead of them. And now, let me just close with a little anecdote from the Copyright Society. Marybeth was fearless but, at the same time, really goodhearted, as all of you have basically commented.

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<sup>75</sup> The General Guide to the Copyright Act of 1976 was published by the United States Copyright Office in September 1977. U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 (1977).

<sup>76</sup> *Id.*

<sup>77</sup> See generally MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 (1977).

<sup>78</sup> *Id.* at 6:5. (“NOTE: Some work will not be subject to any termination rights. Section 304(c) applies only to grants made prior to January 1, 1978 and section 203 applies only to grants made on or after that date. Section 203 termination rights apply only to grants made by the author, and works made for hire are not subject to termination.”).

<sup>79</sup> *Id.*; This Section of the Copyright Act grants authors the right to terminate certain grants of transfer within time frames set forth by statute. *Id.* Essentially termination rights allows authors, and their heirs, to garner further economic gain from their works. See Possible Gap in Termination Provisions, U.S. COPYRIGHT OFFICE (proposed June 6, 2011) (to be codified at 76 F.R. 32316). Marybeth Peters noted a narrow fact pattern regarding when the author agreed to grant prior to the calendar start date of 1978, but the work was actually created after the calendar start date. See *Special Edition: Marybeth Peters*, *supra* note 54. This is colloquially considered as the ‘termination gap’ in copyright. *Id.*

<sup>80</sup> *Special Edition: Marybeth Peters*, *supra* note 54.

In 1985, at the end of my first year as the Copyright Society President at the Annual meeting in June, I inaugurated the Copyright Society softball game, calling it Copyright Classic I, and I acted as the informal softball commissioner.<sup>81</sup> Now, we had plenty of players to fill two teams and then some, but nobody was willing to volunteer to be an umpire.

So, I asked Marybeth to be the umpire, and she enthusiastically accepted, even though she acknowledged that this was indeed the first – yes, the first – baseball game she had ever attended and ever watched. She was the first person that I know who would say, “Hey, they aren’t balls or strikes until I call them.” Thank you. And now, over to you, Eric.

**Eric Schwartz:** Thank you, Richard. Thank you as well Maria, Regan, and the Copyright Society for inviting me to join what I will call the Marybeth Fest, a real celebration of Marybeth. Let me second Art’s comments with thanks to David Carson and Maria for taking care of Marybeth in her last years. It was really very much appreciated by her friends.

To sum up Marybeth’s legacy and career in three minutes, and to try and to say something unique as the 13th speaker here in this lineup, I organized my remarks into three baskets: Marybeth the teacher, Marybeth the policymaker, and Marybeth the manager as Register. If time permitted, I would also talk about just how much plain fun she was to be around, telling the best Marybeth stories and Copyright Office stories, and Lord knows there were plenty of them.

As [a] teacher: since we are all gauging ourselves on time, I met Marybeth on my very first day at the Copyright Office, which next month will be 35 years ago. April 1st, 1988. The Copyright Act of 1976 Guidebook that Richard was talking about was sitting on my desk, awaiting me on day 1.<sup>82</sup> More importantly and immediately, Marybeth realized how little I knew about internal Copyright Office practice, and she took me under her wing as a tutor to teach me Copyright Office practice and the internal workings of the Office.

This segment of today’s talk is a focus on her early career. But by the time I arrived at the Office in 1988, she’d already been at the Copyright Office 22 years. So, I think it was the midway point in her 45-year career there, but the constant was that teaching. She started, as has been said, as a social studies teacher in Rhode Island.<sup>83</sup>

And as Jon has mentioned – and Kate and Richard – Barbara Ringer asked her to; she prepared these internal training materials for Office staff.<sup>84</sup> And as

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<sup>81</sup> The Copyright Classic is still in effect today, with the 35th annual softball game occurring in 2023. See *AM23 Softball*, ANNUAL MEETING 2023, THE COPYRIGHT SOCIETY, <https://members.copyrightsociety.org/products/am23-softball> (last visited June 24, 2024).

<sup>82</sup> *Special Edition: Marybeth Peters*, *supra* note 54.

<sup>83</sup> *Id.*

<sup>84</sup> Marybeth Peter created staff training for the Copyright Act of 1976, receiving the Library of Congress Superior Service award in 1977 for her valiant effort. See Marybeth Peters,

Richard said, it was known as Marybeth's Maxi Course, taught to several hundred people.<sup>85</sup> It meant two classes a day, four days a week, eight sessions per employee for 16 weeks.<sup>86</sup> It was a huge undertaking with a different course for the clerical and technical staff.

Here's one interesting anecdote about that: When Barbara recommended that the Guidebook be published. That came after someone had tried to register the written summaries that Marybeth had prepared.<sup>87</sup> One of the examiners who had been trained by Marybeth, recognizing the unauthorized registration, denied the registration.<sup>88</sup> That teaching is something that she always did, whether to Members of Congress or third-graders taking a tour of the Copyright Office. And yes, those groups are not necessarily mutually exclusive on the level of the teaching Copyright Law that that she would provide.

Sometimes she would walk past the Public Information Office, and if she saw a band trying to register a cassette tape, for instance, she would jump right in and help them with their registration. If the cliché in Washington [is] that "knowledge is power," Marybeth always worked against those conventions. She was happy to share everything she knew with anyone who asked. As a policymaker, you can run off the list of accomplishments, but the key thing to note is she had no political opponents and no drama in all that she worked on, at least none of it directed personally to herself.

Whether it was her work on the major 1976 Act revision<sup>89</sup> or an implementation to of the Visual Artist Rights,<sup>90</sup> Architectural Works Act,<sup>91</sup> or enactment of changes to accede to the two digital treaties,<sup>92</sup> or the WTO/TRIPS

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1994-2010, U.S. COPYRIGHT OFFICE,  
<https://www.copyright.gov/about/registers/peters/peters.html> (last visited June 18, 2024).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Special Edition: Marybeth Peters, supra* note 54.

<sup>88</sup> *Id.*

<sup>89</sup> See LEE HOLLAR, LEGAL PROTECTION OF DIGITAL INFORMATION, Ch. I.C. (2002). ("In the major revision of 1870, administration of copyright registration was centralized in the Library of Congress, where it remains to this day... The deposit requirement of two copies to the Library of Congress provided a free copy of virtually every book published for the national library.")

<sup>90</sup> The Visual Artists Rights Act ("VARA") provides protection for the physical integrity of certain works of visual art. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U.L. REV. 945, 946 (1990). The passage of this Act in 1990 is seen as a major advancement for the rights of artists. *Id.*

<sup>91</sup> Copyright protection was extended in 1990 to include architectural works, which was defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." See U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF ARCHITECTURAL WORKS 1 (Circular 41, rev. ed. 2021).

<sup>92</sup> See *WIPO Internet Treaties, supra* note 19.



Agreement.<sup>93</sup> She also did a lot of initial work with China on the Memorandum of Understanding with the United States Government<sup>94</sup> and on China's work to accede to the Berne Convention and then later to the WTO,<sup>95</sup> and of course the DMCA.<sup>96</sup> In addition to what Shira mentioned about moving the Copyright Office and the registration system into the digital era, and Marybeth completely reengineered the entire organization and work structure of the Office and still remained beloved by everyone in the Office and outside of the Office.

When you would talk to her about her job as Register, the thing that she would often say – and this is in the context of Marybeth as a manager – was that she was proudest of how she treated her own employees in the Office, which is not something you hear often in Washington D.C. or in other places for that matter. That was true both internally and outside the Office, folks on the Hill, as Joe Keeley mentioned, lobbyists and those in the copyright bar, and those in the Copyright Society. There really was no public persona different from her personality, no pretense. She talked the same way to a Member of Congress as she would to any staffer that she knew in the Office, and she knew most of them on a first-name basis.

I have a ton of stories and wish I had more time to share them. I know the often-told story is the one that Kate and I shared with Marybeth on her 60th birthday in 1999, but I'll just leave it at that by saying "what happened in Lake George will stay in Lake George." And with that, I think we are going to now see a short video of Marybeth doing one of her training sessions. Thank you.

**Maria Pallante:** Thank you, Eric. Yeah. I just want to thank this last panel, a very important group of people that knew Marybeth for such a long time and were so important to her. So, thank you so much for making time. And we are going to see a video now. I want to thank the Copyright Office for searching

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<sup>93</sup> The Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a World Trade Organization agreement that plays a central role in facilitating trade in knowledge and creativity and in resolving trade disputes over intellectual property. TRIPS frames the intellectual property system in terms of innovation, technology transfer, and public welfare. *TRIPS - Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm) (last visited June 17, 2024).

<sup>94</sup> The Memorandum of Understanding is an understanding between the United States Agency for International Development and the Ministry of Commerce of the People's Republic of China regarding strengthening of development cooperation and establishing communication between the United States and China *Memorandum of Understanding on U.S.-China Development Cooperation*, USAID, <https://www.usaid.gov/document/memorandum-understanding-us-china-development-cooperation> (last visited June 19, 2024).

<sup>95</sup> The World Trade Organization is the "only global international organization dealing with the rules of trade between nations." *What is the WTO?* WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited June 18, 2024).

<sup>96</sup> See *The Digital Millennium Copyright Act*, *supra* note 19.

through its archival materials, and George Thuronyi in particular.<sup>97</sup> This is a picture of Marybeth teaching what I think is an internal Copyright Office class, which was just mentioned. Over to the video.

**Marybeth teaching on video:** What's the purpose according to the Constitution of copyright statute? What's it supposed to do? Who is it supposed to benefit? The public. Okay, the public. By how? How do you do that? By encouraging artistic creation. It's gonna encourage people to sit down and spend their time writing. The wealth of our civilization is what people write. That's what advances civilization. The artwork, the music, the philosophy books, all of that is what makes a great civilization. So, we want to encourage that. Most people are not independently wealthy. Most people do not have patrons, like Mozart did, who paid him to do things, at least in this day and age. There's a few people, but not most.

So, therefore, what we have to do is somehow give them an economic incentive so that they can spend their time writing, and that's why we have a copyright law. So, if you look at it, it's two-pronged. We definitely want to encourage the writings of authors. And we recognize that in order to do that, which is to benefit society, there must be some rights granted to authors so that they will get some economic compensation, and that they will have some control over what they write. Because what happens if there are no rights? What if the work is in the public domain? What happens? What if there was no copyright law?

Authors are not encouraged to write because they feel they're being ripped off, and they probably are. And a vicious cycle starts, and there's no way to stop it then.

Take it one step. What happens? Say I write a work. And I go to a publisher, and I say, "Would you publish my work?" but there's no copyright. What's his problem with that? Peter? That's right. He could be the 14th. He could be the first. Even if he was the first, as soon as he got it out there, after he spent the time, the money, the editorial discretion that he has in making it so that the public wants to read, the publication costs, the printing costs, the advertising costs, after he does all of that, somebody can come behind him and save all of that expense and bring it out immediately.

So, it's not too attractive for most publishers to do that, not to have any rights in it. So, that was a recognition that you've gotta give them some rights. There's gotta be some control. Otherwise, not only does the author not get paid, but there

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<sup>97</sup> George Thuronyi is the deputy director of the Office of Public Information and Education for the Office. See *George Thuronyi*, COPYRIGHT.GOV, <https://www.copyright.gov/about/leadership/george-thuronyi.html> (last visited June 25, 2024). He has worked in the Office since 1999 and has been integral to the community engagement and education objectives. *Id.* He also designed the first "web-based" copyright catalog, catapulting the Office into the digital world and allowing millions to easily access copyright records. *Id.*

is no incentive for the publisher, who is really the distributor, to get involved in the act.

**Maria Pallante:** Okay. Everybody dry your eyes after that. I now want to invite our professors to turn your cameras on. We're so fortunate to have our distinguished next group of people that not only knew Marybeth well but no doubt studied her record of work and continued to reference it and were very important to her. The academy was always very important to Marybeth, and she herself tried to teach whenever she could. So, we're gonna start with Bob Brauneis, then Paul Goldstein, June Besek, David Nimmer, and Lolly Gasaway. And although you don't need an introduction, I'm nevertheless going to ask you to please introduce yourselves. Over to you, Bob.

**Bob Brauneis:**<sup>98</sup> Thanks, Maria. So, yeah, I'm Bob Brauneis. I'm a professor of law at [George Washington University] where I teach, among other things, copyright law. Dear Marybeth, since you always seemed to treat everyone you met as a person deserving respect and directness, I thought I'd present my tribute to you in the second person. I don't know whether you can hear this, but I hope you can. What I really wanna tell you is that you are a hero to me.

You may only have been the second-longest serving register of copyrights, although I've heard that Thorvald Solberg, the first and longest-serving register back in the early 20th century, actually spent long stretches on leave.<sup>99</sup> However, you were definitely the register with the longest and broadest experience in the Library of Congress and Copyright Office before you ever became Register. One of my prized possessions is a copy that you autographed of your General Guide to the Copyright Act of 1976, that Richard Dannay and Eric Schwartz have already mentioned.<sup>100</sup>

You were there at the beginning, and you wanted to use your skills as a teacher as well as a lawyer to introduce everyone to what was then a radically new law. That was back in 1977. And over the ensuing three and a half decades, you only deepened your expertise in U.S. law, in international law, in Copyright Office procedure, and in the people associated with all of those.

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<sup>98</sup> Robert Brauneis is a Michael J. McKeon Professor of Intellectual Property Law, Co-Director of the Intellectual Property Law Program, and Co-Director of the Dean Dinwoodey Center for Intellectual Property Studies at George Washington Law. Brauneis is also a Member of the Managing Board for the Munich Intellectual Property Law Center and a Trustee of the Copyright Society of the USA. He previously served as the inaugural Abraham L. Kaminstein Scholar in Residence at the United States Copyright Office. *Robert Brauneis*, GW LAW, <https://www.law.gwu.edu/robert-brauneis> (last visited June 17, 2024).

<sup>99</sup> Thorvald Solberg was the Register of Copyrights from 1897 to 1930. *See Thorvald Solberg, 1897-1930, U.S. COPYRIGHT OFFICE*, <https://www.copyright.gov/about/register/solberg/solberg.html> (last visited June 25, 2024).

<sup>100</sup> *See GEN. GUIDE TO THE COPYRIGHT ACT OF 1976, U.S. COPYRIGHT OFFICE (1977)*, <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

In short, you knew everything there was to know about copyright, and you knew everyone there was to know. Yet you carried that exhaustive knowledge lightly, and you dispensed wisdom with an authentic Rhode Island accent and an infectious laugh that I personally could not get enough of.

When you came to study here at GW Law in the late 1960s, you had at least two strikes against you. You were in a distinct minority as a woman, and you were working at the same time you were going to school. I would have completely understood if that experience and related career experiences had made you a little defensively imperious. But by some miracle of character, you were always the opposite of imperious. You were open and warm and modest, whether, as others have mentioned, whether you were talking to Orrin Hatch<sup>101</sup> or Howard Coble<sup>102</sup> or a grade-school student.

I was always tickled that you were proud to be a GW Law alum. I was tickled because the balance of pride should be flowing in the opposite direction, and it is. We at GW Law could not be more proud to count you as one of our most illustrious alums. And personally, I'm deeply grateful to have counted you as a friend and as a model of how to live life and how to guide a large agency through momentous times while retaining your humanity, your humility, and your humor. For that and for everything, thank you. And with that, I have the privilege of yielding to Professor Paul Goldstein.

**Paul Goldstein:**<sup>103</sup> Thank you very much, Bob. And thank you, Maria, for including me in this extraordinary, really inspiring tribute to Marybeth Peters. For the record, I teach copyright law here at Stanford Law School. But, in addition to being a teacher – and I suspect, like the other law teachers on this panel – I have also been very much a student of Marybeth's on matters of both domestic copyright law and international copyright law.

It was, I suppose, the sparkle in Marybeth's eye whenever she spoke of copyright that first drew me to her, but I soon discovered in our relationship the depth and range of Marybeth's commitment to this field that connects all of us here. Marybeth practiced at the very highest level of public service. She was an official who could keep copyright's most central objects in view, and yet, at the

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<sup>101</sup> Orrin G. Hatch is the Former Senator of Utah, and the longest serving Senator in Utah history (1977-2019). ORRIN G. HATCH FOUNDATION, <https://orrinhatchfoundation.org/in-memoriam> (last visited June 17, 2024).

<sup>102</sup> Howard Coble is the Former Representative of 6th District of North Carolina (1995-2015). *Representative Howard Cole*, CONGRESS.GOV, <https://www.congress.gov/member/howard-coble/C000556> (last visited June 17, 2024).

<sup>103</sup> Paul Goldstein is the Lillick Professor of Law at Stanford Law School. Goldstein is the author of a five-volume treatise on U.S. copyright law and a one-volume treatise on international copyright law. In 2015, Goldstein was inducted into the IP Hall of Fame. He also serves as Of Counsel at Morrison & Foerster. He previously served as Chairman of the U.S. Office of Technology Assessment Advisory Panel on Intellectual Property Rights in an Age of Electronics and Information. *Paul Goldstein*, SLS DIRECTORY, <https://law.stanford.edu/paul-goldstein/> (last visited June 17, 2024).

same time, she possessed the attention to detail and the craft required to navigate copyright through Washington's treacherous tidepools.

The example that stands out for me goes back to 2001 and the claim by Jonathan Tasini and his fellow freelance writers against *The New York Times* and others that the writers had not transferred to *The Times* the right to exploit their works through digital and other databases.<sup>104</sup> (I should add by way of full disclosure that I worked on behalf of Tasini and the National Writers Union in that case.)

The Supreme Court granted *certiorari* in Tasini, but Marybeth was rebuffed in her effort to enlist the Justice Department to her side in supporting the writers' claim before the Court. How, then, did it happen that Marybeth's strong views on the subject of authors' rights, and specifically those of Tasini and his fellow writers, reached the Supreme Court and ultimately found their way into Justice Ruth Ginsburg's majority opinion endorsing the writers' claim?<sup>105</sup>

Well, it seems that James McGovern,<sup>106</sup> a congressman from Massachusetts, whose name I had not previously associated with copyright, decided to solicit the views of the Register of Copyrights on the Tasini case.<sup>107</sup> I don't know how the idea got into his head to solicit her views. But it was Marybeth's views, in the form of a letter of response to the congressman, that somehow found their way into the Congressional Record, where they appeared a month and a half before the Supreme Court Argument.<sup>108</sup>

Needless to say – again, somehow – the Congressional record was cited to the Court,<sup>109</sup> and Justice Ginsburg cited Marybeth's letter twice in footnotes to her opinion for the majority upholding the writers' claim. In the first footnote, the Justice quoted Marybeth's invocation of Barbara Ringer's famous observation

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<sup>104</sup> Jonathan Tasini and other members of the National Writers Union sued the New York Times, LexisNexis, Newsday, and University Microfilms for copyright infringement arising from the reproduction and distribution in electronic media of articles that they had licensed to be published in print form. *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001). The Supreme Court held for plaintiffs and upheld the rights freelance writers whose works were published in periodicals and then provided by publishers to electronic databases without explicit permission. *Id.*

<sup>105</sup> *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001). (“We conclude that the Electronic Publishers infringed the Authors’ copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors and not privileged by § 201(c).”).

<sup>106</sup> James McGovern is the current Representative for the 2nd District of Massachusetts. He was elected in 2013. *Representative James P. McGovern*, CONGRESS.GOV, <https://www.congress.gov/member/james-mcgovern/M000312> (last visited June 17, 2024).

<sup>107</sup> *Tasini*, 533 U.S. at 483.

<sup>108</sup> Letter from M. Peters to Rep. McGovern, reprinted in 147 Cong. Rec. E182 (Feb. 14, 2001).

<sup>109</sup> *Id.*; *Tasini*, 533 U.S. at n.3.

that the 1976 Act represented a break with the 200-year-old tradition that has identified copyright more closely with the publisher than with the author.<sup>110</sup>

The second footnote reference from Justice Ginsburg was – and I’m quoting again – that the Register of Copyrights has argued “vigorously” – did Marybeth ever argue anything *less* than vigorously? – that that the databases were engaged not only in reproduction and distribution, acts covered by Section 201(c)’s default privilege, but also in public display of the underlying works, which was not covered by the provision.<sup>111</sup> It must have been a disappointment to Marybeth that the Court did not decide the public display point for which she had argued in her letter.

But that Marybeth had argued so vigorously for, and cast so bright and searching a light on this new right of authors, this display right, whose importance Marybeth knew would only grow in the Internet Age – was but another example of Marybeth’s public service in the cause of copyright and of author’s right at the very highest level. Let me turn it over to June.

**Maria Pallante:** June, you’re up.

**June Besek:**<sup>112</sup> Okay. So, first of all, I’m June Besek, and I was the executive director of the Kernochan Center for Law, Media, and the Arts at Columbia Law School until I retired a few months ago.<sup>113</sup> And I want to begin with some comments that Professor Jane Ginsburg because, unfortunately, she wasn’t able to be here today.<sup>114</sup>

She says, “Marybeth lent her great distinction and vast experience to the Copyright Office. Largely homegrown, she proceeded through the echelons from the Office, from examiner to register. She combined mastery of technicalities of the copyright law with a never-failing appreciation of the law’s importance to creators. Protecting and promoting creativity remained her lodestar throughout her exceptional career in copyright.”<sup>115</sup>

Now, I should say that my comments are not quite as succinct as Jane’s, but I will try to keep them short as I know there are a lot of people that follow me. But first, Marybeth was a true expert in copyright. She knew the 1909 Act.<sup>116</sup> She knew the 1976 Act, everything in between, everything afterwards.<sup>117</sup> And this is partly what made her so effective on both the national and international stage. And at the same time, she was always willing to be a resource of for us. I can

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<sup>110</sup> *Tasini*, 533 U.S. at n.3.

<sup>111</sup> *Id.* at n.8.

<sup>112</sup> June Besek, *supra* note 25.

<sup>113</sup> *Id.*

<sup>114</sup> Jane C. Ginsburg is the faculty director of Kernochan Center for Law, Media and the Arts at Columbia Law School. See *Jane C. Ginsburg*, COLUMBIA LAW SCHOOL, <https://www.law.columbia.edu/faculty/jane-c-ginsburg> (last visited June 25, 2024). She is a renowned authority on IP law and the daughter of Ruth Bader Ginsburg. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Copyright Act of 1909, *supra* note 70.

<sup>117</sup> Copyright Act of 1976, *supra* note 29.

remember going to her when I had a particularly vexing question, and she was able to set me in the right direction.

Another thing, and I admired Marybeth for this, but she managed the Copyright Office with grace, with humor, with common sense. She was Register in a really challenging time. For one thing, as the law confronted the digital age, or maybe it was the digital age that confronted the law. I'm not sure which. But, the copyright field has become more polarized, and some people have become less respectful to others and even to the Office. And this is rather disheartening.

I have to say that most of this has surfaced since Marybeth's time, but it was there before. And for those of us who've been in the field for a long time, it's discouraging. Also, Marybeth began the process of moving the Copyright Office into the digital age, and that is a real test, as she found out, and all of the Registers since her have as well. But you face political, and financial, and labor union issues when you go down that road. We often forget that the Register's job isn't purely copyright law, but it entails the day-to-day operations of a very big office.

So, Marybeth was a mentor and a friend to me. I met her early in my career in the runup that the U.S. had toward accession to the Berne Convention.<sup>118</sup> So, this is some 35 years ago now. She was so friendly and approachable. It was great. It was refreshing because she was willing to deal with me and other junior associates and not just our senior colleagues, which in those days were mostly men. And so, it was just very confidence inspiring.

And then, finally, Marybeth was an incredibly warm and kind person. She was always fun to be with. This was especially true at meetings and conferences when her role was done, and she was able to just enjoy herself for a bit. So, I just have such fond memories of things like sharing a boat ride on the Danube or dancing at a Hungarian folk concert in Budapest. And then we marched – or maybe meandered would be a better word – in a parade in Oaxaca, Mexico.

And then we had our annual trip into Bolton Landing to go to Ben & Jerry's with Judy Saffer because we all had birthdays in close proximity in June.<sup>119</sup> So, we always had to celebrate together. So, everything was more fun because Marybeth was there.

One thing that I think she was blessed with was the ability to find humor in many things, including that she had a wonderful ability to laugh at herself, which many people do not have that ability. I just feel like it's sad to think about Marybeth, but I just think we were so lucky to have her with us, and I'm very glad of that. And with that, I will turn it over to David Nimmer.

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<sup>118</sup> The Berne Convention was adopted in 1886 and grants authors, musicians, poets, etc. with protection and rights to their own work. *See* BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, WIPO, <https://www.wipo.int/treaties/en/ip/berne/> (last visited June 19, 2024).

<sup>119</sup> *See* Judy Saffer, *supra* note 21.

**David Nimmer:**<sup>120</sup> Thank you so much, June. I'm David Nimmer. I teach copyright at UCLA. Art Levine mentioned it was 1966 when Marybeth joined the Copyright Office, specifically February 14th of 1966, the same day that a lawsuit was filed, which resulted in Judge Frederick van Pelt Bryan issuing an injunction against publication of a copyrighted work with no permission at all from the copyright owners.<sup>121</sup> Now, that case is noteworthy because the Second Circuit reversed under the caption of *Rosemont Enterprises v. Random House*.

I'm sure that most remember that case as the one involving the unauthorized biography of Howard Hughes.<sup>122</sup> First, he threatened the copyright owner, "I will make trouble for you."<sup>123</sup> But when that did not work, he did what any reclusive billionaire would do under the circumstances—he bought the magazine that owned the underlying articles which formed the basis of the book. So, he became the copyright owner in order to suppress publication.<sup>124</sup>

Well, that was too much for the Second Circuit, which invoked the public interest and ruled that the purposes of copyright law did not favor the copyright owner in this case. It's a sensibility that has emerged from time to time in subsequent cases, most recently *Garcia v. Google*, the Ninth Circuit's infamous case involving *Innocence of Muslims*.<sup>125</sup> It's a wonderful case to bring up the counterpoint that marked Marybeth's career because she was an unfailing champion of copyright law and the rights of authors.<sup>126</sup>

But as in that segment that you saw her giving education to the Copyright Office, she went back to first principles. What is its purpose? "To promote the

<sup>120</sup> Named one of "The 25 Most Influential People in IP" by The American Lawyer, David Nimmer is widely recognized as one of the leading experts in copyright law. See *David Nimmer*, UCLA LAW, <https://law.ucla.edu/faculty/faculty-profiles/david-nimmer> (last visited June 19, 2024). One of his highest achievements is authoring *Nimmer on Copyright*, which is the most popular reference treatise in the IP field. *Id.* This treatise has even been cited by the Supreme Court on numerous occasions. *Id.*

<sup>121</sup> 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

<sup>122</sup> Rosemont Enterprises commenced this action for a book entitled *Howard Hughes – A Biography of John Keats* due to its copyright ownership of a series of articles entitled *The Howard Hughes Story*. *Id.*, at 303. Howard Hughes was a public figure primarily in the aviation and motion picture fields, who shunned the limelight. *Id.*, at 305.

<sup>123</sup> Rosemont Enterprises' attorney *actually* warned Random House that Hughes himself was vehemently opposed to the publication of this book, "and would make trouble if the book was published." *Id.*, at 305.

<sup>124</sup> *Id.*

<sup>125</sup> *Garcia v. Google* started when Cindy Lee Garcia sued Google and YouTube to take down *Innocence of Muslims*, an anti-Islamic short film. The District Court denied Garcia's preliminary injunction, and a Ninth Circuit panel reversed it on appeal and ordered all copies of *Innocence of Muslims* to be taken down. *Id.* Later, the Ninth Circuit en banc rejected the panel's decision. 743 F.3d 1258 (9th Cir. 2014), *amended*, 766 F.3d 929 (9th Cir. 2014), *vacated*, 771 F.3d 647 (9th Cir. 2014), *substituted opinion*, 786 F.3d 733 (9th Cir. 2015) (*en banc*).

<sup>126</sup> For more commentary on that case, see David Nimmer, *Innocence of Copyright: An Inquiry into the Public Interest*, 63 J. COPYRIGHT SOC'Y 367 (2016).



progress of science and the useful arts.”<sup>127</sup> So, on occasion, the opposite sensibility must prevail.

Now, remember when the Copyright Society of the USA had its midwinter meeting in Santa Barbara, California?<sup>128</sup> After both of us [David and Marybeth] finished our presentations, I was asking Marybeth about the most contentious issue on the calendar and how she was reacting to the various sides. So, she explained to me that the proponents of this certain initiative had labeled her – and then she quoted a whole string of epithets of what they called her. But not to be outdone, the opponents on the other side added their own string of insults. And so, she concluded her answer to my question by telling me, not with her trademark laugh but rather with a sly twinkle in her eye, “The only thing I haven’t been called yet is the Whore of Babylon.” Well, I appreciated her biblical allusion and I appreciated what June just talked about, namely her own self-deprecating style, because she took the field with extreme seriousness, but not herself necessarily.

So, I am so grateful to the organizers of this panel for putting it together and for inviting me to commemorate the life of this champion of copyright law, doctrine, and the people involved in it for years and decades. Thank you so much. And with that, I will turn the gavel over to Lolly.

**Lolly Gasaway:**<sup>129</sup> Hi, everyone. I’m Lolly Gasaway, most recently retired from the University of North Carolina, where I was the Director of the law library for 22 years and taught copyright law, not only here but previously at the University of Oklahoma.<sup>130</sup> I first met Marybeth in the mid-1970s. It’s sort of shocking to realize that was almost 50 years ago. And Marybeth and I just hit it off immediately. We were both copyright nerds. That was clear. But besides that, we did like to have a good time and laugh, something many of you have mentioned about her.

I think my first contact with Marybeth was when she was a speaker at a library association meeting. At that time, I was just coming in as chair of the Special Libraries Association Copyright Committee.<sup>131</sup> So, Winston, you were not the

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<sup>127</sup> U.S. CONST., *supra* note 70.

<sup>128</sup> The Copyright Society’s Midwinter Meeting is the premier annual conference for copyright updates and discussions. *See* 2024 MIDWINTER MEETING, U.S. COPYRIGHT SOCIETY, [https://copyrightsociety.org/mw2024/#anchor\\_agenda](https://copyrightsociety.org/mw2024/#anchor_agenda) (last visited June 25, 2024).

<sup>129</sup> Laura (“Lolly”) Gasaway is a leading academic in the fields of art law and copyright law. *See* Laura N. Gasaway, University of North Carolina School of Law, <https://law.unc.edu/people/laura-n-gasaway/>. She started teaching at the University of North Carolina (“UNC”) in 1985 as the Director of the Law Library and Professor of Law. *Id.* During her time at UNC, she published numerous law review articles on law library and copyright, and she served on many accreditation teams for the ABA. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> The Special Libraries Association is a nonprofit, leading resource for specialized librarians, information professionals, and researchers. *See* ABOUT SLA, SPECIAL LIBRARY ASSOCIATION, <https://sla.org/page/About>.

only librarian there. Me, too. With Marybeth's education background, she was very interested in libraries and often wanted to ask me about specific library practices relating to copyright, so, we talked about copyright, but we also talked about libraries.

In those early days, publishers were pretty negative about libraries and librarians. Maybe they still are today, but I pretend they're not. And having Marybeth's support for the librarian, for interlibrary loan, and then for dealing with the digital environment was extraordinarily important.<sup>132</sup> Like everyone else, I found Marybeth to be extremely warm but also so knowledgeable. Through the years, we stayed in touch and continued to work on library issues together. Through her, in fact, I met many of you.

We stayed in touch, as I said, and I thoroughly appreciated her as an expert and a friend. She had a unique ability to turn professional colleagues into lifelong friends, and I think that was quite a skill. Later, Marybeth and I served together on the Board of Directors of the Copyright Clearance Center, and we were sad when she retired from that.<sup>133</sup> I'm still there and I miss Marybeth at those meetings.

I loved her smile, her laughter, and sharing stories with her. I think we all miss her. I know I certainly do. Next is a video from Mitch Glazier.

**Mitch Glazier** (on pre-recorded video): Hi there - Mitch Glazier here at RIAA headquarters. I'm so sorry that I can't be with you today and so glad that everybody is gathering to honor the memory of Marybeth and all the contributions that she's made to our culture, to artists and creators, and to our country. Her contributions will probably never be fully appreciated, but what everybody is doing today is a step in the right direction of remembering how important she has been to not only all of us in the community, but also to the country at large. I worked with Marybeth mostly when I worked on Capitol Hill on the House Judiciary Staff from 1995 to 2000. I will never forget her intelligence, her guidance, her expertise, her influence, and her laugh. Who could forget her laugh? It broke up hearings. It made Members of Congress feel comfortable, and oddly it gave you the reassurance that somehow everybody was gathering to do the right thing. She just had that magic. So, I'm so thrilled for this gathering and what comes out of it will serve to honor her memory and all those people who love her. Love you, Marybeth.

**Maria Pallante**: Well, thank you, everybody. Thank you to all the professors for joining us today. It makes a huge difference to have you here. And I'm gonna turn it now over to my co-host, Regan Smith.

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<sup>132</sup> *Id.*

<sup>133</sup> The Copyright Clearance Center (CCC) is a voluntary, leading information solution provider to various organizations. See ABOUT CCC, COPYRIGHT CLEARANCE CENTER, <https://www.copyright.com/company-about/> (last visited June 19, 2024). CCC advocates for copyright around the world, focusing on educational programs and content, software, and professional services for customers. *Id.*

**Regan Smith:** Thank you. Thank you, all. If we can have the next group of speakers, turn their cameras on to be ready. So, this is Jule Sigall, Michele Woods, Mary Rasenberger, Catie Rowland, Jacqueline Charlesworth, Nancy Wolff, and Fritz Attaway. We're going to hear from another set of Marybeth's key colleagues and friends. And before we do, to start that, we will have, as Lolly mentioned, a recorded message from Mitch Glazier, who was unable to show up live today. So, if we could, turn to the video.

**Mitch Glazier (on pre-recorded video):** Hey, Copyright Society. Mitch Glazier here at RIAA headquarters.<sup>134</sup> And I'm so sorry that I can't be with you today and so glad that everybody is gathering to honor the memory of Marybeth and all the contributions that she's given to our culture and to artists and creators, and our country. Her contributions will probably never be fully appreciated, but what everybody is doing today is a step in the direction of remembering how important she is to all of us in the community but also to the country at large.

I worked with Marybeth mostly when I was on the Hill on the House Judiciary Staff from 1995 to 2000. I will never forget her guidance, her expertise, her influence, and her laugh. Who could forget her laugh? It broke up hearings. It made members feel comfortable, and oddly it gave you a reassurance that somehow everybody was gathering together to do the right thing. She just had that magic. So, I'm so thrilled that this gathering and what comes out of it will serve to honor her memory and all those people who love her. Love you, Marybeth.

**Regan Smith:** Thank you. And now we will have Jule Sigall, please.

**Jule Sigall:**<sup>135</sup> Thanks, Regan, and thanks to Maria and the Copyright Society for including me in this. It's an honor to be a part of this group. So, there's three things about Marybeth that I wanted to highlight in my experience with her, some of which you've heard already. First, she really was, as Karyn Temple said, a true copyright nerd.

I can remember one day in the Copyright Office when I was an associate register.<sup>136</sup> We spent a few hours deep in the dark caves of the Copyright Act trying to figure out why the Section 304 renewal right seemed to pass per capita, whereas the Section 203 termination right seemed to pass per stirpes to

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<sup>134</sup> Recording Industry Association of America (RIAA) has headquarters in Washington, D.C. *RIAA HQ*, RIAA, <https://tv.riaa.com/> (last visited June 17, 2024).

<sup>135</sup> Jule Sigall worked as an Associate General Counsel for Copyright for Microsoft, before retiring in September 2023. *See Jule Sigall*, LINKEDIN, <https://www.linkedin.com/in/jule-sigall/> (last visited July 1, 2024). Before that, he was an Associate Register for Policy & International Affairs. *See Jule Sigall*, BERKELEY LAW, <https://www.law.berkeley.edu/research/bclt/past-events/2014-conferences/april-2014-the-next-great-copyright-act/speakers/jule-sigall/> (last visited June 19, 2024). He had also been a principal drafter for the Office's Report on Orphan Works, testifying before Congress.

*Id.*

<sup>136</sup> *Id.*

descendants of authors and copyright owners.<sup>137</sup> And it's one of those great copyright puzzles. And you've seen Marybeth teach.

Her infectiousness for that kind of puzzle to sort out was always just the best part of working for her, as David Carson has mentioned, just to dive into that really try to figure it out and understand how it all fits into the whole copyright system was such a great, great experience.

The second thing which other people have mentioned is that behind every one of those great copyright puzzles, there were people. And she loved people and copyright. She loved authors. She loved writers. She loved musicians. She loved librarians, researchers, teachers, law students, law professors; and she was willing to talk to anyone about copyright law. And I remember David Carson, and I would often probably roll our eyes when... I don't remember a time in my four years at the Office that Marybeth turned down a speaking opportunity. She always accepted the chance just to talk about copyright.

Now, sometimes, she sent one of us to speak instead of attending herself, and she once sent me to Muncie, Indiana to talk about copyright law. And I remember her telling me, "You not only get to go to Muncie, Indiana. You get to go to Muncie, Indiana, to talk about copyright. And what could be better than that?"

And then anytime you got a chance to trail her at WIPO at a General Assembly's meeting or the Copyright Society annual meeting at Lake George, it was just the best to see how many people knew of her, felt that she was a dear friend and could spend the time talking to her and reminiscing about all the great and wonderful copyright things that they had done together. It was a real treat.

And I guess, lastly, I would say the third thing about her, which others have mentioned, is her optimism. Her optimism was just the best. And part of the reason she is willing to talk to everyone about copyright is she always thought something good would come out of that conversation. And it was just one of the most inspiring things to be around that optimism, and I will forever be grateful for her to just be optimistic about copyright and about what it meant for everyone. So, thank you again for this great chance to chat with you and remember Marybeth. And now I think I'm turning it over to Michele Woods.

**Michele Woods:** Yes, that's right. Thanks, Jule. And so happy to see so many friends of Marybeth's and was having a hard time thinking what to say about Marybeth, figuring coming this late in the lineup, there might not be much to add. But I did come to know Marybeth later than many here, and of course, I'd heard of her before I came to join her, Maria, and David in the Copyright Office following something later than Jule from Arnold and Porter.

I had some trepidation in coming to work for this legend after having only tagged along with Bob Garrett<sup>138</sup> for some meetings with this leader of the

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<sup>137</sup> *Special Edition: Marybeth Peters, supra* note 54.

<sup>138</sup> Robert 'Bob' Garrett is a former partner at the Washington, D.C., office of Arnold & Porter LLP. Throughout his career, Garrett has practiced before the federal courts, the U.S.

copyright world, but she very quickly dispelled this impression or this hesitation with her modesty and humility when she asked me on the first day if I could please write her some clever remarks for digital exhaustion for [inaudible] [01:36:45], so she would not be intimidated by all those brilliant copyright academics. When I realized that she was serious, I knew I had nothing to fear, even though I had to think that perhaps the intimidation was on the other side.

And Marybeth immediately welcomed me into her world, as so many have described, introduced me to a whole cast of characters from her past and present in many aspects of her life. Took a little bit of time to figure out who was actually there, who was in the library, who was in Rhode Island, who was in the Congress. But when she took you in, she took you into her whole world.

And I remember after a few weeks in the Office, my mother died, and she very kindly supported me, including giving me one of her precious symphony tickets, because she was always a lover of music, as some others have mentioned. We started working with Marybeth, Maria, and David on fascinating topics from Google Books<sup>139</sup> to SOPA and PIPA<sup>140</sup> – perhaps shouldn't be mentioned, but it was an experience – the Marrakech Treaty.<sup>141</sup>

And I was in the Office when Marybeth retired and, true to form, told her classic stories about walking into the swimming pool and getting locked in the

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Copyright Office, and the Copyright Royalty Board. *Q&A With Arnold & Porter's Bob Garrett*, MEDIA & ENTERTAINMENT LAW360 (Aug. 31, 2011), [https://www.arnoldporter.com/-/media/files/perspectives/publications/2011/08/qa-with-arnold-porters-bob-garrett/files/publication/fileattachment/arnoldporterllpmediaentertainmentlaw360083111.pdf?rev=228a10cd5cb14d6c9f695cf09069b810&sc\\_lang=en&hash=F9F97B6D8931384240A040BBB0A64B2A](https://www.arnoldporter.com/-/media/files/perspectives/publications/2011/08/qa-with-arnold-porters-bob-garrett/files/publication/fileattachment/arnoldporterllpmediaentertainmentlaw360083111.pdf?rev=228a10cd5cb14d6c9f695cf09069b810&sc_lang=en&hash=F9F97B6D8931384240A040BBB0A64B2A).

<sup>139</sup> Google Books is a digital library available for anyone to access. Millions of books from libraries and universities around the world were scanned and uploaded. Many of these books are no longer printed or available for purchase. The public domain books can be downloaded for free, otherwise only the pages relevant to the search criteria can be viewed. *Google books*, STANFORD.EDU, <https://cs.stanford.edu/people/eroberts/courses/cs181/projects/2010-11/GoogleBooks/background.html> (last visited June 17, 2024).

<sup>140</sup> The Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) were a series of bills that would have created a blacklist of censored websites. The bill was aimed at websites that allowed indiscriminate piracy, but the use of vague definitions expanded the bill to including hosting websites such as Dropbox, Etsy, Mediafire, etc. The bills were defeated by online campaigns that culminated in the Internet Blackout of January 2022. *SOPA/PIPA: Internet Blacklist Legislation*, EFF, <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill> (last visited June 17, 2024).

<sup>141</sup> The Marrakesh Treaty was adopted on June 27, 2013 and began on September 30, 2016. The treaty made the production and international transfer of books for people with visual impairments or blindness easier by establishing limits and exceptions to traditional copyright law. *The Treaty*, WIPO, [https://www.wipo.int/marrakesh\\_treaty/en\\_](https://www.wipo.int/marrakesh_treaty/en_) (last visited June 17, 2024).

ladies' room, already referenced by David. Her love of dogs and of Maggie<sup>142</sup> was also strongly apparent at that time. And, of course, Kate Spelman was instrumental in Maggie joining her life, and we all heard that story many times.<sup>143</sup>

Marybeth encouraged me to follow the international route and to move to Geneva. She had spent a short time at WIPO and told me she would have wanted to stay longer, but she was needed back in Washington. When I think of Marybeth, I think of her great loyalty and her unique ability to bring people together just by being herself. Others have spoken about the way that Maria and David supported Marybeth and Maggie in the years after Marybeth left the Office.

And I remember even before she left the Office, when Maria had gone away for a short time to another role, Maria reminded me to be sure to buy cherries for Marybeth and make her eat them for her health. So, I did my best. This deep loyalty also drew people together. So, when I left the Office to go to WIPO, I found I had a wonderful supportive colleague in another loyal friend of Marybeth's, Gaun Hong, who is also on this call.<sup>144</sup> Gaun Hong had met Marybeth when she was an intern in the Copyright Office from China and became fast friends with Marybeth for many years after that.

And when I arrived at WIPO quite some years later, Gau Hong kindly said that she would draw me into the circle of that friendship, because a friend of Marybeth's was a friend of hers. So, Marybeth was looking out for me all the way to Geneva. And every time I return to D.C. from Geneva, many of us on this call, different ones at various times, would get together with Marybeth for a meal to hear her stories about the dogwalker and hear her wonderful laugh. And this continued for quite some time, even when it became clear she needed more support. There was a period where she was mixing me and Karyn up, but we didn't mind.

Everybody still enjoyed being together with Marybeth. And through the struggles that came health-wise and in other ways, we kept up this habit until... In my case, my final meal with Marybeth was actually with David and Fiona on New Year's Day, just before the pandemic.<sup>145</sup> And I remember well that she was still talking about Gau Hong and their plans to spend time together in retirement. So, she just never forgot a friend.

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<sup>142</sup> Maggie was Marybeth Peters' beloved Bedlington Terrier. *Official Obituary of Marybeth Peters*, DE VOL FUNERAL HOME, <https://www.devolfuneralhome.com/obituaries/Marybeth-Peters?obId=26015312> (last visited June 17, 2024).

<sup>143</sup> Katherine C. Spelman, *supra* note 69.

<sup>144</sup> Dr. Guan Hong Tang is a Director of Dual LLM in Commercial Law at Queen Mary University of London and has worked in academia since 1998. *See* Guan H. Tang, QUEEN MARY UNIVERSITY OF LONDON SCHOOL OF LAW, <https://www.qmul.ac.uk/law/people/academic-staff/items/tang.html> (last visited June 25, 2024). Prior to this, she researched information technology and intellectual property rights in China at Queen's University Belfast. *Id.*

<sup>145</sup> The 2020 COVID-19 Pandemic.

I also recall the wonderful 80th birthday party dinner organized in Baltimore by several on this call when she rallied to have a wonderful time with so many. And that's really, in my mind, a beautiful way to remember Marybeth. Now, I turn it over to Mary Rasenberger.

**Mary Rasenberger:**<sup>146</sup> Thank you, Michele. And I want to thank the Copyright Society, Maria, and Regan for organizing this. It's been just so beautiful and heartwarming to hear all of these stories and remembrances, and I think we all need it. As CEO of the Author's Guild,<sup>147</sup> I could talk about how much Marybeth championed authors' rights and all of her incredible accomplishments in protecting authors, which are immense, and we've heard about some of them. She liked to remind people that without creators and the copyright incentives for creators, there would be no arts. And as we just heard her say in the video, there would be no civilization.

But Marybeth was just an important person to me personally. She's still a role model for me. So, I wanna focus my remarks on Marybeth as an active mentor and friend to so many of us in the copyright community, and especially to women. She inspired and encouraged so many of us in our careers in copyright, which we've already heard about from a number of people. And like many others, I first met Marybeth through the Copyright Society. It was over 33 years ago. She was a larger than life, beloved, and joyous presence at the annual meetings, even before she became Register.

I remember when I was a shy junior associate, how friendly and welcoming she was even then. She was always interested in talking to junior lawyers and hearing our views, making us feel like we actually had something to contribute, as others have mentioned. And she would use causal conversations as an opportunity to teach anyone around about copyright and its importance to the arts. The first time I spoke at an annual meeting, even though I was a complete nobody, she went out of her way to find me and tell me I'd done a nice job. And that was the kind of person Marybeth was.

She was so different from the men I had worked for, and they were all men. This was the late '80s and '90s. She was also different from the senior women in the firms I'd worked at that tended to be very buttoned up. In those days, we all

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<sup>146</sup> Mary Rasenberger is the Executive Director of the Author's Guild and Authors Guild Foundation. Rasenberger is on the Council of American Bar Association's Intellectual Property Section, a Founder of Copyright Awareness Week, an Advisor to the Executive Committee of the Copyright Society of the USA, and an Advisor to the American Law Institute's Restatement of Law, Copyright. She is also a Lecturer in Law at Columbia Law. Rasenberger previously worked for the U.S. Copyright Office and Library of Congress as a senior policy advisor and program director for the National Digital Preservation Program. She was also a partner at Cowan, DeBaets, Abrahams & Sheppard and Counsel at Skadden where she specialized in publishing, entertainment, media, and creators. *Mary Rasenberger*, COLUMBIA LAW SCHOOL, <https://www.law.columbia.edu/faculty/mary-rasenberger> (last visited June 17, 2024).

<sup>147</sup> See The Authors Guild, *supra* note 36.

felt like we had to be very serious and act like men to the extent we could. And Marybeth, by contrast, was completely female, completely herself. She was warm, funny, smart, and often with a twinge of sassy.

She was so fun to talk to about copyright. She had such a passion for it, and that was infectious. And Marybeth was so approachable – that bear hug that Karyn spoke of – that in 2002, when I saw a notice in a Copyright Society publication about a policy and international job opening at the Copyright Office, it sounded like my actual dream job. I never knew such a job could exist. I was so excited. I picked up the phone, even though it was almost 7:00 p.m., and called her. And lo and behold, Marybeth picked up, and she actually remembered me from the Copyright Society. I think she remembered everybody in the community.

We ended up having this interesting conversation about copyright. I loved working for Marybeth. I think everyone did. She made work exciting and fun. David spoke about that. And when she laughed, which was often, the entire register suite could hear it, and I think we all laughed along silently from our offices. That was really powerful.

We knew we could go talk to her about anything anytime and that she would provide wise and fair advice. As David and others mentioned, even though she knew more about copyright than anyone else, she sought our advice and was really interested in and valued our opinions. She had a completely open-door policy, even though she was always busy.

She usually worked late, as I did. And in those evenings, she always welcomed a visit. I feel like I got the best of Marybeth in those evening chats. Not only would she answer my myriad questions, [but] she'd teach me about the history and the intricacies of copyright law, and she regaled me with stories about the past goings-on or sometimes current in the copyright office and the community, that copyright gossip that Richard spoke about.

And she would talk about her mishaps, which were not all that infrequent. She always thought they were just hilarious. Those were life lessons and a lesson in not taking ourselves too seriously.

Marybeth loved animals, as did I. And one evening in one of those conversations, I somewhat joking told her I was gonna go work to help baby elephants in Africa, and she took me seriously. She jumped on me saying, "Oh, no, no, no. You cannot leave copyright law." To Marybeth, that was a mortal sin.

Marybeth understood her role in the copyright world was bigger than herself. She left a legacy of so many copyright lawyers behind her. Look at everybody on the Zoom today. Marybeth felt mentored by Barbara Ringer.<sup>148</sup> And as a teacher, she understood the importance of mentoring. And now, I think it's up to all of us

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<sup>148</sup> Barbara Ringer served as the 8th Register of Copyrights from 1973-1980, and was the first woman appointed to the position. See *generally* *Barbara Ringer*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/registers/ringer/ringer.html> (last visited June 18, 2024).



to pass on Marybeth's spirit and love of copyright and creative arts. I'm gonna turn it over to Catie Rowland now.

**Catie Rowland:**<sup>149</sup> Thank you, Mary. Really, I appreciate it. It's so nice to hear from everyone today and hear everyone's experiences. I just want to say a few brief words about Marybeth today. So, there is no doubt that her unparalleled experience and intellectual curiosity benefited the people lucky enough to work with her, the government she served, and the copyright system overall. You can see this from the comments you already heard today.

One of her many gifts, as you've heard, was her ability to easily communicate often complex copyright principles. To be smart and knowledgeable is one thing, but to be able to share that intelligence and knowledge in a way that truly resonates is an entirely different and rare quality. She explained copyright in many ways, from teaching copyright office employees about the 1976 Act, which you saw a little clip of earlier, to testifying before Congress,<sup>150</sup> which I dare say is also a method of teaching.

Marybeth drew crowds. Her annual luncheon speech in D.C. was often sold out. And she delivered news about copyright in a way that people remember, in part because of her delivery, and in part because she was just so insightful. Throughout these experiences, she was quick to make a point.

For example, when writing about constitutional challenges, she detailed the complex background and then pivoted saying, "You might ask, 'What does all of this have to do with constitutional law governing copyright?' And the answer is more than you would think." With those few words, she grabbed the reader's attention and steered them toward a clear answer to a complicated question.

Marybeth often shared stories. You've heard about some of them today about her travels while engaging in international copyright discussion, and these stories often include humorous elements, to say the least. While some might think her ability to spin a yarn is somehow distinct from her expertise and ability to shape copyright thinking, it's actually quite the opposite. Her way with words and engaging personality helps all remember what she had to say about copyright, and what she had to say was incredibly valuable.

I was lucky to be able to work with Marybeth and to now work at CCC, where she held a board seat after her retirement from the Copyright Office.<sup>151</sup> At the Copyright Office, she went out of her way to make me feel comfortable, even

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<sup>149</sup> Catie Rowland is the current Vice President and General Counsel of the Copyright Clearance Center. Previously, Rowland was the Associate Register of Copyrights and Director of the Office of Public Information and Education at the U.S. Copyright Office. *Catherine Zaller Rowland*, LINKEDIN, <https://www.linkedin.com/in/catherine-zaller-rowland-5940918/> (last visited June 17, 2024).

<sup>150</sup> *Special Edition: Marybeth Peters*, *supra* note 54.

<sup>151</sup> After retiring, Peters entered private practice and sat on the board of directors of the Copyright Clearance Center until her eventual, final retirement. *Special Edition: Marybeth Peters*, *supra* note 54.

though I was but one of many lawyers. I soon learned that I was not alone. She held her door open to so many people at the Copyright Office, which was remarkable. She was the head of the agency, and here she was, welcoming us all in. This openness helped us grapple with and learn copyright in a deep and meaningful way.

And as I have watched the others speak today, I am yet again struck by how Marybeth not only helped us all individually, but how she helped shape generations of lawyers to be better participants in the copyright system. At CCC, she was a treasured member of the board. When she was named to the board, Marybeth said that she was looking forward to being part of CCC's growing thought leadership, policy efforts, and presciently observed that licensing has always been important, but it will only become more so in the future.

During her years on the board, Marybeth served with distinction as a fiduciary of copyright principles and as a mentor and thoughtful to CCC colleagues. CCC's president and CEO have noted that Marybeth's enormous legacy was just outsized and explained that she was so fortunate to have known her and to have had the opportunity to learn from her and to laugh with her.

Today, I have tried to provide a glimpse into Marybeth's vast contributions to copyright, but it is nearly impossible to truly capture her full imprint. Her legacy is not simply written documents and commemorated in speeches and conferences. Instead, it lives on in every person who worked with her and learned from her, enrichment for us all.

When faced with a question of how much Marybeth impacted copyright, I think I'll borrow some of her words in response. The answer is more than you would think. And with that, I will turn it over to my friend, Jacqueline Charlesworth.

**Jacqueline Charlesworth:**<sup>152</sup> Thank you, Catie. And I'm so very honored to be here today in the company of all these amazing copyright lawyers and fans of Marybeth. Much has already been said about Marybeth's historic career. So, I thought I would share a couple of personal anecdotes that demonstrate Marybeth's profound impact on those who were lucky enough to have known her.

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<sup>152</sup> Jacqueline Charlesworth served as General Counsel and Associate Register of Copyrights from 2013 to 2016. During her tenure at the Copyright Office, she oversaw the preparation of two influential reports, *Copyright Small Claims* (2013) and *Copyright and the Music Marketplace* (2015), both of which set the stage for significant amendments to the Copyright Act. After leaving the Copyright Office and reentering private practice, Charlesworth was instrumental in developing and framing the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018, landmark legislation to update the U.S. music licensing system. In 2020, Congress enacted the Copyright Alternative in Small-Claims Enforcement (CASE) Act based on the model statute included in the 2013 Copyright Office report. Now helming a firm of her own in Los Angeles, Charlesworth handles music and copyright-related litigation, transactional and policy matters.

As many of you know, I'm a music lawyer, and it was music that first brought me and Marybeth and me together.<sup>153</sup> I don't mean singing or playing. I mean the really fun stuff: music licensing. As you likely know, Marybeth had been a music examiner and was very talented with music, not just the law around it. In my early years of practice, I was often dispatched to the Copyright Office to represent the interests of music publishers, an intimidating experience for me as a young lawyer.

I remember a particular meeting I had scheduled with the Office to discuss the intricacies of certain Section 115 regulations,<sup>154</sup> at which meeting I was surprised and slightly alarmed to find myself addressing the Register of Copyrights herself, in addition to her staff attorneys. Marybeth was not only fully engaged in the arcane topic of discussion, but somehow led me to believe that I knew what I was talking about.

At the end of the meeting, Marybeth asked me if I'd like a copy of Circular 92.<sup>155</sup> Well, of course, I said yes, although I'm pretty sure I had absolutely no idea what she was talking about. Circular 92 was, and still is, the way people of the Copyright Office refer to the book form of the Copyright Act. Anyway, she handed me this book. And her gift to me that day instilled confidence in me that, in some small way, I had arrived as a copyright lawyer.

Fast-forward to quite a few years later, shortly after Marybeth had retired from the Office, I was working at a New York firm and looking for a side gig doing pro bono work on behalf of creators. I had scheduled a meeting in Washington with a nonprofit organization and, at the suggestion of Professor Jane Ginsburg, had also made arrangements to see Marybeth in Virginia the following day to discuss the possibility of launching a law school clinic.

Well, the first meeting could not have gone worse, as it was made very clear to me by the organization that they had no particular desire or need for my free services. I was incredibly discouraged, indeed so discouraged that I came very close to dropping the whole *pro bono* idea and just returning to New York. Fortunately, though, someone talked me out of that, urging me to stay in DC and meet with Marybeth. And so I pulled myself together and went out to Alexandria the next morning to see her. This was after she had retired.

Marybeth was enthusiastic about the clinic idea and promised to follow up with some contacts of hers in academia, which she, in fact, did, but she also took the time to ask me what I really wanted to be doing with my career. And I confessed an interest in copyright policy. She then suggested that I consider

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<sup>153</sup> Charlesworth actually started her own entertainment law firm at the age of 60. *Id.*

<sup>154</sup> 17 U.S.C. § 115(a)(1)(1776). Section 115 provides for a compulsory license for the reproduction and distribution of musical works.

<sup>155</sup> Circulars are published authorities providing information to a general audience ranging from fundamental concepts of copyright law to policies of the Copyright Office. *See* CIRCULARS, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/circls/> (last visited June 25, 2024).

working at the Copyright Office and offered to put in a good word for me with her successor, Maria Pallante. They were going to be traveling together on a plane to Los Angeles the next day to. And she did that as well.

So several months later, there I was in the Copyright Office. We've heard a lot about how Marybeth – I think someone used the phrase “altered life trajectories.” She certainly altered mine. Like the very best of leaders, she didn't keep people down but lifted them up. Her influence on the communitythe copyright community that we all love so much, will live on in those she supported and inspired. I know it does in me.

And with that, I'm going to turn it over to Nancy Wolff.

**Nancy Wolff:**<sup>156</sup> Thank you, Jackie. Like all of you, it's just amazing to be here and to pay tribute to Marybeth. The only thing I regret now is that I never worked with her. But like many of you, I did get to know her and meet her through the Copyright Society annual meetings. I looked forward to that annual update from the Copyright Office each year. She would also host the Copyright Office day with the ABA IP Copyright Division.<sup>157</sup> And she was always, as everyone's mentioned, in great spirits and had a talent for speaking that not only made everything clear but always, even in the darkest times, was uplifting.

I still have a memory of her during the anthrax scare days in Congress when all the registrations were, I guess, literally... Was it irradiated or whatever the word is?<sup>158</sup> But she held up this charred, blackened registration paper application, which it was at the time, and some melted-down CD and just laughed. So, she could even deliver bad news with a smile.

But where I really got to know her professionally and could see her deep love for trying to solve problems and to help creators was as counsel to a trade association to the Image licensing industry. It's had different names over the

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<sup>156</sup> Nancy Wolff is a partner at Cowan, DeBaets, Abrahams & Sheppard LLP where she primarily focuses on digital media, art law, licensing, and publishing. She serves as Counsel to the Digital Media Licensing Association, co-chair of the firm's Litigation Department, and co-chair of the firm's Art Law Group. She previously served as the President of the Copyright Society and is a member of the ABA IP Task Force on Copyright Reform. Nancy E. Wolff, CDAS, [https://cdas.com/people/nancy\\_wolff/](https://cdas.com/people/nancy_wolff/) (last visited June 19, 2024).

<sup>157</sup> The ABA IP Copyright Division is composed of various subcommittees, such as Copyright and Emerging Tech. or Visual Arts and Dramatic Works, focusing on copyright law and practices. See Copyrights and Related Division, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/intellectual\\_property\\_law/committees/copyrights-division/](https://www.americanbar.org/groups/intellectual_property_law/committees/copyrights-division/). (last visited June 19, 2024).

<sup>158</sup> See *Amerithrax or Anthrax Investigations*, FAMOUS CASES AND CRIMINALS, FBI, <https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation> (last visited June 25, 2024). (“Soon after the terrorist attacks of 9/11, letters laced with anthrax began appearing in the U.S. mail. Five Americans were killed and 17 were sickened in what became the worst biological attacks in U.S. history.”).

years: PACA and DMLA (Digital Media Licensing Association).<sup>159</sup> But this was pre-Internet, and photographs were literally mailed to customers. And these big glossy catalog books were published so that publishers and advertisers would know the sample of the type of works that photo libraries held at that time literally in file cabinets.

And these big glossy books had high-quality images in them, and surprisingly, some people wanted to use them without paying. So, we were trying to figure out how to register these photographs, which was very difficult because the individual images were all owned by hundreds to thousands maybe of contributors, but there was just one company publishing them in a catalog. And so, as an association, we would have meetings at the Copyright Office with the heads of all the departments to discuss solutions.

And everyone, including Marybeth, worked creatively to try to solve this problem and came up with language in contributor agreements that you could transfer copyright to the publisher of the catalog.<sup>160</sup> So that way, there'd be one copyright owner to the catalog and that registration would also protect the image because there was no purpose in protecting any selection and arrangement.

And then, when catalogs became Internet websites, we worked with the association to figure out ways to have databases that could protect images.<sup>161</sup> And she was always there listening and trying to, as everyone said, solve problems. And I loved seeing the video of her talking about: why do we have copyright? Because we do want to encourage creators, and there does need to be economic incentives.

So, she always understood that copyright protection had to work for individual authors as well as corporations, publishers, film studios, record labels, and always looked at ways to help those who really needed the system to work for them, came up with – I don't remember. She came up with group registration

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<sup>159</sup> The Digital Media Association works to “ensure the future” of the media production, distribution and licensing industry. See Working to Ensure the Future of Our Industry, DIGITAL MEDIA LICENSING ASSOCIATION, <https://www.digitalmedialicensing.org/whatwedo> (last visited June 19, 2024). Focusing on protecting the rights of the creators in this digital metasphere, this Association has spearheaded the charge to protect copyright and strengthen its subsequent laws. *Id.*

<sup>160</sup> What Peters deemed a “pervasive” problem, the issue of orphan works – works whose copyright owners cannot be located easily or reasonably – came to a head as libraries and archival systems started to digitize their collections. See David R. Hansen et. al., *Solving the Orphan Works Problem for the United States*, 37 Colum. J.L. & Arts 1, 3 (2013). Since copyright law has a relatively hefty injunctive relief and damages ceiling, it would cause the potential liability to outweigh making these collections available at all. *Id.*

<sup>161</sup> Noting specific limitations for digital information resources, an Office report described situations where there was inaccurate or conflicting information regarding the materials. See REPORT ON ORPHAN WORKS, U.S. COPYRIGHT OFFICE 1, 31 (2006). This highlights a conflict between rendering records more accessible for the general public and protecting the original source, and its subsequent copyright. *Id.* The Office has attempted to remedy this problem with recommendations and proposed solutions. *Id.*, at 5-7.

of photographs to help photographers register their works. She was always there working with the creative community to try to make a system work for everybody.

And I know I'm at the end of the batting lineup. So, I don't wanna take too much time. But like everyone else, I remember Marybeth with her warm, personable approach, her infectious smile, the crazy laugh, and someone who cared deeply about creators and their rights and a workable and very fair copyright system. She is the reason I love practicing copyright law [and] one reason I love this copyright community.

And I hope we can all carry on what she started and be the type of mentor and caring person for the upcoming generations of copyright lawyers. And with that, I will pass it on to another, I think, another fellow Rhode Islander, Fritz Attaway.

**Fritz Attaway:**<sup>162</sup> Thank you. I'd like to add my thanks to Maria and Regan for putting this one. It truly has been a wonderful experience. I knew Marybeth for more than 40 years, starting in 1976, when I knew absolutely nothing about copyright and had the good fortune to learn from the likes of Marybeth and Barbara Ringer<sup>163</sup> and Jon Baumgarten.<sup>164</sup> I still will never reach their level of knowledge, but I certainly appreciated the opportunity to learn from them.

I think this has been a fitting tribute to the life of Marybeth, whose legacy is not just about copyright. It's about being a really good decent human being who touched the lives of so many and contributed to the lives of so many, certainly myself and all of the speakers who you've been listening to today. And I know we've exceeded our time limit. And in the interest of those of you who may still have to work for a living, unlike myself, I'll turn it over back to Regan to give her closing remarks. Thank you.

**Regan Smith:**<sup>165</sup> Thank you. Thank you, everyone. If people could stay on for just a couple more minutes, I think we are nearing the end of the program, but I want to note it's been about two hours, over a half hour over, and we've still got almost 100 people on. I think in this age of virtual fatigue it is really just a testament to Marybeth herself as well as what is really powerful about the copyright community. We have one more video from someone who was not able to show up today, David Israelite.<sup>166</sup>

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<sup>162</sup> Fritz Attaway is the former Executive Vice President and MPAA Special Advisor of Motion Picture Association of America. See *Fritz Attaway*, LINKEDIN, <https://www.linkedin.com/in/fritz-attaway-b788889/> (last visited June 17, 2024); *Our People*, MPA, <https://www.motionpictures.org/who-we-are/#our-people> (last visited June 17, 2024).

<sup>163</sup> See Barbara Ringer, *supra* note 148.

<sup>164</sup> See Jon A. Baumgarten, *supra* note 51.

<sup>165</sup> See Regan Smith, *supra* note 4.

<sup>166</sup> David Israelite is President and CEO of the National Music Publishers Association. Israelite has previously served as Deputy Chief of Staff and Counselor to the Attorney General of the United States, and Chairman of the Department's Task Force on Intellectual Property. Additionally, Israelite was a part of the Commercial Litigation Department at

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And then I would urge you to stay on because we have a video montage that we played at the beginning. If you didn't get a chance to see it, it is really quite powerful to watch the photo montage. And these remarks again, thank you, everyone, for the thoughtful remarks you prepared today. And we will be working to publish it in the Journal of the Copyright Society. So, video.

**David Israelite (on video):** I'm so honored to be given the opportunity to speak about my friend and a true champion for songwriters, Marybeth Peters. When I was hired at [inaudible] [02:02:07], one of my first orders of business was to try to create an annual meeting that would become a celebration of the songwriting and music publishing industry. And for the very first one, I invited Marybeth to be our keynote speaker, and everyone in that room learned why we were such a fan of hers.

Marybeth will be remembered not just as a great Register but really as a champion for songwriters. She was an advocate for songwriters. So much of what songwriters and music publishers enjoy today is built on the foundation that Marybeth Peters helped to build throughout her many years of helping to create a healthy, vibrant copyright community. She'll be missed tremendously.

And I think one thing that we'll never forget is that she was someone that always made you feel at ease, had a smile, and really related to what you were dealing with in the songwriting community. And that's why so many songwriters so much enjoyed working with her. She'll be tremendously missed, but she'll never be forgotten. Thank you so much, Marybeth, for everything that you did.





**PART II**

**ARTICLES**



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**A MATTER OF FACTS:  
THE EVOLUTION OF THE COPYRIGHT FACT-EXCLUSION AND  
ITS IMPLICATIONS FOR DISINFORMATION AND DEMOCRACY**

by JESSICA SILBEY\*

*The Article begins with a puzzle: the curious absence of an express fact-exclusion from copyright protection in both the Copyright Act and its legislative history despite it being a well-founded legal principle. The Article traces arguments in the foundational Supreme Court case (Feist Publications v. Rural Telephone Service) and in the Copyright Act's legislative history to discern a basis for the fact-exclusion. That research trail produces a legal genealogy of the fact-exclusion based on early copyright common law anchored by canonical cases, Baker v. Selden, Burrow-Giles v. Sarony, and Wheaton v. Peters. Surprisingly, none of them deal with facts per se, but instead with adjacent and related copyright doctrines. A close look at these cases and relevant legislative history uncovers provocative aspects of the fight over facts through the nineteenth and twentieth centuries.*

*This fight is really a debate over the role facts play in the evolving place of human labor and the contours of social progress in crucial periods of economic and political development. The nature of "facts" and their increasingly central role in governance and technological progress puts pressure on their production and control, including by and for businesses and democratic institutions, such as legislatures and agencies. Revisiting this history amplifies the need for a broader copyright fact-exclusion and a richer public domain that*

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\*Professor of Law and Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. I am especially grateful for email and in-person conversations with Amy Adler, David Ardia, Shyam Balganes, Barton Beebe, Oren Bracha, Robert Brauneis, Dan Burk, Maggie Chon, Julie Cohen, Jorge Contreras, Jeanne Fromer, Brian Frye, Woody Hartzog, Justin Hughes, Jessica Litman, Glynn Lunney, Michael Madison, Bill Marshall, Bill McGeeveran, Mark McKenna, Mike Meurer, Tyler Ochoa, Gideon Parchomovsky, William Patry, Jennifer Rothman, Pam Samuelson, Susan Silbey, Kara Swanson, and Rebecca Tushnet. Early drafts of this Article were significantly improved by comments from participants at WIPIP 2022, IPSC 2022, the University of Pennsylvania Copyright Roundtable 2023, and the UNC and Boston University Law School Faculty Workshops. I had invaluable help from my research assistant Siddhu Anandalingam, from law librarians Shira Megerman, Stefanie Weigman, and Sarah Stupak, and from Stephanie Sykes. Many thanks to the faculty and student editors of the Journal of the Copyright Society for shepherding the article to print. This Article was awarded a grant by the University of Houston Law Center's Institute for Intellectual Property and Information Law, in partnership with the Honorable Nancy F. Atlas Intellectual Property American Inn of Court. It was also supported by funds from Boston University School of Law.

*will lead to doctrinal clarity in our digital age. It also has political implications for considering the contestability of facts in the twenty-first century as a matter of access to information and the stabilization of societal institutions – such as law, science, and a free press – that are critical for sustaining U.S. democracy.*

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## INTRODUCTION

There is a puzzle at the heart of copyright law with far-reaching implications for disinformation and democracy. It starts with the assumption that facts circulate freely and are excluded from copyright protection. But we only know this because a 1991 Supreme Court case, *Feist Publications v. Rural Telephone Service*, says so.<sup>1</sup> The Copyright Act of 1976 does not expressly exclude facts.<sup>2</sup> Moreover, the legislative history of the Copyright Act says almost nothing about a fact-exclusion, thus failing to clarify both the reason for

<sup>1</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

<sup>2</sup> Copyright Act of 1976, 17 U.S.C. § 102(b).

*Feist*'s holding and the conspicuous absence of a fact-exclusion from the Act.<sup>3</sup> This puzzle has purchase for our current moment when apprehending facts is vital to, among other things, assuring transparency and objectivity in the regulation of everyday life.

Here are three examples of the confusion over facts in copyright law and its relevance to critical regulation today. Imagine insurance companies refusing to insure homes because they predict that fires and floods will devastate vast regions of the United States.<sup>4</sup> To question and assess the insurers' denials requires access to the information on which the companies base their decisions. The National Weather Service collects climate data, which is a publicly accessible resource. But when private companies collate, analyze, and process data for influential forecasting systems, that information—the facts and expert evaluations on which billions of dollars of investments may rely—may be claimed as copyrightable expression and therefore inaccessible for reviewing or auditing except with permission and payment.<sup>5</sup> Insurance companies can refuse insurance, devastating real estate markets and other businesses without explaining the basis of their decisions. When they do so by claiming their evaluations of data as copyrightable expression, ownable and licensable at their discretion, insurers become one of the many “data cartels” in our world in which “companies . . . control and monopolize . . . information”<sup>6</sup> to the detriment of most ordinary market participants.

Imagine a different but related scenario. Building, fire, and electrical codes are mandatory guidelines when constructing (or reconstructing) property in many states and municipalities. Organizations staffed by experts and other knowledgeable members produce and sell these codes to interested parties as indispensable reference materials for building safety. When a town adopts a code as its law, either expressly or by reference, do those who must follow the law—and thus read and abide by the code—have to pay for access to it? Does following the law require paying a fee for the code book, which the organizations claim as their copyrighted expression? Standard drafting organizations and other expert bodies say yes and are litigating their claims in court.<sup>7</sup>

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<sup>3</sup> See *infra* Part II.

<sup>4</sup> One need not imagine it. Juliana Kim, *State Farm Has Stopped Accepting Homeowners Insurance Applications in California*, NPR (Mar. 28, 2023, 11:23 AM), <https://www.npr.org/2023/05/28/1178648989/state-farm-home-insurance-california-wildfires-inflation/>.

<sup>5</sup> Madison Condon, *Climate Services: The Business of Physical Risk*, 55 ARIZ. ST. L.J. 147 (2023) (describing the problem of privatizing climate data and proposing a model that enables access, testing, verification, and competition in the assessments).

<sup>6</sup> SARAH LAMDAN, DATA CARTELS: THE COMPANIES THAT CONTROL AND MONOPOLIZE OUR INFORMATION (2022).

<sup>7</sup> See *Am. Soc’y for Testing & Materials v. Public.Resource.Org*, 896 F.3d 437 (D.C. Cir. 2018) (technical standards incorporated by reference into law remain protected by copyright but whether their copying and distribution are fair uses and thus exempt from

Finally, imagine a third scenario. A playwright produces an award-winning musical based on a true story. The playwright is subsequently sued for infringing the copyright in an autobiography, which was one of the many sources relied upon to retell history. The musical depicts historical events and repeats true statements drawn from an array of truthful accounts. The copyright owner of the autobiography who sues is the heir of the autobiography's ghostwriter; only after years of litigation, an appeal, a trial, and a second appeal is the musical free and clear from the copyright encumbrance.<sup>8</sup> Writing about the true past comes with significant costs.

All three scenarios describe copyright law restricting access to facts and information. These are just a few examples, but as a trend, they raise red flags. The insurance and climate data scenario could instead be about financial information;<sup>9</sup> the building code scenario could be about annotated statutes;<sup>10</sup> and the playwright scenario could be about a journalist, filmmaker, or writer.<sup>11</sup> The Supreme Court's 1991 *Feist* decision states clearly that facts are in the public domain and thus unownable, but disputes like these persist. This Article exposes *Feist*'s lingering ambiguity as grounded in the puzzle with which the Article began: *Feist* says that facts are in the public domain, but without clear statutory text or history, we do not know what "facts" are. Section 102(b) of the Copyright Act excludes "ideas," "concepts," and "discoveries" from copyright protection.<sup>12</sup> However, as described below, courts do not treat "facts" as synonymous with these other words. *Feist* nonetheless puts facts in the public domain as if they are part of, but different from, the statutory list in §102(b).<sup>13</sup>

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copyright enforcement is a question for the jury). The district court eventually entered judgment of fair use for the defendants. 597 F. Supp. 3d 213 (D.D.C. 2022). The Court of Appeals affirmed. 82 F.4th 1262 (D.C. Cir. 2023). *See also* Veeck v. S. Bldg. Code Congress Int'l, 293 F.3d 792 (5th Cir. 2002) (holding the code lost copyright when the town adopted it as law).

<sup>8</sup> Again, not a fictional account. *Corbello v. Frankie Valli et al.*, 974 F.3d 965 (9th Cir. 2020) (affirming decision below because facts cannot form the basis for a copyright claim and each of the alleged similarities between the musical and autobiography were based on historical facts, common phrases, and scenes à -faire, or elements that were treated as facts in the autobiography and were thus unprotected by copyright even though now challenged as fictional).

<sup>9</sup> *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014) (copying and distribution of investor call transcript regarding quarterly earnings fair use in part because of the public purpose of disseminating important financial information).

<sup>10</sup> *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020).

<sup>11</sup> *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d. Cir. 1980) (no copyright infringement when similarities based on historical theories and facts); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (scholar's work about Salinger accurately quoting from letters held unlawful under copyright law).

<sup>12</sup> 17 U.S.C. § 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.").

<sup>13</sup> See *infra* Part I.

We need a clearer understanding of what *Feist* means by “raw facts may be copied at will.”<sup>14</sup>

This issue goes beyond copyright law, of course. Clarification of misinformation and competition for reliable arbiters of truth are essential to self-governance, democracy, and human flourishing. Today, we witness the contestation of facts disrupting democratic elections and exacerbating violent attempts to impede the constitutional transfer of power.<sup>15</sup> We watch the Supreme Court accept as “fact” deeply contentious views of health care and their implications for liberty and equality.<sup>16</sup> We read about stacked legislative hearings manufacturing false claims to justify restricting civil rights.<sup>17</sup> Political candidates, after winning office, admit to falsifying their credentials and experience, explaining their lies as “embellishment” and “stupid” but refusing to admit their mendacity.<sup>18</sup> The nature of facts and their import appear to be in flux. All the while, laws that regulate truth and falsehood put a premium on the former and assume the ability to distinguish truth from lies.<sup>19</sup>

Yet copyright law and its exclusion of facts from subject matter protection is an underexplored area. *Feist* makes it seem obvious and inevitable that facts are in the public domain—even those produced through hard work and skilled labor—and yet the history of the fact-exclusion is anything but straightforward. The fact-exclusion in copyright doctrine has a century-long evolution that, when examined closely, illuminates the evolving status of facts in contemporary society as central to sustaining twentieth-century democratic institutions based

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<sup>14</sup> *Feist*, 499 U.S. at 350.

<sup>15</sup> See, e.g., Melissa Block, *The Clear and Present Danger of Trump’s Enduring ‘Big Lie,’* NPR (Dec. 23, 2021, 5:00 AM), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election/>.

<sup>16</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2238, 2277 (2022) (describing reliance interest on abortion care as both “intangible” and not “very concrete” like those involving “property and contract” and an “empirical question that is hard for anyone . . . to assess”); *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (describing as “unexceptional” the fact that some women come to “regret their choice to abort the infant life they once created and sustained”). For analysis of federal appellate decisions that question established facts and demand scientific infallibility in order to manufacture factual uncertainty and justify their counter-factual result see Ari Ezra Waldman, *Manufactured Uncertainty in Constitutional Law*, 91 *FORDHAM L. REV.* 2249 (2022).

<sup>17</sup> Allison O. Larson, *Constitutional Litigation in an Age of Alternative Facts*, 93 *N.Y.U. L. REV.* 175 (2018).

<sup>18</sup> Michael Gold & Grace Ashford, *George Santos Admits to Lying About College and Work History*, *N.Y. TIMES* (Dec. 26, 2022), <https://www.nytimes.com/2022/12/26/nyregion/george-santos-interview.html/>. See also Oliver Hahl et al., *The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth about Political Illegitimacy*, 83 *AM. SOCIO. REV.* 1 (2018).

<sup>19</sup> Courtney M. Cox, *Legitimizing Lies*, 90 *GEO. WASH. L. REV.* 297 (2022); Suzanna Blumenthal, *Humbug: Toward a Legal History*, 64 *BUFFALO L. REV.* 161 (2016); AUSTIN SARAT, *LAWS AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* (2015); Helen Norton, *Lies and the Constitution*, 2012 *SUP. CT. REV.* 161 (2012).

on the rule of law, the pursuit of scientific truth, and a free press.<sup>20</sup> “Facts” are much broader than the “raw facts” (*i.e.*, telephone numbers) at issue in *Feist*. The early twentieth-century history of “facts” parallels the development of legal, scientific, and journalistic institutions on which our democracy has come to rely, making this history crucial for the contemporary moment. The status of facts as such—and their place in the public domain—depends on their production as credible and authoritative in the context of disciplinary knowledge and through these institutions, which are themselves fundamental to U.S. democracy. As it turns out, these institutional outputs—law, science, and news—were discussed and debated within the early copyright law canon of the twentieth century in the context of “public property”—what is unownable and belongs to the public. Although *Feist* relies only implicitly on this history, making it explicit is one goal of this Article.

Copyright law’s fact-exclusion is underexplored in part because we have taken it for granted for so long. *Feist* makes the question and answer seem easy, but when we scratch the decision’s surface to decide contemporary copyright disputes, the Court’s clear statements reveal contested doctrine regarding both what “facts” are and also whether “sweat-of-the-brow” (*i.e.*, labor and hard work) is sufficient to justify taking facts from the public domain and protecting them under copyright law.<sup>21</sup> This Article explores the fact-exclusion by following three interrelated paths: the first two resemble traditional legal arguments discussing case law and legislative history, and both end with incomplete answers to the puzzle; the third path follows an institutional approach. Only after exploring this third path does a full explanation of the origins and applications of the copyright fact-exclusion emerge. Each path is a section of the Article. As the Article concludes, we end where we started, only with a sharper vision: all roads lead to *Feist*, and also, inescapably, *Feist* needs further explanation.

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> The debate over sweat-of-the-brow before *Feist* was extensive and complex. See, e.g., Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1584 (1963); Robert A. Gorman, *Fact or Fancy: The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y U.S.A. 560 (1982); Ray Patterson & Craig Joyce, *Monopolizing the Law: the Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 (1989) [hereinafter Patterson & Joyce, *Monopolizing the Law*]; William Patry, *Copyright in Compilations of Facts (or Why the “White Pages” Are Not Copyrightable)*, 12 COM. & LAW 37, 64 (Dec. 1990); Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990) [hereinafter Ginsburg, *Commercial Value*]; Robert Denicola, *Copyright in Collection of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. (1981). See also Robert Brauneis, *The Transformation of Originality in the Progressive Era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L. J. 321, 364 (2009) [hereinafter Brauneis, *Transformation*] (explaining that in 1884 “[c]ourts and treatise writers uniformly supported the view that a work which presented facts that had been gathered by observation of the world should be protected under copyright law.”).



Put simply, *Feist* oversimplifies the matter. The story of copyright's fact-exclusion is as much about how writings can "promote the Progress of Science" (copyright's constitutional object) as about the interrelationship of law, political institutions, and technological development.<sup>22</sup> Copyright law intervened early in U.S. political history, scoping the First Amendment's speech and press freedoms at the beginning of the twentieth century when journalism was first professionalized and the First Amendment as we know it today was nascent.<sup>23</sup> Copyright law in the early 1900s left important scientific and economic innovations in the public domain, generating competition and collaboration within scientific and social-scientific fields, even when doing so left certain authors or inventors without intellectual property.<sup>24</sup> Indeed, the story of copyright law's fact-exclusion reveals deep-seated commitments both to the free circulation of facts as essential to developing knowledge (*i.e.*, the progress of science), wherein facts are not discoveries but learned truths, and also to the vitality of knowledge-producing institutions and organizations.<sup>25</sup> Yet because *Feist* predates the internet revolution, its application to the digital age's most pressing issues is unsettled. These issues concern the nature of facts vis-à-vis our new institutions, political circumstances, and cutting-edge technologies,

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<sup>22</sup> U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have the power to . . . promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."). For a history of this clause and the meaning of "progress of science," see, e.g., JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* 4-6 & note 20 (2022) (citing among others, Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993); Jeanne Fromer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L.J. 1329 (2012); Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BRIGHAM YOUNG U. L. REV. 259 (2013)) [hereinafter SILBEY, *AGAINST PROGRESS*]. See also Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017) [hereinafter Beebe, *Aesthetic Progress*].

<sup>23</sup> See *infra* Part III.A. (discussing journalism); *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918). See also John Witt, *Weaponized from the Beginning*, 4 J. OF FREE SPEECH L. 715 (2023) (describing early decade of First Amendment jurisprudence when "Freedom of speech in 1919 had barely been invented" and "absent a First Amendment to rely on, critics and advocates turned not to free speech doctrine . . . but to mediating institutions that offered bulwarks against distortion in the domain of public opinion.>").

<sup>24</sup> See *infra* Part I.B.2. discussing *Baker v. Selden*, 101 U.S. 99 (1879). For further discussion of the value and scope of public domain in the context of interpreting § 102(b), see Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 989-91, 996-99, 1016-18 (1990); Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. R. 215 (2003); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L. J. 783 (2006).

<sup>25</sup> As explained *infra* note 32, an interpretation of "discoveries" as synonymous with "facts" (instead of with "inventions") is inconsistent with the constitutional grant of power to Congress.

which challenge us to differentiate between objectivity and subjectivity and truth and lies.<sup>26</sup>

We live in an age of AI-generated expression, the proliferation of information resources, political polarization, and both moral and epistemological relativism.<sup>27</sup> Together, these characteristics of contemporary culture complicate the meaning and role of “facts” as foundations of public discourse.<sup>28</sup> This Article’s account of copyright’s fact-exclusion clarifies its history by shedding new light on the major Supreme Court case construing the doctrine (*Feist*), thereby guiding both contemporary and future debates concerning copyright’s application to information goods. It aims for copyright law to help (and not hinder) public debates and institutions that rely on access to quality information for democratic self-governance.<sup>29</sup> At stake are the effects on industries, like law, science, and journalism, that produce predominantly fact-based works central to the socio-political institutions at the heart of U.S. democracy.<sup>30</sup>

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<sup>26</sup> Woodrow Hartzog & Jessica Silbey, *The Upside of Deep Fakes*, 78 MD L. REV. 960 (2019); Danielle Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019). See also, e.g., Tiffany Hsu & Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots*, N.Y. TIMES (Feb. 8, 2023), <https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html/>; Barry Forbes, *ChatGPT: Five Alarming Ways in Which AI Will Lie For You*, FORBES.COM (Dec. 20, 2022, 7:53 AM), <https://www.forbes.com/sites/barrycollins/2022/12/30/chatgpt-five-alarming-ways-in-which-ai-will-lie-for-you/?sh=63475d575cb9/>.

<sup>27</sup> See, e.g., Mathias Osmundsen et al., *How Partisan Polarization Drives the Spread of Fake News*, BROOKINGS INST. COMMENT (May 13, 2021), <https://www.brookings.edu/articles/how-partisan-polarization-drives-the-spread-of-fake-news/>; Tiffany Hsu & Steven Lee Myers, *A.I.’s Use in Elections Sets off a Scramble for Guardrails*, N.Y. TIMES (June 25, 2023), <https://www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html/>.

<sup>28</sup> See JONATHAN RAUCH, *THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH* 40-41, 85-94, 131-138 (2021) (describing political polarization rooted in conversion of facts to markers of identity and affiliation) [hereinafter, RAUCH, *THE CONSTITUTION*]; ROBERT POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 6-10 (2012) (grounding marketplace of ideas approach in First Amendment jurisprudence to belief in expertise and its role in democratic governance).

<sup>29</sup> These debates include: how to sustain quality journalism; facilitating access to information for good governance and scientific progress; the contested role of professional publishers and user-generated platforms in the internet ecosystem; and whether labor justice and wage equity is something copyright law should assure even at the expense of follow-on creativity and knowledge.

<sup>30</sup> See, e.g., MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1981) (showing “that the very idea of impartial, objective ‘news’ was the social product of the democratization of political, economic, and social life in the nineteenth century”).

This Article consists of three parts. Part I starts with *Feist* in 1991 and works backward to describe the cases on which *Feist* relies. This inquiry offers a revised legal genealogy of *Feist*, highlighting in that genealogy a curious absence of a coherent fact-exclusion doctrine despite *Feist*'s conclusion that such a doctrine is deeply rooted.<sup>31</sup> Part I reorients and reinterprets these cases, which are purportedly about facts, as actually about disciplinary knowledge and knowledge-producing institutions. As reinterpreted, these cases describe not just "facts" but the acceptability of facts as a foundation for knowledge, produced through processes and within institutions with increasingly accepted social and political authority. For the past century, facts have been (and still are) an evolving concept, not just data points on a graph or singular statements about the world. Understanding how facts evolved from disciplinary knowledge into shared public understandings of verifiable truth claims is key to understanding *Feist*'s future application. In other words, *Feist* is not wrong, it just does not say enough.<sup>32</sup>

Part II excavates the legislative history of the Copyright Act of 1976. It connects the case history in Part I with the rise of the authorial labor theory of copyright, a flash point in the legislative debate preceding the 1976 Act.<sup>33</sup> *Feist* categorically rejected the labor theory of copyright fifteen years after the Act's passage, extinguishing a debate that waged for over a century.<sup>34</sup> The labor theory (or sweat-of-the-brow) posits that hard work and skill justify copyright protection to incentivize "intellectual labor."<sup>35</sup> The theory favors a particular brand of individualism and freedom-to-labor rhetoric often at the expense of institutional and community well-being, despite having roots in organized labor and the Progressive movement, as Part II discusses.<sup>36</sup> The co-optation of the

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<sup>31</sup> Part I owes a great debt to several previous articles about *Feist*, especially: Craig Joyce & Tyler T. Ochoa, *Reach Out and Touch Someone: Reflections on the 25th Anniversary of Feist Publications Inc. v. Rural Telephone Service Co.*, 54 HOUS. L. REV. 257 (2016) [hereinafter Joyce & Ochoa, *Reach Out*]; Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007) [hereinafter Hughes, *Ontology*]; Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 TEX. L. REV. 1921 (2007); Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992) [hereinafter Gordon, *Artifact*]; Ginsburg, *Commercial Value*, *supra* note 21.

<sup>32</sup> For earlier related critiques of *Feist* focusing on the ambiguity of "facts," see Gordon, *Artifact*, *supra* note 31, at 94-95 (making the point that even created facts (like census data) are facts, but that *Feist* oversimplifies facts as "discoveries"); Hughes, *Ontology*, *supra* note 31, at 83 (criticizing *Feist* in the context that "facts are not pebbles waiting to be picked up; the size and shape of the pieces of reality we see are just the result of how we hammer and chisel the world").

<sup>33</sup> See *infra* Part II.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* See also C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (HOBBS TO LOCKE) (1962) (describing possessive individualism's roots and its central

labor theory by businesses, some of them corporate authors and many that become copyright owners (*e.g.*, publishers, distributors, and media conglomerates), is an old story about copyright rhetoric subverting copyright's benefactors and ultimate purpose (individual authors and "progress of science").<sup>37</sup> In the case of fact-based works, the rhetoric of protecting the fruits of one's labor (and thus protecting its output with property rights) has two negative effects: (1) devitalizes expertise and (2) undermines the institutions producing news, science, databases, and forecasts essential to the regulation on which our technologies, socio-legal organizations, and democratic politics rely.

Part II's main focus is the small part of the voluminous legislative history that discusses the fact-exclusion. It features a debate between a then-prominent copyright lawyer, Irwin Karp, representing the Author's Guild and its interests in protecting creative labor, and a coalition of librarians advocating for more open access to books via interlibrary loans and library photocopying. This debate rehashes a familiar tension in copyright law regarding the proper balance between copyright's public interest and private rights, reorienting that debate around the production and role of facts as a core copyright concern and with renewed interest in our information age.<sup>38</sup>

Part III situates the cases and copyright's authorial labor theory within the turn-of-the-twentieth-century philosophical and political debates about the production of knowledge. Facts as we understand them in the twenty-first century are modern in concept.<sup>39</sup> Facts—as distinguished from truth and value—developed at the turn of the nineteenth century with the evolution of the modern university and the emergence of the social and varied physical sciences.<sup>40</sup> From the Enlightenment epistemological fields of religion, moral philosophy, and so-called "natural" philosophy (*e.g.*, anatomy, botany, geology, and zoology) came the new sciences of sociology, psychology, economics, anthropology, and urban studies, along with the diversification of the natural sciences of biology,

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idea that a person's normative essence consists in self-ownership, a theory that today pervades the basis and continued purchase of global capitalism).

<sup>37</sup> MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1995). *See also* SILBEY, *AGAINST PROGRESS*, *supra* note 22, at 44 (discussing this rhetoric in the context of digital photographers and digital photography platforms and publishers).

<sup>38</sup> Readers who did not know that librarians often play the part of subterranean revolutionaries in copyright law—on the side of labor *and* access to information—will also learn this history in Part II. Kyle Courtney & Juliya Ziskina, *The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission*, THE INTERNET ARCHIVE (2023), <https://archive.org/details/the-publisher-playbook/>.

<sup>39</sup> *See infra* Part III.

<sup>40</sup> RAUCH, *THE CONSTITUTION*, *supra* note 28, at 68. A Google n-gram of "fact," "truth," "knowledge," and "value" between 1800 and 2010 shows "fact" and "value" peaking in 1920 and "truth" at its nadir. "Knowledge" remains fairly constant. The n-gram is hardly empirical proof, but as a rough estimate of word usage it shows the word "fact" on the rise in the early twentieth century and "truth" used frequently until the turn of the twentieth century and then not again as frequently until the turn of the twenty-first century.

chemistry, and physics.<sup>41</sup> These evolving disciplines produced new “truths,” also called “facts,” from empirically grounded methods with consensually established standardized practices characterized by experimentation, verification, and falsification.<sup>42</sup> This twentieth-century history established “objectivity” as a new measure of “truth” with a variety of “facts” at its core.<sup>43</sup>

Jonathan Rauch explains this development in his book *The Constitution of Knowledge* as the decentralized and impersonal social adjudication process of objective understandings about the world.<sup>44</sup> This progression includes the evolution of the modern university and its disciplinary fields, with the so-called “liberal sciences” as an “epistemic regime—that is, a public system for adjudicating differences of belief and perception and for developing shared and warranted conclusions about truth.”<sup>45</sup> Debates about new disciplinary knowledge circulated between the 1880s and 1910s as a result of new information industries, including the telegraph and the rise of national journalism (with its share of “fake” news).<sup>46</sup> They also tracked the revolution in legal education and law courts from legal formalism to legal realism, with the attendant rise of

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<sup>41</sup> *Id.* at 68-69. See also JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY* 22 (2009) (describing revolution in American universities and the creation of “new knowledge”).

<sup>42</sup> RAUCH, *THE CONSTITUTION*, *supra* note 28, at 68-69.

<sup>43</sup> *Id.* at 99. Of course, historic events, geographic details, and scientific truths were age-old subjects of knowledge and debate. See *infra* Part III & note 275 (citing M.T. Clanchy and Hayden White). The emergence of “facts” as such is as much about the measure of knowledge – its smallest common incontestable denominator – as much as it is about the process of its production. The very idea of the “fact-exclusion” could not arise in copyright without understanding how facts came to be understood. New fields of expertise, scholarly disciplines, and research methods provided some answers to the increasingly fraught truth/value distinction and the contested claim to universal truths that plagued 19<sup>th</sup> century politics and science because of bias and error. See also LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* 27-28 (2007).

<sup>44</sup> RAUCH, *THE CONSTITUTION*, *supra* note 28, at 5. See also Max Weber, “Science as Vocation,” in *THE VOCATION LECTURES* 1-31 (Rodney Livingston trans., David Owen & Tracey Strong eds., 2004) (explaining how science provides methods of explanation and means of justifying an outcome, but not moral questions which is the domain of philosophy and religion). Robert Merton’s canonical work, *SOCIOLOGY OF SCIENCE* (1973), popularizes some of Weber’s ideas when explaining an ethos of science (“Mertonian norms”) that includes disinterestedness and organized skepticism. See also STEVEN SHAPIN, *SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND* (1994) (historical account of scientific knowledge production rooted in trust and social civility norms around dispute resolution).

<sup>45</sup> RAUCH, *THE CONSTITUTION*, *supra* note 28, at 76. The goals of such a regime include producing knowledge (distinguishing reality from non-reality), freedom (encouraging human autonomy), and peace (fostering institutional resolution of disagreement and nonviolence). *Id.*

<sup>46</sup> WILL SLAUTER, *WHO OWNS THE NEWS? A HISTORY OF COPYRIGHT* 109-12 (2019) [hereinafter SLAUTER, *NEWS*] (describing evolution of news industry, its relation to copyright, and early fake news scandals).

legislative facts and courts' deference to them.<sup>47</sup> The debates in law, news, and science eventually resolved into what became the New Deal politics and its modern government structure—administrative agencies, expert bodies, and deferential judicial review, as well as professional journalism strengthened by constitutional guarantees.<sup>48</sup> This metamorphosis came only after industry consolidation and professional institutions could rely on law (including copyright law) to support their missions and refrain from interference.<sup>49</sup> The new understanding and role of “facts”—a revised way to understand both the inputs and outcomes of knowledge and disciplinary learning—was at the center of these institutional changes.

What Wendy Gordon has called the “odd epistemology” of *Feist* can be explained in part by the popularization of “facts” as a synonym (and sometimes replacement) for “truth” in the early twentieth century.<sup>50</sup> *Feist* does not talk about “truth” because the case was about the legality of unauthorized copying of phone book information (*i.e.*, numbers and addresses organized alphabetically). These were “facts” (or “data,” as the Court says repeatedly). But what *Feist* means when it says “no one may claim originality as to facts” is broader than simply: home addresses are public domain information. It means that facts form truths about the world, be they social, scientific, legal, or historical truths, and copyright ownership of even compilations of facts cannot keep truths from circulating freely.<sup>51</sup>

As Part III explains, *Feist*'s reasoning is both slippery and seems inevitable. This is because the word “fact”—absent from the 1976 Copyright Act and its legislative history—only fully emerged as a category of “truth” forming the bedrock of “knowledge” in the early twentieth century, along with the institutions that produce both knowledge and facts (*e.g.*, journalism, natural and social sciences, agencies and research centers, and legislatures).<sup>52</sup> As the authority and influence of these knowledge-producing institutions evolve alongside their ability to shape public policy and law, the facts produced by

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<sup>47</sup> Jessica Silbey & Jeanne Fromer, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J. L. & ARTS 341, 346-47 (2021).

<sup>48</sup> See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>49</sup> This would occur with the overturning of *Lochner v. NY*, see *infra* Part III. See also SLAUTER, NEWS, *supra* note 46, at 109-12.

<sup>50</sup> Gordon, *Artifact*, *supra* note 31, at 93 n.18. See also Hughes, *Ontology*, *supra* note 31, at 49-52 (continuing Gordon's critique and describing a “very short history of facts” citing MARY POOVEY, THE HISTORY OF THE MODERN FACT 2-9 (1998) and scholarship of Lorraine Daston that was a precursor to her co-authored book OBJECTIVITY, *supra* note 43).

<sup>51</sup> *Feist*, 499 U.S. at 347.

<sup>52</sup> This is the same time when certain government agencies, such as the GSA, and independent nongovernmental organizations with similar missions such as RAND (efficient and evidence-based governance), originated and quickly became influential. To be sure, the word “fact” existed and was used before this time, but the institutionalized, diversified production of facts while remaining authoritative and discernable as truths is the twentieth-century innovation this Article describes. See *supra* note 40 (describing n-gram results), and Part III.

them become less contestable and more self-evidently “facts.”<sup>53</sup> That was true in 1991 about phone book data when *Feist* was decided, but the earlier decades debated “truths” or “facts” from journalism, human biology, and labor economics, which were more contestable than phone numbers. Absent from *Feist* is the specter of the early twentieth-century debate between “truths” or “facts” and “values,” a kind of “ontological politics”<sup>54</sup> that preoccupied the new sciences and law. But that specter was present when the canonical copyright cases leading to *Feist* were decided. Part III fills in that history to clarify why *Feist* is correct and explains how to apply *Feist* today given our democracy deficit and the predominance of our new information industries. (Who uses phone books anymore?)

*Feist* came about because producing “facts” is hard work, and the telecommunications industry sought to protect its fact-producing labor—the telephone book—with copyright. It was rational to do so given that copyright’s first subject matter categories of “maps, charts, and books” were fact-intensive works; the grant of a fourteen-year copyright (by the Copyright Act of 1790) was intended to incentivize their laborious and skilled production.<sup>55</sup> When *Feist* excised the sweat-of-the-brow principle from copyright law, but preserved copyright protection for information goods that contained originality in the “selection, coordination, and arrangement” of their information (although not for the alphabetized phone book, which lacked such originality), it avoided answering the question at the heart of the labor theory of copyright: Who is the primary beneficiary of copyright law, the author or the public?

Therein lies the reason that the third path to *Feist* is both the most helpful and the most complicated. Whether to protect an author’s labor to the detriment of the public interest is ultimately a policy question that becomes a legal question when human labor produces what are called “facts.” Standing in the way of clarifying *Feist*’s definitive statement on the issue—that works are in the public domain when they lack originality no matter how much skill they take to produce—is the Court’s other most famous copyright decision, *Bleistein v. Donaldson Lithographing* (1903).<sup>56</sup> *Bleistein* was written nearly a century before *Feist* by Justice Oliver Wendell Holmes during his first year on the Court; it has since become a celebration of the inevitability of human originality, standing for the principle that all expressive works have “something irreducible,

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<sup>53</sup> The “facts” produced by these organizations were called “data” and “information,” not necessarily “facts.” Today we may consider these terms synonyms, or we might say that facts are derived from analysis of data and information.

<sup>54</sup> John Law & John Urry, *Enacting the Social*, 33:3 *ECONOMY AND SOCIETY* 390, 390 (2005) [hereinafter Law & Urry, *Enacting the Social*].

<sup>55</sup> Copyright Act of 1790 § 1, 1 Stat. 124 (current version at 17 U.S.C. et seq.).

<sup>56</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

which is one man's alone."<sup>57</sup> *Feist* cites *Bleistein* exactly once.<sup>58</sup> Reevaluating *Feist*'s fact-exclusion in the context of its history and its future application, as this Article does, also requires a reassessment of *Bleistein* and its hold on U.S. copyright law.<sup>59</sup> Part III does just that in order to clarify *Feist*'s holding and extend its future reach. This reassessment is an important step to help resolve current disputes over access to information necessary for human flourishing in the Anthropocene.

The Article concludes with examples of *Feist*'s broader application to a range of scenarios actively in litigation. It shows that *Feist*, properly understood, actually means that facts *and other forms of objective knowledge produced within knowledge-producing institutions* are uncopyrightable and in the public domain, even if they require substantial labor and investment to produce. The upshot is threefold. First, reading *Feist* this way helps define the public domain of facts not as physical-world discoveries but instead as building blocks of knowledge and expression. Second, it emphasizes the need to reinforce the institutions and organizations—scientific, professional, and expert—that are vital to the production and dissemination of knowledge and are under pressure in the Internet age.<sup>60</sup> And finally, it prepares the *Feist* doctrine for the twenty-first century (in which facts are again being contested) in order to prevent copyright law, in the guise of “originality” or “natural rights” from interfering with the dissemination of expertise essential to self-governance and promoting the public good. In concrete terms, facts should not be so narrowly defined that copyright interferes with the circulation and amplification of knowledge and expertise. Copyright law has been and should continue to be a regime serving the public interest by promoting the progress of science—and of knowledge more broadly—by granting limited rights to authors over their expression, *but not over the knowledge it contains*. Where copyright law fails to remunerate labor or sustain an industry because the outputs are largely fact-based or principally objective, we must not compromise these other values of copyright law, but

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<sup>57</sup> *Id.* See also Ginsburg, *Commercial Value*, *supra* note 21, at 1882 (“Justice Holmes set forth the most celebrated American judicial espousal of the ‘copyright as personality’ approach in *Bleistein*...”). See *infra* Part III for further explanation of the celebration and critique of *Bleistein*, especially Beebe, *Aesthetic Progress*, *supra* note 22, at 250 (describing *Bleistein*'s “damaging influence” and “culturally regressive trends”).

<sup>58</sup> *Feist*, 499 U.S. at 359 (citing *Bleistein* for the proposition that there are “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent”); *but see Bleistein*, 188 U.S. at 250 (saying even directories may be copyrighted), which *Feist* does not overrule. See *infra* Part III.

<sup>59</sup> Other copyright scholars have been working to tame *Bleistein* as well, see Barton Beebe, *Aesthetic Progress*, *supra* note 22, at 250. See also Joyce & Ochoa, *Reach Out*, *supra* note 31, at 268-74, 308.

<sup>60</sup> See, e.g., Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J. F. 185 (2018) (narrowly defining professional speech, in terms of First Amendment doctrine, to protect its qualities of accuracy, comprehensiveness, and reliability and in accordance with the insights of the relevant knowledge community).



instead look to the many other ways to enable working people and valuable industries to thrive.<sup>61</sup>

### I. FEIST AND ITS GENEALOGY

This Part describes *Feist* and then traces the cases on which it relies, along with their histories, to make three points. First, the earliest incarnations of the copyright fact-exclusion doctrine in nineteenth- and early twentieth-century cases did not discuss facts *per se*. The word “facts” was rarely uttered in these canonical cases. Instead, early cases concerned legal opinions, photographs, news headlines, graphical forms, and financial information. In each situation, courts had to justify the scope of copyright protection in light of copyright’s corollary: the public domain. A close look at these cases and the case families they produced reveals that the fight over facts through the nineteenth and twentieth centuries was a fight over how copyright serves the public interest by enabling the unfettered dissemination of various forms of knowledge. The matter of “facts” in these early pre-*Feist* cases was tied to a contingent and contextual public domain of various subject matter that the Court claimed critical to preserve as free even, as it turns out, at the expense of under-protecting the outputs of human labor. With each case, the copyright public domain grew in scope and importance, as did the plausible categories of “facts” to which *Feist* would eventually refer. The result was an expanding landscape comprised of various forms of common property for “promot[ing] the Progress of Science and the useful Arts.”<sup>62</sup>

Second, these early cases are about evolving *industries* (e.g., law, news, finance) with rising socio-economic power, epistemic authority, and developing professionalism. In addition to diversifying what eventually came to count as “facts” for public domain purposes, these cases connect the production of facts to their institutional contexts (e.g., of law, journalism, and finance). These cases concern the copyright status of law reports, journalism, and photography, along with the social progress produced through and because of these evolving institutions in crucial periods of political, economic, and technological development. Thus, when the Court analyzes the copyrightability or non-copyrightability of a work or its parts, it also considers how the work is produced (*i.e.*, the institutional and professional structures that produce and disseminate it) and the consequences for excluding the public from it unless payment is made.

Third, we learn from these cases that even though a “fact” may be contingent and contestable, facts are also discernible and reliable. Facts are knowable according to socio-political processes grounded in professional expertise and institutional authority. And thus, one explanation for the absence

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<sup>61</sup> For a similar critique in another context, see, e.g., Jessica Silbey, *New Copyright Stories: Clearing the Way for Fair Wages and Equitable Working Conditions in American Theater and Other Creative Industries*, 83 OHIO ST. L. J. ONLINE 29 (2022).

<sup>62</sup> U.S. CONST., art. I, § 8, cl. 8.

of clear, consistent case law guidance on the fact-exclusion from copyright before the 1991 *Feist* decision is that, for a century prior, facts and the institutions producing them (such as university disciplines, professional organizations, legislatures, and even courts) were subject to debates over their power and influence. As Lorraine Daston and Peter Galison write in *Objectivity*, the modern notion of “objectivity” is a scientific ideal that emerged only in the mid-nineteenth century and is grounded in “epistemic virtue,” which they describe as a moral attribute of those producing knowledge.<sup>63</sup> As courts debate whether a “fact” is in or out of copyright protection—be it arising from a photograph, a financial report, the law, property evaluations, weather forecasts, or a news headline—the institution or the professional community that produces the “fact” requires authority, a kind of power or influence.<sup>64</sup> And so the absence of clear precedent on the copyrightability of “facts” is explained by a century-long evolution of the institutional authority of organizations producing facts on which we have come to depend.

This Part builds on these three points and demonstrates that *Feist* is not wrong, but its reasoning is insufficiently clear to answer complicated questions about the copyright fact-exclusion for today’s purposes. By situating the cases *Feist* relies on within their socio-institutional histories, the defeat of sweat-of-the-brow doctrine in *Feist* becomes more justifiable, and our ability to discern new categories of public domain “facts” and knowledge becomes easier.

A. *Feist Publications v. Rural Telephone Service Co. (1991)*

*Feist* was a dispute between rival phone directory publishers.<sup>65</sup> Rural Telephone was a local Kansas public utility with a state mandate to publish a directory in exchange for its utility monopoly. Newcomer Feist Publications was a publication company whose directory covered a wider geographic territory, and thus was arguably more useful.<sup>66</sup> Both companies provided directories free

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<sup>63</sup> DASTON & GALISON, OBJECTIVITY, *supra* note 43 at 27-29 (introducing the term). Daston and Galison write a social and institutional history of the concept of objectivity based on a case-study of atlases, putting into practice what Emile Durkheim calls “coercion” in his canonical essay “What is a social fact?” about the development of field expertise and community standards and norms. ÉMILE DURKHEIM, *What Is a Social Fact?*, in THE RULES OF SOCIOLOGICAL METHOD (W.D. Halls trans., Steven Lukes ed., The Free Press 1982) (1895).

<sup>64</sup> When Durkheim theorizes about the force or “coercion” of facts, he does not mean physical force, but the force of norms in culture, e.g., “collective aspects of the beliefs, tendencies, and practices of a group that characterizes social phenomena.” *Id.* at 50-59. “Currents of opinion, with an intensity varying according to time and place, impel certain groups [to behave in certain ways]. . . . These currents are plainly social facts. At first sight they seem inseparable from the forms they take in individual cases. But statistics furnish us with the means of isolating them. . . . It is a group condition repeated in the individual because imposed on him.” *Id.* at 8-9.

<sup>65</sup> *Feist*, 499 U.S. at 343.

<sup>66</sup> The *Feist* directory covered 11 different telephone service areas in 15 counties and contains 46,878 white pages listings – compared to Rural’s approximately 7,700

of charge and, according to the Court, “compete[d] vigorously for yellow page advertising.”<sup>67</sup> Rural was a lone holdout among other local utilities refusing to license its listings to Feist. Because Feist was not a utility, it “lacked independent access to subscriber information.”<sup>68</sup> Feist wanted to produce a directory that included the geography Rural’s listings covered and thus used the listings in Rural’s directory without Rural’s consent. Feist verified the accuracy of Rural’s listings with independent research, discarding those listings outside Feist’s geographic area and adding information not contained in Rural’s directory (including street addresses). Feist eventually copied 1,309 of Rural’s 7,700 listings. Feist’s total directory contained 46,878 listings. When Rural sued Feist for copyright infringement, Feist defended by saying it took no copyrightable material from Rural because the listings were facts and not authorial expression.<sup>69</sup>

Both lower courts ruled in Rural’s favor based on a “string of . . . court decisions” holding directories and factual compilations copyrightable.<sup>70</sup> The Court did not disturb this line of cases; instead, it sought to resolve an “undeniable tension” between the principles that “facts are not copyrightable” because they lack originality and that “compilation of facts generally are”<sup>71</sup> copyrightable. In reversing the lower rulings and holding for *Feist*, the Court

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listings. *Feist*, 499 U.S. at 343. For a fuller exploration of *Feist* and its backstory, see Joyce & Ochoa, *Reach Out*, *supra* note 31.

<sup>67</sup> *Feist*, 499 U.S. at 343. There is evidence in the papers of Justice Stevens, who wrote the memo encouraging the Court to grant cert. in *Feist*, that he and others were motivated to take the case to promote competition in the phonebook industry and among telecommunication companies. See Justice Stevens’ Papers (copies on file with author and available in Manuscript Room, Library of Congress, Box 590). The original vote on the certiorari petition indicated that Justices Stevens, White, Marshall, and Scalia voted to grant cert., whereas Chief Justice Rehnquist, Justices Blackmun and O’Connor voted to deny cert., and Justice Kennedy voted to defer and relist. Justice Souter had not yet been appointed, but he was on the Court in time for the oral argument. This is a notable line-up because Justice O’Connor, who voted to deny cert., authored the unanimous opinion in *Feist* reversing the lower court’s ruling in favor of Rural and “sweat of the brow.” (Blackmun indicated his concurrence in a single line.)

<sup>68</sup> *Feist*, 499 U.S. at 343.

<sup>69</sup> Rural proved copying-in-fact because Feist’s listings included four fake listings that Rural used in its directories to detect copying of this sort. *Id.* at 344. Fake listings were not facts in the world like places on a map or historic dates, and they arguably contained some minimal originality. But Feist’s copying of the four listings was determined to be “de minimis.” Rural’s assigned phone numbers were “created facts” like the name of a person or a street address, not originating from “nature” but from the mind of a person, and yet copyright calls these “facts” or “information” as essential features of efficient and accurate communication. See *infra* note 73.

<sup>70</sup> *Feist*, 499 U.S. at 344. See also Robert Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1584-89 (1963) (collecting and discussing cases about copyrightability of directories).

<sup>71</sup> *Feist*, 499 U.S. at 345.

confirmed both principles and explained their harmonious coexistence.<sup>72</sup> In the context of a directory containing only phone numbers and addresses, the Court said that content did not “originate” with Rural.<sup>73</sup>

Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not “ow[e] its origin” to Rural. . . . Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them, and would have continued to exist if Rural had never published a telephone directory.<sup>74</sup>

According to the Court, compilations of facts may be protectable if the particular selection, coordination, and arrangements of facts contain some originality. If, however, the facts’ selection, coordination, and arrangement are “entirely typical,” “obvious,” “mechanical or routine,” or “devoid of even the slightest trace of creativity,” the compilation, like any other work, lacks copyright protection.<sup>75</sup> Rural’s white pages had all these non-original qualities: it was alphabetical and comprehensive (thus lacking selectivity), making it a “garden-variety white pages directory” lacking any creativity.<sup>76</sup> The Court concluded that “Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.”<sup>77</sup>

The prelude to this determination includes two key paragraphs about the matter of facts and their exclusion from copyright protection:

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<sup>72</sup> *Id.*

<sup>73</sup> Well, of course it did. Rural created and assigned the phone numbers. This is part of the “odd epistemology” of *Feist*, which Wendy Gordon describes in her article, *Reality as Artifacts: From Feist to Fair Use* explaining that even “created” facts are uncopyrightable. This comports with the word’s etymology. Gordon, *Artifact*, *supra* note 31, at 96 n.16. The word “fact” comes from the Latin “factum” which means “a thing done or performed” and derives from the Latin root “fac” meaning “to make or do” (e.g., “factor,” “manufacture”). *See supra* note 69.

<sup>74</sup> *Feist*, 499 U.S. at 361 (citation omitted).

<sup>75</sup> *Feist*, 499 U.S. at 362. Compilation copyright must meet requirements of 102(a), 17 U.S.C. §§ 102(b), 103. Compilation copyright was expressly added to the Copyright Act of 1976. *See* 17 U.S.C. §§ 101 (defining compilations), 103 (defining what is protectable subject matter of compilations).

<sup>76</sup> *Feist*, 499 U.S. at 362. “There is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. *See* Brief for Information Industry Association *et al.* as *Amici Curiae* 10 (alphabetical arrangement ‘is universally observed in directories published by local exchange telephone companies’). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.” *Id.*

<sup>77</sup> *Id.* at 363.

It is [a] bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts" [Nimmer sec. 2.11[A]]. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." "The discoverer merely finds and records" [Nimmer sec. 2.03[E]]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 525 (1981). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense.

The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to every person."<sup>78</sup>

In response to the "unfairness" of declaring public property all these "facts" produced with significant labor, investment, and effort, the Court said:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row* (dissenting opinion). . . It is, rather, "the essence of copyright," . . . *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, . . . only the compiler's selection and arrangement may be protected; the raw facts may be

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<sup>78</sup> *Feist*, 499 U.S. at 347. Note here the persuasive authority of treatise and scholarly writings. Other than Nimmer and Denicola, the Court relies on Ginsburg, Patry, Patterson and Joyce to fill in the gaps left by case law suggesting more legal ambiguity that Feist admits. *Id.* at 347-48 (citing William Patry, *Copyright in Compilation of Facts*, 12 COMM'NS. & L. 37, 64 (1990); Ginsburg, *Commercial Value*, *supra* note 21; Joyce & Patterson, *Monopolizing the Law*, *supra* note 21). See also Joyce & Ochoa, *Reach Out*, *supra* note 31, at 292-93 (making a similar point about reliance on scholarly citations).

copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>79</sup>

The Court relies on several cases dating from the mid-1800s to the mid-1990s for this “bedrock” principle.<sup>80</sup> *Feist* reads like a statement of how past cases about copyright’s public domain definitively and inevitably sum to the present moment about a phone book. But the common law of copyright is less clear.<sup>81</sup>

<sup>79</sup> *Feist*, 499 U.S. at 349 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985)).

<sup>80</sup> For the “constitutional requirement,” *Feist* relies on a law review article and Nimmer’s treatise. *Feist*, 499 U.S. at 347. The article is Patterson & Joyce, *Monopolizing the Law*, *supra* note 21, at 759-60, 763 n.155, which supports its assertion with *Bleistein v. Donaldson Lithographing* (1903) and *Durham Indus. Inc v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980), which itself cites to *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945). Nimmer’s 1990 treatise describes original authorship to be a “statutory as well as a constitutional requirement,” and also that “a modicum of intellectual labor . . . clearly constitutes an essential constitutional element.” 1 NIMMER ON COPYRIGHT §1.06[A], §1.08[C][1]. As one commentator at the time wrote, “The *Feist* opinion . . . blurs the concept of originality in relation to authorship with two quotations from Nimmer.” Leo Raskin, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 335 (1992). As best as I can determine, the pre-*Feist* Nimmer treatise grounds the constitutional requirement of originality in authorship via his interpretation of the constitutional text alone. *See* 1 NIMMER ON COPYRIGHT, §1.06[B] (1987) (as quoted and analyzed in Ralph Oman, *The Copyright Clause: “A Charter for a Living People,”* 17 U. BALTIMORE L. REV. 99, 107 (1987) (citing 1 NIMMER ON COPYRIGHT, §1.06[A] (1987) for the proposition that “originality is different from intellectual labor: the former stems from the copyright clause’s use of the term ‘authors’ and refers to independent creation, while the latter suggests an absolute, although minimal, standard of creativity.”)).

None of these citations adequately clarify “originality,” “authorship,” or their relationship to sweat-of-the-brow, except with a circular reference to the Constitution. What “authorship” means remains subject to substantial debate. Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA L. REV. 1229, 1230-31 (2016). And none of these citations explain why the Constitution would leave objective knowledge created with substantial investment of time and intellectual labor in the public domain as a constitutional matter, unless the First Amendment (or some other constitutional interest) limits copyright’s scope.

<sup>81</sup> For scholarship highlighting the lack of clarity on this issue, *see supra* note 21 (describing sweat-of-the-brow debates). Also, a circuit split existed relating to directories, which appeared to be one motivating factor to grant certiorari. *Compare* *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990) *with* *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485 (9th Cir. 1985), *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985), *and* *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984). *See also* Justice Stevens’ papers, Memo dated Sept. 11, 1990, describing the circuit split related to “sweat of the brow” and fact-based works, *see supra* note 67.

B. *Pre-Feist Cases*

The cases on which *Feist* relies fall into three categories that have developed into different (but related) doctrinal paths. The first, *Burrow-Giles Lithographic Co. v. Sarony*, undergirds *Feist*'s proposition that the *sine qua non* of copyright is originality. *Burrow-Giles* (and later *Bleistein v. Donaldson Lithographing Co.* (1903) and *Harper & Row, Publishers v. Nation Enterprises* (1984)) identifies the scope of originality and distinguishes between uncopyrightable facts in the world and copyrightable factual compilations. But, as this part explains more fully, *Burrow-Giles* also pertains to the new technology of photography: Do photographers use cameras to make portraits like the painters of the past, producing creative expression with new and different tools, or are they merely mechanical recorders of contemporaneous life? Implicit in this analysis are assertions that new technologies advance knowledge (*i.e.*, we learn about the world through photography), and that photography also shapes what we know by influencing *how* we know. Is photography different from other forms of expression or "writings," like maps, charts, books, engravings, and illustrations, that were already within the scope of copyrightable subject matter and whose limited copyright protection is understood to promote "the progress of science"? That was the question presented in *Burrow-Giles*.

*Feist* also relies on *Baker v. Selden* (1880), which has become canonical for distinguishing methods and systems as patentable subject matter from creative expression as copyrightable subject matter. *Baker* further designates certain ideas, discoveries, and principles as in the public domain. This holding was eventually codified in the 1976 Copyright Act as part of §102(b), which notably does *not* include "facts" within its long list of exclusions. Although *Feist* depends on *Baker* to ground the fact/expression distinction in a century's worth of copyright case law, it confounds this distinction with the *idea*/expression dichotomy, which is what *Baker* really says. *Baker* is concerned with innovations in accounting and financial records—specifically, the imperative of learning and teaching the new "science" of double-column bookkeeping without copyright law impeding its practice. One way to understand the evolution of facts as constitutional constructs anchoring a broad copyright public domain and promoting knowledge production is to recognize *Baker* as limiting copyright scope in order to disseminate knowledge and promote the practice of "useful arts." On this reading, *Feist* is correct, but does not go far enough or explain its reasoning fully.

The third set of cases on which *Feist* relies begins with *International News Service v. Associated Press* [*INS v. AP*] (1918), whose central holding is anchored in the first Supreme Court copyright case, *Wheaton v. Peters* (1834). Both *INS* and *Wheaton* justify unremunerated labor under copyright law. *INS v. AP* allows copying and distribution of news bulletins among competing news

services.<sup>82</sup> *Wheaton* decided that the production and editing of judicial case reports and the work of Henry Wheaton (the first paid Supreme Court reporter), when left unregistered despite the requirements of copyright law, rendered the valuable edited volumes in the public domain. *Wheaton* is often cited for the by-then blackletter proposition that judicial decisions specifically, and law more generally, are not copyrightable and thus free for all to copy and disseminate. But its reach and extension in modern times remains contested given the many private-public partnerships that produce essential legal materials, such as annotated statutes and regulatory standards.<sup>83</sup>

*Feist* relies on this case family to refute the sweat-of-the-brow theory of copyright protection denying copyright revenue to news organizations in their headlines and law reporters in their edited court decisions. *Feist* renders defunct the labor theory of copyright, even while appreciating that the industries producing the materials (here, news organizations and law reporters) are indispensable to democratic governance and that the lack of copyright may weaken their economic vitality. It does so by explaining, albeit implicitly, that sometimes the most valuable information and knowledge (*i.e.*, journalism and the law) are not private property but “public property,” or *publici juris*.<sup>84</sup> This recognition requires first accepting that these industries produce valuable public goods that should be accessible to all. Journalism in 1918 and the Court in 1834 were still establishing themselves as institutions with public authority. *Feist*’s reliance on *INS* and *Wheaton* to protect a public domain in “facts” (qua news and law) despite the expensive labor required to produce them is therefore intertwined with these institutions earning reputations as serving the public interest in the production of and access to knowledge. In all these cases and case families, the unprotected “facts” are tied to the developing industry, its reputation for epistemic authority, and copyright’s role in preserving public domain knowledge produced by and through those industries.

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<sup>82</sup> To be sure, while defeating a copyright claim because AP failed to register any copyrights, an impracticality for most news organizations, *INS* contrives the “hot news” misappropriation doctrine, which the court describes as a quasi-property right and has rarely been extended beyond the facts of the case. See Shyamkrishna Balganesh, *The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v. TheFlyOnTheWall.com*, 112 COLUM. L. REV. SIDEBAR 134 (2012) [hereinafter *Balganesh, Hot News*].

<sup>83</sup> *Public.Resource.Org*, 590 U.S. at 263 (holding annotated statutes are not “authored” works under copyright law); see also *supra* note 7 and *infra* notes 264, 392-406 (discussing model code and legal material cases).

<sup>84</sup> *Feist*, 499 U.S. at 354 (citing *INS*, 248 U.S. at 235, 241-42). See also Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 UNIV. DAYTON L. R. 215 (2003) (on the evolution and meaning of *publici juris* and related terms) [hereinafter *Ochoa, Public Domain*].



1. *Burrow-Giles Lithographic Co. v. Sarony (1884)*

*Feist* relies on *Burrow-Giles* for the proposition that the Constitution limits copyright protection to original authorial expression.<sup>85</sup> *Burrow-Giles* defines an author as “he to whom anything owes its origin; originator; maker.”<sup>86</sup> Importantly, novelty is not the touchstone for originality, but that which springs from the “intellectual conception” of a person.<sup>87</sup> *Feist*’s reliance on *Burrow-Giles* makes the most sense in the context of the fact-exclusion when we understand that *Burrow-Giles* debates authorship in photography because its technology and artistry in 1884 were still contestable.

The case centers on photographer and portraitist Napoleon Sarony, who made a photographic portrait of Oscar Wilde. When the Burrow-Giles Lithographic Company made unauthorized copies of the photograph and sold them, Sarony sued. To win, Sarony had to prove that he added something recognizably his own in the photograph, something that did not come from Wilde himself or other preexisting things in the world; he had to explain what he “authored” of the reality reproduced in the photograph. At the time, many people understood photography as a mechanistic and unartistic practice.<sup>88</sup> Cameras were new technologies that could reproduce the world as it exists rather than reconstruct or create original images of it.<sup>89</sup> “It is insisted, in argument,” the Court said, “that a photograph being a reproduction, on paper, of the exact features of some natural object, or of some person, is not a writing of which the producer is the author.”<sup>90</sup> Competing with this view of photography was an alternative conception: that of photography as “a misleading form of

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<sup>85</sup> U.S. CONST. art. I, § 8, cl. 8 (protecting “writings” of “authors”).

<sup>86</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

<sup>87</sup> *Id.* at 59.

<sup>88</sup> There was a competing view of photography at the time, too, however, which was that it created ghostly apparitions and fictions. See, e.g., Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 MICH. J. L. REFORM 493 (2004); Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J. L. & HUMAN. 1 (1998) [hereinafter Mnookin, *Truth*]. See also Christine Haight Farley, *The Lingering Effects of Copyright Law’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

<sup>89</sup> FRANCOIS BRUNET, *THE BIRTH OF THE IDEA OF PHOTOGRAPHY* xiii-xiv (2019) [hereinafter BRUNET, *BIRTH*] (describing the origins of photography as “an art without art” and “essentially a natural, or ‘atechnical’ image” but also, importantly, as an invention and a cultural practice “of making pictures”). Oliver Wendell Holmes famously called photographs “mirrors with a memory.” Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, 3 ATLANTIC MONTHLY 738 (1861), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY 71, 74 (Alan Trachtenberg ed., 1980).

<sup>90</sup> *Burrow-Giles*, 111 U.S. at 56.

proof<sup>91</sup> and the product “of human agency.”<sup>92</sup> At stake in Sarony’s argument was an understanding of photography as both creative *and* factual.

The Court drew on several analogies to rule in Sarony’s favor. The first was to compare copyright in photographs to copyright in “maps and charts,” the first subject matter of U.S. copyright law in 1790.<sup>93</sup> The second analogy was to engravings and etchings—reproductions of historical prints—which were the subject of the 1802 amendment to the Copyright Act:

Unless, therefore, photographs can be distinguished . . . from . . . maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright. . . . The only reason why photographs were not included in . . . the act of 1802 is probably that they did not exist, as photography, as an art, was then unknown.<sup>94</sup>

By explaining that photographs are tools of knowledge production—akin to “science,” in the language of the Constitution, like other “writings”—the *Burrow-Giles* Court blessed photography as both factual (containing knowledge about the world) and plausibly authored (originating from a person), and thus protectable under copyright law.<sup>95</sup> This was no small feat. As mentioned, photography was not uniformly considered to perform like a telescope or looking glass—transparently and without substantive distortion, simply bringing into focus things already in the world the human eye cannot see. Some thought photography to be a phantasmic practice, creating apparitions and ghosts, a fictional exercise not always to be trusted.<sup>96</sup> By blessing photography as both art and science, *Burrow-Giles* implicitly recognizes that photography follows a

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<sup>91</sup> Mnookin, *Truth*, *supra* note 88, at 4 (describing the early history of photography as courtroom evidence based on the evolving understanding and acceptance of photographic technology as a product of professional practice and expertise).

<sup>92</sup> *Id.* at 20-21 (describing early use of photographs as disputed forms of “the most dangerous perjurer”).

<sup>93</sup> *Burrow-Giles*, 111 U.S. at 56-5.

<sup>94</sup> *Id.* at 58. “Art” used in this context does not mean “fine arts” but the more general “art” as a skilled or learned practice, usually technical or practical. For a discussion of the Progress Clause’s “useful Arts” as opposed to “Science” (and its exclusion of “fine arts”), see Beebe, *Aesthetic Progress*, *supra* note 22, at 338.

<sup>95</sup> *Burrow-Giles* relied on contemporary English precedent, *Nottage v. Jackson*, to conclude that photography is authored, extending illustrations and painting to photographs, citing Lord Justice Cotton for the proposition that “‘author’ involves originating, making, producing, as the inventive or mastermind, the thing which is to be protected, whether it be a drawing or a painting, or a photograph.” *Nottage* also says that “photography is to be treated for the purposes of [the Copyright Act] as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.” *Nottage v. Jackson*, 11 Q.B.D. 627 (1883).

<sup>96</sup> See *supra* note 88.

predictable, physical process directed and influenced by its maker.<sup>97</sup> This view reflects the emerging modern conception of scientific constructivism, foreshadowing the imminent evolution of sciences and university disciplines in the coming years.<sup>98</sup>

From these propositions, *Burrow-Giles* held that Sarony could own in the portrait that which was a product of his own “intellectual conception,” namely

[the] useful, new, harmonious, characteristic, and graceful picture [which was] . . . entirely from his own original mental conception, to which he gave visible form by posing . . . Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging this subject so as to present graceful outlines, [and] arranging and disposing the light and shade, suggesting and evoking the desired expression.<sup>99</sup>

In other words, photographs can be copyrighted as long as they contain some aspects of the author’s “intellectual conception.”<sup>100</sup> Like maps, charts, engravings, and etchings, photographs contain both authorial expressions and promote the “progress of science” by disseminating knowledge about the world.<sup>101</sup> This shift did not happen overnight, of course. The history of photographs becoming reliable evidence, as well as both high art and “the most democratic art,” took more than a century.<sup>102</sup>

*Feist*’s reliance on *Burrow-Giles* omits this socio-technical history, but it is central to *Feist*’s application of precedent. Copyright’s public domain—unauthored parts of photographs or other works—is hidden in *Burrow-Giles* but made explicit in *Feist*. In the passage quoted earlier,<sup>103</sup> *Feist* cites the famous Melville Nimmer copyright law treatise to connect *Burrow-Giles*’ positive ruling (Sarony has copyright in his photograph of Oscar Wilde) with *Feist*’s negative ruling (Rural has no copyright in its alphabetized phone directory).

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<sup>97</sup> Mnookin, *Truth*, *supra* note 88, at 4 (confirming authentication of photographs).

<sup>98</sup> See *infra* Part III (defining scientific constructivism).

<sup>99</sup> *Burrow-Giles*, 111 U.S. at 54-55.

<sup>100</sup> *Id.* at 55.

<sup>101</sup> Copyright law permits copying only factual parts of factual works – names and places, or visual information. This practice was rare until the mid-20<sup>th</sup> century as previously only the whole work was usually copied (the entire photograph or map or chart), not just parts of it. And when whole works were copied, whatever authorial expression the work contained was also copied. Not until the early-20<sup>th</sup> century did copying parts become more common, developing the doctrine of literal fragmented similarity and the substantial similarity test. This development highlights the importance of the “de minimis” defense, about which there is some doctrinal confusion. See Oren Bracha, *Not DeMinimis*, 68 AM. U. L. REV. 139 (2018); see also Jessica Silbey, *De Minimis Copying: An Empirical Study* (with Samantha Zyontz) (July 2024) (unpublished draft on file with author).

<sup>102</sup> Mnookin, *Truth*, *supra* note 88; BRUNET, BIRTH, at xiii (describing photography as “the cultural face of the political idea of equality, it heralded a democratic art”).

<sup>103</sup> *Feist*, 499 U.S. at 349.

Several aspects of this *Feist* passage deserve attention. First, Nimmer equates “discoveries” with “facts”—a problem because “discovery” in the Constitution means “invention.”<sup>104</sup> Nimmer conflates “facts” with “discoveries” despite their differences as a matter of semantics and statutory and constitutional text. The Court relies on Nimmer’s interpretation as a “bedrock” interpretation of statutory law.<sup>105</sup>

Second, *Feist*’s reliance on *Burrow-Giles* inverts the latter’s focus, suggesting that *Burrow-Giles* concerns both what is within and outside copyright law. One must scour *Burrow-Giles* to find the “facts” of the photograph that are unprotected by copyright law. Their mention is buried in the middle of the opinion. There, the Court hypothesizes a situation wherein the photograph

is simply the [result of] manual operation, by the use of these instruments and preparations . . . transferring to the plate the visible representations of some existing object [for which] the accuracy of this representation [is] its highest merit.

This may be true in regard to the *ordinary* production of a photograph, and . . . in such case, a copyright is no protection.<sup>106</sup>

Like census takers and directory publishers, photographers in 1884 or today can reproduce “scientific, historical, biographical” facts or “news of the day,” with the production of “accuracy” being the “highest merit.”<sup>107</sup> *Burrow-Giles*’ breakthrough is understanding that photography in 1884 was doing just that and that Sarony was the exception to that rule. His photograph contained creative choices that originated from his mind and was not an “ordinary” photograph. Or, as *Feist* says about Rural’s directory, it was not “mechanical or routine,” “entirely typical,” or “garden-variety.”<sup>108</sup> The photograph’s originality needed proving in *Burrow-Giles* because photography was still a contested communicative medium: Was it informational, artistic, or both?

<sup>104</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>105</sup> *Feist*, 499 U.S. at 347 (citing MELVILLE NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.11[A] 2-157 (1990)). Earlier *Feist* cites *Harper & Row* (a decision authored by Justice O’Connor) for the proposition that facts are not protected by copyright, *id.* at 345; *Harper & Row* in turn cites *INS*. See *infra* at 219 discussing both cases.

<sup>106</sup> *Burrow-Giles*, 111 U.S. 53 at 282 (emphasis added). The court said on this question, “we decide nothing.” But the comparison between “ordinary” photography and the Sarony photograph justifies protecting the latter. And thus, identifying the difference between an ordinary photograph and an original photograph becomes critical for defining the boundaries of copyright. See also Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339, 342 (2012); Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019).

<sup>107</sup> *Feist*, 499 U.S. at 349.

<sup>108</sup> *Id.* at 362.

Third, when *Feist* considered the same question for phone directories, both photography and phone directories were understood to contain “facts” available for copying and use. Yet *Feist* leaves implicit the evolution of that institutional history of knowledge production within a disciplinary practice developing its expertise. *Feist* relies on *Burrow-Giles* for its blackletter definition of authorship. Left unmentioned is the nineteenth-century debate over photography as both an emerging expressive genre with creative components and a new technology producing reliable information about the world. Thus, *Feist* lacks an explanation of what facts are. By 1991, facts were assumed to be self-evident—a weakness in the case to be sure.<sup>109</sup> However, the production and identification of facts in earlier and novel forms of expression were exactly the focus of these earlier debates, which were structured around the technological production of new expressive forms and their sources of epistemic authority. *Feist* assumes away these historical and institutional foundations by universalizing the identification and production of facts.

An astute reader of *Feist* might say that it cites *Burrow-Giles* less frequently than the latter’s twentieth-century corollary, *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985).<sup>110</sup> *Harper & Row* protected President Gerald Ford’s autobiography from an unauthorized quotation by *The Nation* in a scooped story about the soon-to-be-released book and its description of Richard Nixon’s pardon. Like *Burrow-Giles*, *Harper & Row* was a case about a fact-based work.<sup>111</sup> And like *Burrow-Giles*, the copyright owner in *Harper & Row* won its case against the unauthorized copier despite the “thin” copyright in fact-based works. But for reasons explained below, *Feist*’s reliance on *Harper & Row* is more directly related to the next case family with roots in *Baker v. Selden*, which establishes the importance of keeping useful inventions either under patent protection (and thus disclosed as part of the patenting process) or in the public domain, even if made with significant investment of time and labor.<sup>112</sup>

## 2. *Baker v. Selden* (1880)

*Feist* cites to *Burrow-Giles* more often than *Baker v. Selden*, but this earlier case best supports *Feist*’s holding that facts are in the public domain despite the expense of the labor required to collect, produce, and organize them. *Baker*

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<sup>109</sup> See Gordon, *Artifact*, *supra* note 31, and Hughes, *Ontology*, *supra* note 31, pointing out these weaknesses.

<sup>110</sup> *Feist* cites to *Burrow-Giles* seven times and to *Harper & Row* eight times.

<sup>111</sup> *Harper & Row* was about pre-existing facts reported by President Ford in his own voice, and *Burrow-Giles* was about Wilde’s appearance as posed and captured by the photographer. There is a fine line between pre-existing facts and created facts, but neither case sufficiently interrogates it for the purposes of copyrightability or otherwise. See, e.g., Justin Hughes, *Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. OF L. & TECH. 327 (2012).

<sup>112</sup> *Baker v. Selden*, 101 U.S. 99 (1879).

anchors *Feist*'s conclusion that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the useful Arts.'"<sup>113</sup> As quoted in full above, *Feist* says:

[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, . . . only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>114</sup>

The slippage in this canonical paragraph between "ideas" and "information" and also between "idea/expression" and "fact/expression" goes unnoticed, perhaps because they are assumed to be synonyms.<sup>115</sup> Yet they are not. As Section III describes in more detail, the debate in the 1880s over copyright protection for factual works, especially regarding the development of professional journalism, begs the question whether facts (as opposed to ideas, principles, and discoveries as discussed in *Baker*) are or should be protected by copyright. As already noted, §102(b) of the Copyright Act contains the word "idea" but not "fact" (or "information"). *Feist* conflates "ideas" with "facts" however, rendering them indistinct for the copyright public domain.

*Feist* appears to say that *Baker* originates a century-long doctrine that takes facts as self-evident and uncopyrightable. But a closer look at *Baker* makes *Feist*'s reliance on it more complex, revealing that *Feist* erroneously characterizes *Baker* as the origin of the conflation of "ideas" with "facts":

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world that useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. 99, 103 (1880).<sup>116</sup>

*Feist* then cites *Harper & Row v. Nation* to "reiterate[] this point":

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<sup>113</sup> *Feist*, 499 U.S. at 349.

<sup>114</sup> *Id.*

<sup>115</sup> The Court made this slippage in *Harper & Row* as well, so it is making it again in *Feist*. (Thanks to Tyler Ochoa for bringing this to my attention.)

<sup>116</sup> *Feist*, 499 U.S. at 350.

‘[N]o author may copyright facts or ideas.’ . . . ‘[C]opyright does not prevent subsequent users from copying from a prior author’s work those constituent elements that are not original—for example . . . facts, or materials in the public domain.’ [*Harper & Row*, 471 U.S. at 547-48] . . . This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts . . . are not original, and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.<sup>117</sup>

But *Baker* is not about the non-protectability of facts. It is about the non-copyrightability of methods of operation, processes, or systems—in particular, an accounting (or “bookkeeping”) system described and made popular by Charles Selden. Those words—“processes,” “systems,” and “methods of operation”—are listed in §102(b) (along with “idea,” “principle,” “concept,” and “discovery”). Understanding the eventual inclusion of “facts” as public domain material arising from *Baker v. Selden* and its progeny requires a closer look at *Baker* and its underlying principles.

*Baker* is much discussed in legal scholarship for its canonical holding that copyright in Selden’s book about bookkeeping did not protect the system it describes or the forms necessary for its use.<sup>118</sup> *Baker* also contains three subsidiary and often-cited holdings. First, it instantiates copyright law’s “idea/expression” distinction, declaring that “ideas” are in the public domain but “expression about ideas” may be copyrighted.<sup>119</sup> It also exemplifies the principle of “merger”: when there are limited ways to express an idea (e.g., the accounting system in Selden’s forms), those expressions are in the public domain to also keep the idea or system in the copyright public domain.<sup>120</sup> Finally, it distinguishes patentable subject matter (i.e., inventions) from copyrightable subject matter (i.e., authorial writings).<sup>121</sup> As Pamela Samuelson writes, the first two holdings are not new but merely restate earlier copyright principles.<sup>122</sup> Yet

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<sup>117</sup> *Id.* See also *id.* at 357 (“Section 102(b) is universally understood to prohibit any copyright in facts. Harper & Row, *supra*, ... Accord, Nimmer § 2.03[E] (equating facts with ‘discoveries’). . . . Congress emphasized that § 102(b) did not change the law, but merely clarified it: ‘Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate that the basic dichotomy between expression and ideas remains unchanged.’ H.R. REP. at 57.”).

<sup>118</sup> See, e.g., Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction between Authorship and Invention*, in INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2005) [hereinafter Samuelson, *The Story of Baker v. Selden*].

<sup>119</sup> Samuelson, *The Story of Baker v. Selden*, *supra* note 118, at 13-14.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 17.

<sup>122</sup> *Id.* at 2-3.

*Baker*'s third point "is unusual in the attention it gives to the distinction between copyrights and patents and the respective roles of these laws in the protection of the fruits of intellectual labor."<sup>123</sup> Samuelson attributes this "unusual attention" in part to Selden's failed attempt to obtain a patent on his bookkeeping system.<sup>124</sup> It was therefore in the patent public domain, and the question for the Court was whether it was also in the copyright public domain.

Samuelson explains the Court's reasoning that renders Selden's valuable forms and charts free to all: Selden's system of double-entry bookkeeping was an improvement on prior bookkeeping systems, but it was an iteration of existing methods, not a wholesale revolution or novel invention.<sup>125</sup> Selden's system combined ledgers into one book, where previously debits and credits were spread among several books, thereby making the system less error-prone, more efficient, and better for preparing future business plans.<sup>126</sup> By the trial court's account, Baker copied from Selden's book, leaving the lower court to question whether he copied too much, copied some but made his own work with it, or, by some coincidence, independently authored a similar accounting book. As Samuelson asks, "[w]as Baker a 'pirate,' . . . an improver, . . . or an independent creator?"<sup>127</sup> At the Supreme Court, however, the arguments shifted from these typical copyright infringement questions to whether what was copied (a version of the form used to practice double-entry bookkeeping) was the proper subject for copyright protection in the first place.<sup>128</sup> This question changed the case from one about piracy and impermissible free-riding on authorial expression into one about the dissemination of information about and the essential tools for performing "useful arts."<sup>129</sup> The new framing threatened the most valuable aspect of Selden's book because "[i]n the absence of a patent, the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even indirectly competing works."<sup>130</sup>

A reader of *Baker v. Selden* might think that Baker, the alleged copier, was the story's hero. And that is because, when explaining why Selden's book could and maybe also *should* be copied, the decision celebrates the progress of

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2-3, 17-18, 23. Business method patents were not considered patentable until *State St. Bank Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368 (1998).

<sup>125</sup> Samuelson, *The Story of Baker v. Selden*, *supra* note 118, at 13-14.

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Id.* at 12-13.

<sup>128</sup> *Id.* at 17.

<sup>129</sup> *Id.* at 18-19 ("The Baker opinion introduced a new kind of inquiry to the framework for analyzing copyright claims. In essence, it directed courts to consider whether the defendant had copied the author's description, explanation, illustration, or depiction of a useful art (such as a bookkeeping system) or ideas, or had only copied the useful art or ideas themselves. In the absence of a patent, the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even in directly competing works. Any necessary incidents to implementing the art (*e.g.*, blank forms illustrating use of the system) could likewise be used and copied by second comers without fear of copyright liability.").

<sup>130</sup> *Id.* at 19.



learning as well as innovation and industry that Baker's unauthorized copying produced. The case neither uses the term "facts," nor, as Samuelson points out, does the decision use the term "expression."<sup>131</sup> *Baker* can therefore hardly be the origin of the "fact/expression" distinction that *Feist* claims it is. The case is about the peremptory interest in promoting the progress of the useful arts by disseminating ideas and systems, and if copyright law thwarts that dissemination by stretching too far, copyright law must yield. The examples of "useful arts" in *Baker* include medicine, the construction and use of plows, and modes of drawing lines to produce the effect of perspective.<sup>132</sup> That is, *Baker* analogizes the "useful art" of bookkeeping to other "useful arts" that were well-established at the time to remind readers that copyright adhering in medical textbooks, industrial manuals, and books about fine art techniques could not be asserted to prevent the *practice* of medicine, farming, and the fine arts. *Baker* explains:

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public.<sup>133</sup>

Several features of this reasoning deserve highlighting given that *Feist* eventually held that twentieth-century "facts" should be understood as part of the broader conception of "knowledge" and its practical applications. Ostensibly, one reason *Baker* analogizes bookkeeping to medicine, fine art drawing, and plow construction is that bookkeeping was not yet well-understood to be either a "science" (a form of "knowledge") or a "useful art." To be sure, keeping accounts was a practice as old as money. But whether bookkeeping was to be studied like a learned "science" and practiced as a "useful art" would turn on the discipline's social and innovative significance, professional organizations, and reigning expertise (here producing competing treatises). Without being explicit about its historical context, *Baker* (both the decision and the dispute that gave rise to it) is anchored in the aftermath of the Industrial Revolution, during which bookkeeping became central to commercial successes as businesses grew larger and more complex and the post-Civil War United

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<sup>131</sup> *Id.* at 20, n.111. *See generally* *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>132</sup> *Baker*, 101 U.S. at 99.

<sup>133</sup> *Id.* at 103.

States expanded in wealth, geography, and global significance.<sup>134</sup> In other words, bookkeeping was most certainly “useful” (and became more so) at this time.

Also, by analogizing bookkeeping and accounting to these other learned practices essential to contemporary society and culture, *Baker* indicates that copyright plays a role in promoting learned domains. First, it explains that copyright attaches to authorial explanations, but not to the useful art itself. Books cannot be pirated (and should be read and learned from), but a book describing “useful arts” cannot prevent the application of the arts it contains.<sup>135</sup> Second, *Baker* relies on many other cases wherein copyright claims failed or were narrowed because of the importance of preserving access to information and enabling its use. These other cases concern weekly publications about “the state of the market” and “daily price-current[s]”,<sup>136</sup> furniture catalogs,<sup>137</sup> cricket-scoring sheets,<sup>138</sup> and dress patterns.<sup>139</sup> In them all, copyright either did not

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<sup>134</sup> B.S. Yarney, *Scientific Bookkeeping and the Rise of Capitalism*, in 1 *ECON. HIST. REV.* 99 (1949); JOHN L. CAREY, *THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL, 1896-1936* (1969).

<sup>135</sup> “[A]s a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.... The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such book. Whether the art might or might not have been patented, is a question which is not before us. It was not patented, and is open and free to the use of the public. And, of course, in using the art, the ruled lines and heading of accounts must necessarily be used as incident to it.” *Baker*, 101 U.S. at 104.

<sup>136</sup> *Id.* at 105 (citing *Clayton v. Stone*, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2872)) (“the term ‘science’ cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, not a work of science. The title of the act of Congress is ‘for the encouragement of learning,’ and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.”).

<sup>137</sup> *Id.* at 106 (citing *Cobbett v. Woodward*, (1872) 14 L.R. Eq. 407 (Eng.)) (furniture catalog drawings not subject of copyright because when “done .... solely for the purpose of advertising particular articles for sale, promoting the private trade of the publisher by the sale of the articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which .... would prevent him from using the same advertisement”).

<sup>138</sup> *Id.* (citing *Page v. Wisden*, 20 L.T.N.S. 435 (1869)) (“cricket scoring sheets not fit subject for copyright .... because to say that a particular mode of ruling a book constituted an object for copyright is absurd.”).

<sup>139</sup> *Id.* at 107 (citing *Drury v. Ewing*, 7 F. Cas. 1113 (C.C.S.D. Ohio 1862)) (book of dress designs could be copyrighted but that does not prevent their use which generates copies of the exact patterns and designs as “exemplified in cloth on the tailor’s board and under his shears; in other words, by the application of a mechanical operation to the cutting of cloth in certain patterns and forms. Surely the exclusive right to this practical use was not reserved to the publisher by his copyright of the chart”).

cover the works at issue (prices and scoring sheets) or copying was allowed because of the nature of the use (information to sell consumer goods).<sup>140</sup> These copyright limitations and exclusions foreshadow future legislative debates. The protectability of price predictions, fashion, manufacturing catalogs, and sports scorecards became part of early twentieth-century copyright reform discussions, and was mentioned specifically in legislative history as unprotectable subject matter under the new §102(b).<sup>141</sup> These cases and examples support the growing consensus that copyright cannot extend to mere “industry”<sup>142</sup> or the “practical use”<sup>143</sup> of information and information-containing images, which is one way to understand “facts” and their constitution through tables, charts, graphs, and narratives.<sup>144</sup>

One final point about *Baker*: it only implicitly relates truth, as a goal of “Progress of Science and the useful Arts,” with a reliably open public domain. But it is hard not to read into the Court’s reasoning their necessary interdependence. The Court explains:

Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account books arranged on substantially the same system, but the proof fails to show that he has violated the copyright of Selden’s book, regarding the latter merely as an explanatory work.<sup>145</sup>

The Court states copyright’s role as encouraging multiple dialogues on “truths of . . . science,” which ideally produce diverse perspectives on that subject. Later, the Court says:

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<sup>140</sup> See *supra* notes 135-39.

<sup>141</sup> See Part II (discussing legislative history). See also cases litigated on these subjects: *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109 (2d Cir. 2007) (daily price currents); *CCC Info. Servs. v. MacLean Hunter Mkt. Repts., Inc.*, 44 F.3d 61 (2d Cir. 1994) (car prices); *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999) (coin prices); *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700 (6th Cir. 2005) (illustration and organization of auto parts in catalog were not sufficiently original); compare *Kregos v. AP*, 937 F.2d 700 (2d Cir. 1991) (on forms for predicting outcomes of baseball games based on pitching statistics); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017) (shape, cut, and dimensions of cheerleader uniforms not copyrightable).

<sup>142</sup> See *Clayton*, *supra* note 136.

<sup>143</sup> *Baker*, 101 U.S. at 107 (discussing *Drury*, *supra* note 139).

<sup>144</sup> Cf. HAYDEN WHITE, *CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 1-25 (1987) (describing how historic events recorded in annals and calendars inevitably become narrativized challenging the distinction between objectivity and subjectivity).

<sup>145</sup> *Baker*, 101 U.S. at 101-2.

To give to the author of the book an exclusive property in the art described therein when no examination of its novelty has ever been officially made would be a surprise and a fraud upon the public. . . . The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained, and it can only be secured by a patent from the government.<sup>146</sup>

This declaration confirms the right to rely on and assume an open public domain for debating “truths of . . . science” and practices of useful arts. Unless notice exists that a patent has been issued on the art, there are no limits on its use. Copyright law must be interpreted to make sure that patent law—and only patent law—protects novel and useful inventions. Copyright cannot cover truths of “a science or the methods of an art,” which are society’s common property absent a patent on the subject matter.

These copyright principles apply despite the hard work of producing and communicating “truths” and developing “methods” of discerning or applying them. *Baker* clarifies that Selden’s loss in the case is not fortuitous or an accident of legal formalities. It is, to use *Feist*’s updated formulation, a “result [that] is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”<sup>147</sup> In so stating, *Feist* relies on *Harper & Row v. Nation*, a case about the line between protecting expression and the facts it contains. *Feist* paraphrases that case:

Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, . . . we explained that President Ford could not prevent others from copying bare historical facts from his autobiography . . . but that he could prevent others from copying his “subjective descriptions and portraits of public figures.”

As we saw above, *Feist* then affirms that, though “it may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation,” such use is actually “the essence of copyright” and constitutionally required: “The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and the useful Arts.’”<sup>148</sup>

As such, Baker could copy Selden’s accounting charts and other material from Selden’s book necessary to explain and practice the “art,” but he could not copy the whole book containing Selden’s “particular” descriptions and explanations. Similarly, *The Nation* could copy facts and truths of history

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<sup>146</sup> *Id.* at 102.

<sup>147</sup> *Feist*, 499 U.S. at 349.

<sup>148</sup> *Id.* at 348-9 (quoting *Harper & Row*).

contained in President Ford's forthcoming autobiography for its news reporting, but not the "subjective descriptions" contained therein. And while Baker might benefit from Selden's labor (writing and publishing his book) by drawing on it to write and publish a competing treatise containing similar illustrations and charts, so too might *The Nation* reveal facts and truths about the President contained in his autobiography without having done the hard work of collecting them. Likewise, Feist may copy the facts of Rural's directory without expending the time or money collecting the facts. *Feist's* rejection of protections for "sweat of the brow" or "industrious collection and labor" has roots in both *Baker* and *Harper & Row*.<sup>149</sup>

*Feist* extends its discussion of public domain facts and rejection of sweat-of-the-brow to yet a third case and its resulting genealogy: *Wheaton v. Peters* by way of *INS v. AP*. Like *Burrow-Giles v. Sarony* and *Baker v. Selden*, *Wheaton* and *INS* do not mention "facts" in their conclusions denying copyright to law reports and news. But as with the other cases, they focus on the "Progress of Science and the useful Arts" and copyright's role in the pursuit of knowledge within imminently authoritative industries whose relevance to "truth" and "science" was at first controversial, then widely debated, and eventually stabilized due in part to an open public domain. The origin of twentieth-century "facts" that *Feist* refers to emerges in the eighteenth and nineteenth centuries within institutionally generated and disciplinarily grounded knowledge-producing industries—the subjects of these cases on which *Feist* relies.

### 3. *Wheaton v. Peters* (1834) and *Publici Juris*

*Feist's* holding that facts are not copyrightable was uncontroversial in 1991. However, its holding that sweat-of-the-brow can never justify copyright protection was subject to significant controversy that started a century earlier in the 1880s and endured until *Feist*.<sup>150</sup> Robert Brauneis recounts this history of the Progressive Era debate over copyright in news as inaugurating copyright's "originality" doctrine.<sup>151</sup> But this history also anchors copyright's fact-exclusion to its public domain in knowledge and truth.<sup>152</sup>

Recall that maps were among the original copyrightable subject matter, and they were full of facts.<sup>153</sup> But in the early days of copyright, the justification for

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<sup>149</sup> See Brauneis, *Transformation*, *supra* note 21, at 321 (discussing industrious labor doctrine). See also Miriam Bitton, *Trends in Protection for Informational Works under Copyright Law during the 19th and 20th Centuries*, 13 MICH. TELECOMM. & TECH. L. REV. 115 (2006) (discussing the historical treatment of informational goods under copyright as a "complicated spectrum" between industrious labor and creativity).

<sup>150</sup> See *supra* note 21 (citing scholarship on sweat-of-the-brow).

<sup>151</sup> See Brauneis, *Transformation*, *supra* note 21.

<sup>152</sup> See Ochoa, *Public Domain*, *supra* note 84.

<sup>153</sup> See generally Copyright Act of 1790, 1 Stat. 124; "[F]or the first three-quarters of the 19<sup>th</sup> century, the notion that copyright incorporated an originality requirement which excluded factual matter from protection was unknown to Anglo-American law. Courts routinely found infringement of fact-based works, such as maps, charts, road-books,

protecting maps from unauthorized copying did not require distinguishing the labor to collect the facts from the facts themselves.<sup>154</sup> Mapmakers competed because mapmaking was hard and affordably pirating whole maps was nearly just as hard.<sup>155</sup> Once copying and communication technology evolved to threaten the markets in copyrighted works, including maps—as it did with affordable lithography and photography in the mid-1800s—justifying the protection of works with “thin” copyright would follow.<sup>156</sup> According to Brauneis, this is when the originality standard develops, finding its nineteenth-century apex in *Burrow-Giles*.<sup>157</sup>

As technological innovation accelerates knowledge production and dissemination via new discovery tools, communication technology, and delivery systems, the value of labor diminishes and the value of information increases. *Feist* affirms this result, deriving its anti-sweat-of-the-brow holding from the case of *INS v. AP*, which itself has origins in *Wheaton v. Peters*. These two cases concerned developing professions and industries (news and the law) that, like the directories in *Feist*, produced informational works and compilations of preexisting materials for sale. By reaffirming these cases’ holdings, *Feist* claims to correct an off-course line of twentieth-century cases that wrongly protected “component parts of the work” and “directories, gazetteers, and other compilations”<sup>158</sup> in the absence of originality. *Feist* expressly says that “some courts . . . infer[ed] erroneously that directories and the like were copyrightable per se.”<sup>159</sup> *Feist* explains:

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as “sweat of the brow” or “industrious collection,” the underlying notion was that copyright was a reward for the hard work that went into compiling facts. . . . The “sweat of the brow” doctrine had numerous flaws, the

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directories, and calendars, on the basis of the copying of their factual content, and concluded that the industry of plaintiffs in gathering and presenting facts—their ‘intellectual labor’ should be protected under copyright law.” Brauneis, *Transformation, supra* note 21 at 321. See also Joyce & Ochoa, *Reach Out, supra* note 31 (describing competing lines of authority for copyright protection, some requiring originality, and some not).

<sup>154</sup> Brauneis, *Transformation, supra* note 21, at 321.

<sup>155</sup> For map cases discussing sweat-of-the brow, see, e.g., *Blunt v. Patten*, 3 F. Cas. 763, 765 (S.D.N.Y. 1828); *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845); *Farmer v. Calvert Lithographing, etc., Co.*, 8 F. Cas. 1022 (C.C.E.D. Mich. 1872); *Perris v. Hexamer*, 99 U.S. 674 (1878). For a history of map-making as it relates to copyright law, see ISABELLA ALEXANDER, *COPYRIGHT AND CARTOGRAPHY: HISTORY, LAW, AND THE CIRCULATION OF GEOGRAPHICAL KNOWLEDGE* (2023).

<sup>156</sup> See Brauneis, *Transformation, supra* note 21, at 321.

<sup>157</sup> *Id.* Joyce & Ochoa, *Reach Out, supra* note 31, agree with Brauneis that *Burrow-Giles* is a dividing line and resolved the competing lines of authority in favor of originality.

<sup>158</sup> *Feist*, 499 U.S. at 353 (discussing the 1909 Copyright Act).

<sup>159</sup> *Id.*

most glaring being that it extended copyright protection in a compilation . . . to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler “was not entitled to take one word of information previously published,” but rather had to “independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information. . . .” “Sweat of the brow” courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.<sup>160</sup>

To support its anti-sweat-of-the-brow principle, *Feist* cites *INS*, a case confirming the denial of copyright protection to news bulletins and the facts they contain.<sup>161</sup> Without copyright protection (and only the limited “hot news” protection), competition intensified in the production and dissemination of news, inaugurating a new era for the journalism industry.<sup>162</sup> Because *INS* was allowed to republish AP’s news bulletins without copyright liability even if it did not collect the news, the scope of AP’s monopoly over (and value in) its news enterprise diminished, especially with the ease of telegraphic copying and dissemination. *Feist* cites *INS* as the “best example” of copyright’s scope and purpose concerning the value and status of information goods.<sup>163</sup> Citing *INS*, *Feist* affirms that “[t]he news element—the information respecting current events contained in literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”<sup>164</sup>

#### 4. *INS v. AP and the “Science” of Journalism*

*Feist*’s citation to *INS* highlights two key features of the evolution of facts as elements of authoritative knowledge in the twentieth-century public domain. First, for “news” to be *publici juris*, an understanding of news as truthful and trustworthy (as “fact”) had to be established. This would take time, as newspaper publishing was still local and unprofessionalized.<sup>165</sup> Second, for journalism to be valued and sustainable given rapidly evolving business models and industry standards, paying for news production and keeping it reliable triggered arguments about its copyrightability.<sup>166</sup> As Brauneis explains, the tumult in the news industry between 1875 and 1910 driven by technological change (e.g., telegraphy and printing) forced its reorganization from an industry

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<sup>160</sup> *Id.*

<sup>161</sup> It did grant AP a limited misappropriation claim, today called the “hot news” doctrine which has not been expanded beyond its original context. See Balganes, *Hot News*, *supra* note 82.

<sup>162</sup> See Brauneis, *Transformation*, *supra* note 21.

<sup>163</sup> See *supra* note 82 (describing how *INS* was primarily an unfair competition case).

<sup>164</sup> *Feist*, 499 U.S. at 353.

<sup>165</sup> SLAUTER, NEWS, *supra* note 46, at 109-12.

<sup>166</sup> See Brauneis, *Transformation*, *supra* note 21.

that did not rely on copyright (because copying was hard and local journalism the norm) to one that sought copyright protection.<sup>167</sup> This reorganization included investing in journalists, which raised questions about how to pay for them, with copyright being one potential answer. This shift inaugurated the new career of professional journalists, who previously were considered gossip columnists or mere “collectors” of news items.<sup>168</sup> Journalists would eventually become expert investigators and “writers,” commanding respect, deference, and reasonable pay for their high-quality, truthful accounts of contemporary events. *Feist*'s reliance on *INS* takes for granted the 1991 quality standards of journalism, even though *INS* does not discuss facts per se (but *news*) because journalism in 1918 was still establishing itself as a dependable, reliable profession.

*INS* preceded three decades of fighting among expanding news organizations competing for national coverage.<sup>169</sup> Starting in the mid-1800s, the news industry evolved from many small local papers (which, because of geographically constrained markets, happily copied news stories from each other, sharing across distances through subsidized postal services) to consolidated, regional news organizations and national news services like the Associated Press and Western Union.<sup>170</sup> Changing communication technology accelerated these organizations' growth. Journalism transformed with the telegraph, improvements in printing, ease of railroad transportation in the 1880s, and the shrinking of political subsidies for newspapers.<sup>171</sup> Lead-time advantages for stories shrank as distances and time became more traversable, and more news stories could be copied quickly, across greater distances, and without adhering to professional courtesies that were part of local journalism's norms of reciprocity and delay.<sup>172</sup> Competition among newspapers increased and

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<sup>167</sup> *Id.* See also SLAUTER, NEWS, *supra* note 46.

<sup>168</sup> See Brauneis, *Transformation*, *supra* note 21, at 355 (describing the critique of journalists as not authors and news gathering and journalism not considered the product of “skilled labor” or “intellectual conception of the writer”). As Brauneis describes, news was considered unlike original copyright subject matter – maps and charts – which required lengthy expeditions, special tools, and expertise. An 1884 article from the *Nation* described news reporters in the following way, as part of a critique of a new bill that would protect copyright in news.

“[I]t is absurd to talk of a man who picks up a piece of news or an “item” as an “author” at all. The reason why copyright laws are passed is to secure the fruits of original, intellectual labor. But the proposed copyright in “news” does not do this. Any one may collect news without any original intellectual effort, and with very little effort of any kind. Some people do it by listening at keyholes ... [or] in the ordinary course of conversation with the persons whom they meet in the way of business or pleasure.”

*Id.*

<sup>169</sup> See SLAUTER, NEWS, *supra* note 46, at 227.

<sup>170</sup> *Id.* at 87-107.

<sup>171</sup> See Brauneis, *Transformation*, *supra* note 21, at 345-49.

<sup>172</sup> Laura J. Murray, *Exchange Practices among Nineteenth-Century US Newspaper Editors: Cooperation*, in LAURA J. MURRAY, S. TINA PIPER & KIRSTY ROBERTSTON,



newspapers became more dependent on sales and advertising.<sup>173</sup> Companies and larger associations emerged and came to dominate the market; all of them were accused of anti-competitive practices, putting even more pressure on local papers.<sup>174</sup>

From these changes came calls for copyright (or something!) to protect the news from expropriation.<sup>175</sup> Intriguingly, local newspapers were not asking for these changes—they did not want copyright because they depended on copying.<sup>176</sup> Only new media conglomerates were asking for stronger copyright to prevent competition in national news services. In 1883, AP hired a lobbyist (Henry Watterson) to seek passage of the “News Copyright Bill” that would grant short-term protection to articles published in newspapers.<sup>177</sup> Although the bill never got out of committee, debates about it foreshadowed copyright’s implied fact-exclusion that *Feist* makes blackletter law, extinguishing sweat-of-the-brow to protect *publici juris*.<sup>178</sup>

How did the notion of *publici juris*—property so important for general welfare that it must be free—enter copyright’s canon?<sup>179</sup> *Feist* does not quote Justice Louis Brandeis’s famous *INS* dissent but is surely channeling it.<sup>180</sup> Brandeis’s opinion reflects the changing nature of journalism at the turn of last century and the growing emphasis on the public interest in freedom of information as a mainstay of scientific progress and democracy:

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrences of

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PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR, AND THE EVERYDAY 86, 86-109 (Oxford Univ. Press 2014) [hereinafter Murray, *Exchange Practices*].

<sup>173</sup> See Brauneis, *Transformation*, *supra* note 21, at 341.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* See also Douglas Baird, *The Story of INS v. AP*, in *INTELLECTUAL PROPERTY STORIES* (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., Foundation Press, 2006) (referring to *INS* as a “concocted controversy”).

<sup>176</sup> Murray, *Exchange Practices*, *supra* note 172 (describing the accepted process of cutting and pasting among newspapers as “cabbaging”).

<sup>177</sup> Compare Brauneis, *Transformation*, *supra* note 21, at 355, with Journalism Competition and Preservation Act of 2022, S. 673, 117th Cong. (2022). Recently, similar calls to specially protect journalism have arisen as the internet has profoundly disrupted journalism’s predictable revenue streams from advertising. How to fund reliable news is once again a pressing concern.

<sup>178</sup> Instead of extending copyright to news, the Court decided *INS*, which as stated above, ended in a limited *sui-generis* “hot news” doctrine that has rarely been extended beyond facts.

<sup>179</sup> See Ochoa, *Public Domain*, *supra* note 84 (discussing history and related terminology of *publici juris*). I use *publici juris* because it is what *INS* uses when describing *Wheaton v. Peters*. Other terms include public property and common property.

<sup>180</sup> Brandeis’s opinion is considered a dissent (although it is sometimes indicated as a concurrence) because he would have denied all relief to AP, including unfair competition, placing all news in the public domain.

interest and to distribute reports thereof. The [AP] contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news, and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is that the noblest of human production—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.<sup>181</sup>

Brandeis's language reflects a changing respect for the news industry as a producer of knowledge serving the public interest. It also reflects property law's limits, including copyright, when "property" is "affected with a public interest." At the turn of the twentieth century, the Court was familiar with debates concerning public interest limits on property and contract because it frequently decided such cases regarding state regulation of ordinary economic affairs. The Court's infamous 1905 *Lochner v. New York* decision confounded states' power to regulate such matters by holding both property and contract inviolable as a matter of fundamental rights.<sup>182</sup> *Lochner* prevented state government from, for example, fixing prices of essential household staples and setting minimum wages and maximum hours.<sup>183</sup> Justices Brandeis and Holmes were at the forefront of this fight, dissenting in *Lochner* and eventually planting the doctrinal seeds for its demise.<sup>184</sup> The point here is twofold: In 1918, "news" was not the same as "facts" (despite *Feist* later equating them); and *INS* made a breakthrough determination that "news agencies" were sufficiently reliable and expert to produce "truths" that people could rely on—and they served the public good—such that exclusivity over the news (via copyright or otherwise) was inappropriate.

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<sup>181</sup> *INS*, 248 U.S. at 250.

<sup>182</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>183</sup> *Id.* (discussing both kinds of regulations).

<sup>184</sup> *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price regulation for milk because it was an industry "affected with the public interest"); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the hours and wages regulation as a reasonable in the public interest). Justice Brandeis was on the Court for both decisions (stepping down in 1939). Justice Holmes left the Court in 1932.

Although *Feist* says none of this, it cites *INS*'s holding that "the news element—the information respecting current events contained in the literary production—is not the creation of the writer but a report of matters that ordinarily are *publici juris*."<sup>185</sup> As such, *Feist* affirms the preeminent value of free, accessible, and accurate information as a function of effective and efficient knowledge production in furtherance of the public interest. After designating "history of the day" *publici juris*, *INS* says that "[i]t is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and the useful arts' . . . , intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."<sup>186</sup> *Feist* itself does not say "knowledge," but after quoting this sentence designating "history of the day" *publici juris*, *Feist* does say:

[C]opyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." . . . But "sweat of the brow" courts took a contrary view; they handed out propriety interest in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent. . . . Protection for the fruits of such research . . . may, in certain circumstances, be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials."<sup>187</sup>

By criticizing copyright protection of "fruits of . . . research" and for the "wasted effort" it creates, this passage shows that "facts" in *Feist* means more than "information" or "data." It means knowledge produced through institutions with disciplinary authority (such as journalism). So understood, *Feist* expands the public domain in the information age.<sup>188</sup>

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<sup>185</sup> *Feist*, 499 U.S. at 354.

<sup>186</sup> *INS*, 248 U.S. at 235.

<sup>187</sup> *Feist*, 499 U.S. at 354 (citations omitted).

<sup>188</sup> *Feist* was about telephone directories, critical information specific to the time of burgeoning competitions among telephone and communication companies. Knowledge and information we care about today might include data fueling algorithms, biochemical processes, and scholarly research. See LAMDAN, DATA CARTELS, *supra* note 6. See also *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (determining that the Internet Archive, engaging in controlled digital lending, committed copyright infringement unprotected by fair use by scanning and distributing copies of books online as part of the National Emergency Library (NEL) stemming from the COVID-19 pandemic).

5. *Wheaton v. Peters and Knowledge of Law*

*Feist* cites *INS* as a precedent for copyright's *publici juris*, justifying free-riding on labor and investment to collect and publish the news. But from where did *INS* derive it? To be sure, the notion of "public right" or common property—like claims on rainwater or, as Justice Brandeis says in *INS*, that which is "free as the air to common use"—was an enduring concept in English and U.S. law. It is an ancestor of today's "public domain," or the "commons."<sup>189</sup> In deciding *INS*, the Court was well aware of the battles at the time between privatization and maintaining public goods. Yet in *INS v. AP*, the argument for news as public property came from the *INS*'s lawyer, who cited *Wheaton v. Peters* in his argument to justify limiting copyright as a matter of public interest.<sup>190</sup> Although neither *INS* nor *Feist* cites *Wheaton*, the latter is discussed in the *INS* briefs as the canonical case for limiting copyright when public interest demands it.<sup>191</sup>

*INS* argues first that "facts are public not private property," citing *Baker* as controlling precedent (though we know that is not what *Baker* said).<sup>192</sup> Then *INS* explains that because *AP* does not copyright its news—*i.e.*, *AP* does not seek copyright registrations for its news reports before publishing them—it can have, at most a common law right extinguished upon publication.<sup>193</sup> "Yet, by the common law, the publication of such works amounts to a dedication to the public and confers a universal right of reproduction and use whether for purposes of gain or otherwise. *Wheaton v. Peters*."<sup>194</sup> *INS*'s lawyer anchors his argument for news as *publici juris* in *Wheaton*'s 1834 holding that copyright extinguishes when writings are "published" without being properly registered. "As long ago as 1774, the House of Lords in *Donaldson v. Beckett* . . . laid down principles which indicate that there can be no ownership in news at common law after publication. To the same effect are [other federal cases and two copyright treatises Drone and Bowker]."<sup>195</sup> *INS*'s lawyer analogizes this public dedication

<sup>189</sup> See Ochoa, *Public Domain*, *supra* note 84.

<sup>190</sup> *INS*, 248 U.S. at 229 (citing *Wheaton v. Peters*, 33 U.S. 591, 657 (1834)).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Petitioner also cited in support lower court decisions, such as *Davies v. Bowes*, 209 F. 53, 56 (S.D.N.Y. 1913); *Tribune Co. v. Illinois Publ'g Co.*, 116 F. 126 (N.D. Ill. 1900); *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903); *West Pub. Co. v. Edward Thompson Co.*, 176 F. 833 (2d Cir. 1910); *Clayton*, *supra* note 136. *Baker* discusses *Clayton*, see *Baker*, 101 U.S. at 105.

<sup>193</sup> *INS*, 248 U.S. at 229.

<sup>194</sup> *Id.* The petitioner in *INS* also cites *Holmes v. Hurst*, a 1899 Supreme Court case upholding the public domain status of parts of Justice Oliver Wendell Holmes's father's book, *The Autocrat at the Breakfast Table* (1858). 174 U.S. 82 (1899). Those parts were published in the *Atlantic Monthly* prior to registration and deposit with the appropriate government office.

<sup>195</sup> *INS*, 248 U.S. at 229 (emphasis added). Neither Bowker nor Drone directly address the issue. In relevant part, Bowker writes: "There is, therefore, no copyright protection for news as such, but the general copyright of the newspaper or a special copyright may protect

to the common law of trade secrets. “Upon publication, the news becomes the common possession of all to whom it is accessible; private property therein dies with its publication, as in the case of a trade secret.”<sup>196</sup> Citation to *Wheaton* is not out of the blue. It is the Court’s first copyright case and its holding, like *INS*, and like *Feist* eventually, extinguishes copyright in factual works produced with skill and effort.

The works in *Wheaton* were twelve volumes of Supreme Court law reports (arguments and opinions), edited by Court reporter Henry Wheaton from 1816 to 1827.<sup>197</sup> Richard Peters, the Defendant, was alleged to have published a volume called *Condensed Reports of Cases in the Supreme Court of the United States* containing all the Court’s decisions from its beginning through to the commencement of Peter’s reports (in 1827), and including, “without any material abbreviation or alteration, all the reports of cases in the first volume of Wheaton’s reports.”<sup>198</sup> Like *Baker v. Selden*, *INS v. AP*, and *Burrow-Giles v. Sarony*, *Wheaton* concerned competing copies in the marketplace and the scope of copyright’s public domain in works of “science.” *Wheaton* reads like a long, complicated opinion (with a dissent of approximately thirty pages), but the short story is that there was a factual dispute as to whether Wheaton and his publisher failed to adhere to statutory formalities to secure federal copyright in his reports.<sup>199</sup> As such, Wheaton also claimed common law property rights in his manuscripts to prevent Peters from republishing them in the updated annotated volumes. Wheaton justified exclusive control over the manuscript in his labor and skill, even if he failed to effectuate a federal copyright in them. Peters, however, claimed the manuscripts were in the public domain because they had been published absent notice, deposit, and registration, and thus were free to republish and sell.

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the form of a dispatch, letter, or article containing news.” RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 89 (Project Gutenberg 2012) (1912) (ebook). Drone explains: “But it may be said that the contents of a daily newspaper are too ephemeral and often too insignificant to be worthy of statutory protection. This is doubtless true of much that appears in a newspaper; but . . . among the contents of such publications are frequently found productions of great value and permanent literary merit. There is, then, nothing in the law of copyright, as made by the legislature or as expounded by the courts, to prevent valid copyright from vesting in a magazine or a newspaper, as a whole, or in any of its contents that may be worthy of protection.” EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 169 (1879).

<sup>196</sup> *INS*, 248 U.S. at 215.

<sup>197</sup> *Wheaton v. Peters*, 33 U.S. 591 (1834). See also Craig Joyce, *A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (Of Copyright in the New Republic)*, 42 Hous. L. Rev. 325 (2005).

<sup>198</sup> *Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>199</sup> The substantial majority of the Court’s opinion in *Wheaton* considered the relationship and potential conflict between common law copyright (which could ostensibly last in perpetuity) and statutory copyright, which had specific requirements for protection and a limited term. For the full story, see Joyce, *supra* note 197.

Nowhere in the *Wheaton* decision does the Court mention the public domain of facts or knowledge as part of the U.S. copyright regime. However, in deciding that *Wheaton* may have forfeited his copyright by failing to adhere to statutory formalities, the *Wheaton* Court explained the pitfalls of property law and constraints of copyright in light of its purpose: “[E]very man is entitled to the fruits of his own labor . . . ; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.”<sup>200</sup> While this enjoinder nods to the value of work and authorship as a kind of labor, it also recognizes that turning labor into property requires positive law. The law here is the U.S. Copyright Act, which the Court interprets as *preempting* common law copyright when the work at issue was published, as *Wheaton*’s reports were.<sup>201</sup> Because *Wheaton* (or his publisher) apparently failed to vest and/or renew his copyright in the reports, they were not private property and were instead in the public domain. As *Feist* would say 150 years later, it “may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. . . . [But] this is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright. . . .”<sup>202</sup>

*Wheaton* explains that both the scope of statutory protection and its preemptive effect construct and justify copyright’s public domain despite the labor of authors, even those on whom the Court relies to disseminate its decisions. They sum to the Court’s first holding—that no common law copyright can exist in published works; only federal copyright pertains, and federal law requires statutory formalities. The Court also announced a second holding before sending the factual issue of statutory compliance back to the trial court—that its own writing is unownable by reporters (and potentially, by anyone): “[N]o reporter has or can have any copyright in the written opinions delivered by this Court, and . . . judges thereof cannot confer on any reporter any such right.”<sup>203</sup>

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<sup>200</sup> *Wheaton*, 33 U.S. at 658.

<sup>201</sup> *Wheaton*, 33 U.S. at 663 (“Congress . . . by this act, instead of sanctioning an existing right as contended for, created it.”). *Wheaton* relied on persuasive English law authority, *Miller v. Taylor*, 4 Burr. 2303 (1769) (holding that absent publication exclusivity over a manuscript could be perpetual) and *Donaldson v. Beckett*, 4 Burr. 2408 (1774) (holding that a published manuscript under the English copyright law, Statute of Anne (1710), was subject to statutory limits and thus could expire and become public property). “This right [to exclusive control over published works], . . . does not exist at common law—it originated, if at all, under the acts of congress. No one can deny that when a legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not . . . comply with the requisitions of the law.” *Wheaton*, 33 U.S. at 663-64.

<sup>202</sup> *Feist*, 499 U.S. at 349.

<sup>203</sup> *Wheaton*, 33 U.S. at 668. It reaffirmed this holding in *Banks v. Manchester*, concerning reports of the Supreme Court of Ohio, holding that “what a court or a judge . . . cannot

The unanimous decision that judicial opinions cannot be copyrighted stems from Wheaton's argument that his reports of judicial opinions were distinct from "law" or "statutes," which he admitted cannot be copyrighted. In so admitting, Wheaton differentiated between his investment and expertise as a "reporter" and the "law" that he reported, a difference that faded over time, only to be contested again in the early twenty-first century.<sup>204</sup> Wheaton's attorney made his case as follows:

It is attempted to put judicial decisions on the same ground as statutes. It is the duty of legislators to promulgate their laws. It would be absurd for a legislature to claim copyright. . . . Statutes never were copyrighted. Reports always have been. . . . It is the bounden duty of government to promulgate its statutes in print, and they always do it. It is not considered a duty of government to report the decisions of courts, and they therefore do not do it. The oral pronunciation of the judgments . . . of courts is considered sufficient. Congress never employed a reporter, and they never gave any one compensation, before Mr. Wheaton. Mr. Cranch reported without compensation, and relied upon his copyright; and Mr. Wheaton continued, with full understanding that he was to report in the same way. [Is] the court prepared to deprive all authors of [judicial] reports in this country of their copyrights? Of property which they have labored to acquire?<sup>205</sup>

The answer, according to *Wheaton*, is yes. But the distinction between "judicial decisions" and "reports" remains important. Annotations and abridgments of opinions are copyrightable as to that which the author or reporter added himself; this is how, for example, Westlaw retains copyright over its headnotes and summaries.<sup>206</sup> The opinions themselves, as part of the "law," however, are in the public domain. This is one version of the "government edicts" doctrine, embodying the public policy that people must have access to the laws that govern them.<sup>207</sup> The doctrine is an early incarnation of open access principles and prevents copyright's monopolization of especially useful information. Indeed, Wheaton's lawyer made this precise point to barter a compromise in the case:

If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide

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confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the state." *Banks v. Manchester*, 128 U.S. 244 (1888).

<sup>204</sup> *Public.Resource.Org*, 590 U.S. at 277 ; *Matthew Bender & Co v. West Publ'g*, 158 F.3d 674 (2d Cir. 2001).

<sup>205</sup> *Wheaton v. Peters*, 1834 U.S. LEXIS 619, at \*20-21, *aff'd*, 33 U.S. 591 (1834).

<sup>206</sup> *Matthew Bender*, 158 F.3d at 674.

<sup>207</sup> *Public.Resource.Org*, 590 U.S. at 264-67 (describing history of government edicts doctrine).

our actions. . . . [But] it is proper here to draw [a] distinction between *reports*, the immediate emanations from the sources of judicial authority, and . . . *treatises*, or even *compilations*. These may be of great utility, but they are not the law. Exclude or destroy them, and the law and the knowledge of it still exists. . . . The owner may close them at his pleasure, and no one can complain. But the entrance to the great temple itself, and the highway that leads to it, cannot be shut without tyranny and oppression.<sup>208</sup>

Here is yet another clear path to *Feist*: compilations can be copyrighted, but not the “law” or “knowledge” they contain.

Wheaton lost his case at the Supreme Court because of two principles: there is a copyright public domain even against authors’ “natural” right to the fruits of their labor, and judicial opinions as such are not copyrightable. *Wheaton* is not so strange a precedent for *INS* to declare “news” in the public domain if we understand both cases (as the petitioner in *INS* did) to describe copyright law’s construction and preservation of the public domain as essential to the production of knowledge and self-government. Moreover, *Wheaton*’s outcome depends on court reporters’ evolving professional identity straddling two roles: mouthpieces of the Court transcribing the “law” (*i.e.*, judicial opinions, which are in the public domain), and expert annotators whose authored additions can be owned and sold as their “work” if copyright formalities are met. *INS*’s outcome likewise depends on the evolving industry of journalism, recognized as producing both truths and knowledge about the world, which form part of the public domain, and articles and essays containing truths and knowledge, which can be copyrighted as expressions of authorship if formalities and other statutory requirements are met. Both cases explain that failure to register work prior to publication forfeits copyright and puts the material in the public domain, whatever its nature. And both cases unapologetically prioritize *publici juris* over exclusive rights preserving what *Feist* eventually calls the “essence of copyright.”<sup>209</sup>

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From *Wheaton* to *Feist* is a long journey to establish the bedrock principle that “facts” are in the public domain. But as that journey demonstrates, identifying “facts” is not always self-evident, and their shifting context is subject to dispute. Moreover, the priority of the public domain to accomplish copyright’s goal of producing knowledge in furtherance of the public interest is tacit when it should be manifest and unconditional.

One reason for the long road is that the twentieth century saw two overhauls of the Copyright Act without clarifying the fact-exclusion or prioritizing the

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<sup>208</sup> *Wheaton*, 1834 U.S. LEXIS, at \*23-24 (emphasis added).

<sup>209</sup> *Feist*, 499 U.S. at 349.



public domain to achieve copyright's goals. Instead, legal debates focused on remunerating authorial labor when technological advances made copying and distribution easier and computing power made catalogs, databases, archives, and libraries copyright's cutting edge. Part II focuses on the story behind the 1976 Copyright Act and its newly minted §102, which strangely omits "facts" in its long recitation of subject matter exclusions. This history contains committee reports describing what should be in and out of copyright, but "facts" are only rarely mentioned. The history also includes an illuminating debate between a renowned copyright lawyer seeking stronger rights for his author-clients and a coalition of librarians advocating for better access to books and the knowledge they contain. We turn now to that history.

## II. LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT: AUTHORIAL LABOR AND THE VALUE OF THE PUBLIC DOMAIN

The 1976 Copyright Act was the last major overhaul of U.S. copyright law. It took more than two decades.<sup>210</sup> The legislative history for those revisions is voluminous.<sup>211</sup> Jessica Litman's definitive history of the copyright legislative process explains it as a series of "meetings and negotiations among representative industries with interest in copyright" that helped address the "dilemma of updating . . . a body of law that seemed too complicated . . . for legislative revision."<sup>212</sup>

Throughout the twentieth century, new communicative forms created controversies over whether "the current copyright statute can adjust to the climate of rapid technological change."<sup>213</sup> The advent of moving pictures (film), the modernization of the news industry, the development and diversification of the music industry, and the popularization of radio, television, and copying/recording technology presented all sorts of challenges for copyright law.<sup>214</sup>

The 1976 Act's innovation was to simplify copyrightable subject matter according to general and elastic (as opposed to specific and rigid) categories.<sup>215</sup> It extended copyright to fixed "original works of authorship" within seven broad

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<sup>210</sup> The first committee reports date from the late 1950s and the Act was finally passed in 1976. See *infra* citing studies from the 1950s. See also Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) (describing "the introduction of at least 19 general revision bills over a period of more than 20 years").

<sup>211</sup> *Id.* ("The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.")

<sup>212</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 48 (Michigan Publishing 2017) (2006) [hereinafter LITMAN, *DIGITAL COPYRIGHT*].

<sup>213</sup> *Id.* at 35.

<sup>214</sup> *Id.*

<sup>215</sup> Jessica Silbey & Jeanne Fromer, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J. L. & ARTS 341, 371 (2021).

categories listed in §102(a), which are illustrative and not exhaustive.<sup>216</sup> At the same time—and for the first time—the 1976 Act also included subject matter exclusions in its new §102(b). Although §102(b) was new, the legislative report accompanying the 1976 Act says that “Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law.”<sup>217</sup> Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.<sup>218</sup> The report instructs courts to refer to past case law when interpreting §102(b).

At the time, *Feist* was one of just a handful of Supreme Court cases to interpret the 1976 Act and the first to interpret §102(b).<sup>219</sup> It repeats Congress’s intent to “clarify, not change existing law.”<sup>220</sup> Yet *Feist* also says, misleadingly, that the Act’s “revisions explain with *painstaking clarity* that copyright requires originality (§102(a)); that facts are never original, (§102(b)); [and] that the copyright in a compilation does not extend to the facts it contains (§103(b)).”<sup>221</sup> *Feist* is correct on the first point, but the last two points are versions of the question *Feist* granted certiorari to decide. Section 102(b) does not mention facts, and the legislative history only barely does, as demonstrated further below. Likewise, §103(b) mentions “preexisting material,” not facts.<sup>222</sup> Very little is “painstakingly clear” in the legislative history or the statute itself about the omission of “facts” from §102(b).

Indeed, there is very little in thousands of pages of legislative history to explain why Congress excluded “facts” from the language of §102(b). General comments that the section leaves “unchanged” the “basic dichotomy between expression and idea” and denies “any intention to protect a programmer’s algorithms” do not help in identifying and applying the fact-exclusion, as opposed to the idea-exclusion or the method-exclusion.<sup>223</sup> There are, however,

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<sup>216</sup> *Id.* at 372 (“As the legislative history explains, Congress set out to list as these illustrative categories ‘the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.’”).

<sup>217</sup> Section 102(b) reads: “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.” 17 U.S.C. § 102(b).

<sup>218</sup> H.R. REP. NO. 94-1476, at 57 (1976) [hereinafter *House Report*].

<sup>219</sup> The three other cases interpreting the Copyright Act were *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (interpreting Section 107), *Harper & Row*, 471 U.S. at 592 (interpreting Section 107), and *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) (interpreting Section 304(c)).

<sup>220</sup> *Feist*, 499 U.S. at 360.

<sup>221</sup> *Id.* (emphasis added).

<sup>222</sup> 17 U.S.C. §§ 102, 103.

<sup>223</sup> See *House Report*, *supra* note 218, at 57; Legislative History of the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes, Pub. L. No. 94-553, 90 Stat. 2541 (October 19, 1976) [hereinafter *Legislative History of the General Revision*]; See generally *Copyright Law Revision: Hearings Before the Subcomm.*

three places in the legislative history spread over nearly twenty years that offer some answers to the puzzle and draw from case law described in Part I.

A. 1956: Study 3 and “The Meaning of Writings in the Copyright Clause of the Constitution”

This report, submitted in 1960 to the House of Representatives Committee of the Judiciary’s Subcommittee on Patents, Trademarks, and Copyrights, was the third of four studies submitted that year. It is an exhaustive case analysis of evolving copyright subject matter. Of particular interest for the eventual drafting of Section 102 is the discussion of “subjects denied copyright protection,”<sup>224</sup> including phonorecords, ideas, names and titles, reports of current events, and dress designs and fabrics.<sup>225</sup> Some of these categories were drawn from current debates and court disputes with specific industries (e.g., music and fashion). The point was to focus legislators on disputes that were gaining traction to statutorily settle some of the questions, if possible.

A few things to note about this list. First, phonorecords eventually received protection under the Sound Recording Amendment of 1971.<sup>226</sup> Second, the 1976 Act granted protection for designs and printing on fabric.<sup>227</sup> Third, the Copyright Office would later deny protection for names and titles, along with short phrases, as lacking sufficient originality.<sup>228</sup> Fourth, the 1956 report distinguished “ideas” from “reports of current events,” by which it meant news and other factual reports.

As to the *idea*-exclusion, the report summarizes cases stemming from *Baker v. Selden* that excluded analogous graphic systems for their use as opposed to the expression they convey. The report explains that copyright excludes a range of “ideas” embodied in graphical systems (and thus the systems themselves), such as systems of shorthand, speedwriting, and indexing, as well as charts and game rules.<sup>229</sup> The report further states that the application of *Baker* depends on

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*on Cts., Civ. Liberties, and the Admin. of Just. of the H. Judiciary Comm. on H.R. 2223, 94th Cong. (1975) [Hereinafter Copyright Law Revision Hearings].*

<sup>224</sup> See *House Report, supra* note 218, at 101.

<sup>225</sup> STAFF MEMBERS OF THE N.Y.U. L. REV., THE MEANING OF “WRITINGS” IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 101–07 (1956) [hereinafter *Study 3*].

<sup>226</sup> Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 39 (1971).

<sup>227</sup> *House Report, supra* note 218, at 55 (“a two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as *textile fabrics*, wallpaper, containers, and the like...” (emphasis added)).

<sup>228</sup> U.S. COPYRIGHT OFFICE, CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT 2-3 (2021), <https://www.copyright.gov/circs/circ33.pdf>; cf. Justin Hughes, *Size Matters (or Should) in Copyright Law*, 75 *FORDHAM L. REV.* 575 (2005) (explaining some short phrases are original, but policy reasons exist to exclude them from protection).

<sup>229</sup> See *Study 3, supra* note 225, at 103-04. We might today call this the merger doctrine, but as Pamela Samuelson explains, *Baker v. Selden* did not originate from the merger doctrine. Pamela Samuelson, *Reconceptualizing Copyright’s Merger Doctrine*, 63 *J.*

“whether [the writing] was an object of explanation or use,” and that “if it did not teach or convey information, it was not copyrightable.”<sup>230</sup> For example, a “chart was not a ‘writing of an author’ within the meaning of the Constitution since it did not convey the thought of the author, was not intended to communicate facts or ideas, and was solely for use in making records of facts.”<sup>231</sup> This summary is confusing: the assumption that works *would be* protected if they communicated “facts or ideas” (or “information”) seems to contradict the assertion that “ideas” are unprotectable. Both statements are true, but neither helps to identify any differences between a “fact,” “idea,” or “information” in light of copyright’s subject matter. The report does suggest, however, that a chart made solely for recording facts is unprotectable, implying that when facts and expression merge, the work is not copyrightable.

In excluding “reports of current events” from copyright protection, the 1956 report relies on *INS v. AP* to exclude news reports “not because they are not ‘writings,’ which they clearly are in the familiar sense of the word, but because they lack distinctive creativity, labor of the brain, and particularly originality.”<sup>232</sup> The report interprets *INS* and previous cases as denying protection to “mere annals” because they lack authorship according to *Burrow-Giles*; it does not justify excluding news reports based on the public interest in the public domain—a theme that *INS* emphasizes, especially in Brandeis’s famous dissent.

These last two examples concerning news and “facts and ideas” foreshadow *Feist*’s reasoning, particularly its facile definition of facts as “unoriginal” because “they do not owe their origin to an act of authorship,” which distinguishes “between creation and discovery.”<sup>233</sup> Yet nothing here explains *Feist*’s rejection of sweat-of-the-brow, denying authors of factual works copyright protection in order to promote the progress of science.

#### B. 1961: *Kaminstein Register’s Report*

The 1961 *Copyright Register’s Report*, written by newly appointed Register of Copyrights Abraham Kaminstein, holds more clues to *Feist*’s reasoning and result.<sup>234</sup> Jessica Litman describes Kaminstein as a compromiser (compared to his predecessor, who considered interindustry compromise a weakness of prior revision efforts).<sup>235</sup> Kaminstein’s new approach would take fifteen years to achieve a consensus among participants.<sup>236</sup>

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COPYRIGHT SOC’Y USA 417 (2016) (dispelling myth that *Baker* originated the merger doctrine).

<sup>230</sup> See *Study 3*, *supra* note 225, at 104.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 105.

<sup>233</sup> *Feist*, 499 U.S. at 347.

<sup>234</sup> Kaminstein was appointed in 1960 after the death of Register Arthur Fisher. LITMAN, DIGITAL COPYRIGHT, *supra* note 212, at 50.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 51.

In the 150 pages of Kaminstein’s initial report, only two mention the eventual §102(b)’s idea-exclusion. The report states that “[c]opyright does not preclude others from using ideas or information revealed in an author’s work.”<sup>237</sup> It also explains that “anyone is free to create his own expressions of the same concepts, or to make practical use of them,” and that the work is always subject to “fair use,” whose four factors would be codified in the 1976 Act for the first time.<sup>238</sup> Neither of these statements are revolutionary, and they are not about “facts” (as opposed to “ideas”). But they do endorse as lawful the unauthorized copying of another author’s work for certain purposes related to efficiency and other practical uses. In other words, these are not statements about the defense of independent creation; they support a controversial (at the time) view of copyright law that allows copying from previously authored works to promote iterative productivity—a view that some case law approving sweat-of-the-brow would prohibit.<sup>239</sup>

C. 1975–76: *Hearings Before the House Judiciary Committee’s Subcommittee on Courts, Civil Liberties, and Administration of Justice*

In the mid-1970s, the Subcommittee on Courts, Civil Liberties, and Administration of Justice met several times to take testimony and issue reports. Two of these reports specifically discuss the copyrightability of facts.

One mention was in a list of subject matter to be omitted from the new §102(b) and expressly considered by a future Congress. An October 19, 1976 report discussed this list in the context of a deleted footnote from prior 1967 and 1974 Senate reports:

Although the coverage of the present statute is very broad, and would be broadened further [under the revision bill] . . . , there are

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<sup>237</sup> REGISTER OF COPYRIGHTS, GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (1961). *See also id.* at 24 (same, but changing “revealed” to “disclosed”).

<sup>238</sup> *Id.*

<sup>239</sup> Famously, *Bleistein v. Donaldson* said that “[o]thers are free to copy the original. They are not free to copy the copy” and cited *Blunt*, 3 F. Cas. at 765 (upholding copyright in a map that corrected errors in an old map, but otherwise was substantially the same and was based on the author’s independent discoveries). 188 U.S. at 249. *Feist*, in ruling against *Rural*, criticized (or silently overruled) the line of cases that required independently sourcing facts to avoid copying from authored works. *See* 499 U.S. at 352-53 (criticizing *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 89 (2d Cir. 1922) in which a “subsequent compiler was ‘not entitled to take one word of information previously published’ but rather than to ‘independently work out the matter for himself, so as to arrive at the same result from the same common source of information’”). Justice Stevens’ papers containing the *Feist* file indicate he was focused on whether *Jeweler’s Circular Pub. Co.* should remain good law. A copy of the case exists in his files and his oral argument notes mention how both *Jeweler’s* and *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) are (in his words) “old cases” upholding “sweat of the brow.” *See supra* note 67.

unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want. . . . Without implying that they would be wholly without protection under one or another of the seven categories listed in sec. 102, or that they are necessarily the “writings” of “authors” in the constitutional sense, we cite the following as examples. *These are areas of subject matter now on the fringes of literary property but not intended, solely as such, to come within the scope of the bill:* typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; [and] *news and factual information considered apart from its compilation or expression.* Many of these kinds of works can be clothed in or combined with copyrightable subject matter and thus achieve a degree of protection under the bill, but any protection for them as separate copyrightable works is not here intended and will require action by a future Congress.<sup>240</sup>

Strikingly, the soon-to-be-enacted §102(b) contains many of the exact words listed above—“ideas,” “principles,” “methods,” and “systems.” Here, finally, is a near-complete draft of what would become the first subject matter exclusion section in the 1976 Copyright Act. However, most listed items were eventually expressly mentioned in legislation or regulation, *except for news and factual information.* *Feist* does not cite this history to fill in the absence of “facts” in §102(b) or to justify its holding, perhaps understandably since this passage is from a deleted footnote in an obscure and superseded Senate report. But its relevance to the question in *Feist* seems clear. The copyrightability of news and factual information was left for other Congresses to decide—which they did not, leaving the question for federal courts or the states under common law.

The subcommittee mentioned the deleted footnote in its report, one of the final reports issued before the vote on the new Copyright Act, to clarify the application of statutory preemption regarding the subject matter exclusions in the soon-to-be-enacted §102(b):

Since section 301 pre-empts only what is covered by section 102, and since the Supreme Court’s *Goldstein* decision held that pre-emption is statutory and not constitutional, the States would presumably be free to give unlimited protection to any subject matter outside the scope of section 102. This may be a desirable result, but Congress should consider the consequences before adopting it.<sup>241</sup>

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<sup>240</sup> *Legislative History of the General Revision*, *supra* note 223, at 3-4 (emphasis added).

<sup>241</sup> *See id.* at 15.

According to this report, §102(b)'s eventual omission of "news and factual information" is relevant to federal preemption. The above guidance worries that statutory preemption requires clarity. A future Congress (or Court) can decide that "news and factual information" is within the penumbra of §102(b) and not copyrightable.<sup>242</sup> Otherwise, states are free to protect such material.

The bulk of the subcommittee report urges the new legislation to offer more clarity about the copyrightability of computer programs, architectural works, and typeface designs, given their national commercial significance;<sup>243</sup> it does not revisit "news or factual information," and thus, the preemption issue concerning this subject matter is left tacit. Protecting "news and factual information" under state law as private property raises substantial and fundamental First Amendment concerns regarding freedom of press and speech, unlike computer programs, typeface, and architectural works.<sup>244</sup> The report did not discuss this constitutional implication, suggesting that "news and factual information considered apart from its compilation or expression" is not seriously at risk for state protection under common law copyright. But then why include it on the list in the deleted footnote?

Reassurance was necessary. The non-copyrightability of facts was mentioned earlier, on May 14, 1975, during a long day of heated testimony from the American library community represented by Edmon Low,<sup>245</sup> and from Irwin Karp, counsel for the Author's League of America. The testimony concerned library photocopying on behalf of patrons. Low described the question as "whether libraries will be permitted—at no additional expense—to continue to serve the public by the long-standing practice of providing single copies of copyrighted-material for users' research or study."<sup>246</sup> The reason for the question was recent prolonged litigation in which a library was sued for copying medical journal articles. The case lasted seven years and ended with a 4–4 Court decision affirming the library's use as fair.<sup>247</sup> Proposed revisions to the Copyright Act

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<sup>242</sup> *Goldstein v. Cal.*, 412 U.S. 546 (1973) (holding that U.S. copyright law preemption is statutory not constitutional).

<sup>243</sup> See *Legislative History of the General Revision*, *supra* note 223, at 6.

<sup>244</sup> Of course, computer programs, typeface art, and architectural drawings can also be "speech." *Bernstein v. U.S. Dep't of Justice*, 192 F.3d 1308 (9th Cir. 1999) (encryption software as speech); Compendium (Third) § 906.4, citing 37 C.F.R. § 202.1(a), (e) (excluding typefaces as such but not when it forms part of "original pictorial art . . . such as a representation of an oak tree, a rose, or a giraffe that is depicted in the shape of a particular letter"); Jessica Rizzo, *Federal Architecture and First Amendment Limits*, 16 WASH. J. L. TECH. & ARTS 47 (2021).

<sup>245</sup> Edmon Low was the representative of the six major library associations. Included in that group was the Music Library, Special Library Association, Harvard University Library, American Library Association and Association of Research Libraries. See *Copyright Law Revision Hearings*, *supra* note 223, at 184.

<sup>246</sup> *Id.* at 185.

<sup>247</sup> *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (the case was 4–4 because Justice Blackmun recused himself).

would add language prohibiting libraries from engaging in “systematic reproduction” of either single or multiple copies of copyrighted material, a limitation the library community thought was problematically ambiguous, risking more lawsuits and substantial harm to library patrons and the public.

The librarians argued that without an exemption for library photocopying, information would be restrained, frustrating the purpose of copyright to promote the progress of science. They also argued that because copyright is a public good and unlike real or personal property, limitations and exemptions such as for libraries are commonplace. Low’s testimony was urgent:

When we are talking about library copying practices, we are talking about the schoolboy in California who may need a copy of an article in the Los Angeles Times for a project . . . or about a judge in the county court . . . who may find he needs a copy of a law review article which bears directly upon a difficult question of law which has arisen in the course of his work. Or about the doctor in downstate Illinois who has a patient with an unusual and rare disease and the only recent material to be found is contained in an obscure journal published in Sweden, and available only through the Regional Medical Library system, but which article may aid him in saving his patient’s life. . . .

The list is endless, but . . . we are talking about an issue that very broadly affects the ability of people in this country to make use of their libraries which are the repository and storehouse of man’s knowledge.

. . . [C]opyright is not a constitutional right, such as trial by jury of one’s peers. The Constitution simply authorizes Congress to create the right. It is therefore a statutory right—one created by law—and may be changed, enlarged, narrowed, or abolished altogether by the Congress here assembled. It is a law enacted not for the benefit of an individual or a corporation but for the public good and with the purpose, as the Constitution expresses it, “to promote the progress of science and useful arts.”<sup>248</sup>

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<sup>248</sup> See *Copyright Law Revision Hearings*, *supra* note 223, at 185. Other testimony followed by a variety of libraries and librarians. See, e.g., Wisconsin Interlibrary Loan Service: “I am deeply concerned that the interests of the consumers of library and information resources be represented. Too often the user is overshadowed and not heard and remains the silent majority, even though s/he is the ultimate recipient for good or ill in many legislative actions. . . . Of particular concern is the fact that . . . the Bill could be interpreted to effectively discontinue the traditional right of libraries of making a single copy of a copyrighted journal for a single user, even when the number of users and the volume of single copies is substantial. . . . Wisconsin is not alone in this concern. . . . the National Commission on Libraries and Information Science . . . restates its philosophy of greater, not less, access to library and information resources by all the citizens of the United States.” See *House Report*, *supra* note 218, at 216. See also, e.g., Alaska Methodist



How does one respond to a librarian's plea to consider the public good above individual pecuniary interests? With an equally righteous assertion of individual rights. Karp did not dispute the librarian's public interest framing; he inverted it in the service of a right to the fruits of one's labor, echoing copyright's sweat-of-the-brow principle that *Feist* eventually eviscerates:

The instrument chosen by the Constitution to serve the public interest—i.e., the securing of literary and scientific works of lasting value—is an independent, entrepreneurial property-rights system of writing and publishing. The Copyright Act establishes the rights which prevent others from depriving authors and publishers of the fruits of their labor. But it does not guarantee a fair reward, or any reward. For authors and publishers . . . must depend on income derived from uses of their books and journals to compensate for the talent, labor and money expended in creating them. . . . Congress should not disrupt the delicate balance of this essential system. Carving exemptions out of the “enforceable rights” of authors and publishers does not serve the public interest. . . . It has become ritual for library organization and Ad Hoc Committee spokesmen to accompany their demands for new exemptions with a series of attacks on copyright, calculated to suggest that the author has no legitimate claim to reasonable protection for the work he creates.<sup>249</sup>

Karp quoted “enforceable rights” presumably because he thought copyright insufficiently strong for authors to protect what he considered a basic human right: to own the fruits of one's labor. He nevertheless admitted to copyright's limits, responding to the librarian's concern about restraint of information and knowledge:

Library and Ad Hoc Committee spokesmen charge that a copyright places a restraint on information. This is not so. . . . Anyone is free to use the ideas, facts or information presented in a copyrighted book or article. The copyright only protects the author's expressions, not the ideas, facts or information. Other writers can draw on them. Other writers are free to independently create similar (indeed closely similar) works; the copyright only prevents substantial copying of the author's expression.<sup>250</sup>

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University, College of Nursing, “Photocopying of books and articles is extremely helpful to both students and faculty. It provides an inexpensive and rapid way to acquire, read, and synthesize new materials, thus greatly enhancing the quality of education in schools and universities.” *Id.* at 222.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 221-22.

For this most relevant proposition, Karp quoted the nineteenth-century economist Henry George, who is famous for his theory of redistributive taxation on the rising value of land to alleviate poverty. Karp quoted George presumably because the best-selling social theorist and economist of the 1880s was an early leader in the Progressive Era, when wealth redistribution was embraced to fund public goods.<sup>251</sup> Quoting a Progressive theorist would appeal to those who thought copyright should yield to the public interest. And because George supported authorial copyright, Karp must have thought that public interest advocates should too. Karp quoted George as saying:

“Copyright . . . does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for similar production, but only from using the identical form of the particular book or production—the actual labor which has been expended in producing it. [Copyright] rests upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of anyone else to do likewise.” The [c]opyright is therefore in accordance with the moral law.<sup>252</sup>

Karp repeated in his testimony the part he deemed most helpful: that authors have a “natural, moral right . . . to enjoy the products” of their labor.<sup>253</sup> In emphasizing this principle, Karp apparently hoped it would persuade legislators to exclude library copying from newly proposed authorized uses in the soon-to-be 1976 Act. As already noted, the “right to own the fruits of one’s labor” (or sweat-of-the-brow justifications for ownership, even of intangible statutory property) ran deep.<sup>254</sup> It was a well-calculated plea.

Yet reliance on George only helped superficially. To be sure, George did pen the passage, but it is the only part of his famous treatise that mentions copyright. The force of George’s overall theory is redistributivist.<sup>255</sup> It is predominantly a theory of taxation that justifies limiting absolute claims to returns on investment from private property, and it only concedes the retention of some private wealth from private property in order to build or maintain

<sup>251</sup> Henry George, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Henry\\_George/](https://www.newworldencyclopedia.org/entry/Henry_George/) (last visited July 29, 2024).

<sup>252</sup> *Copyright Law Revision Hearings*, *supra* note 223, at 222 (quoting HENRY GEORGE, POVERTY AND PROGRESS 411 (Robert Schalkenbach Foundation 1929) (1879) [hereinafter *Poverty and Progress*]).

<sup>253</sup> *Id.*

<sup>254</sup> See *supra* note 21 (sweat-of-the-brow debates).

<sup>255</sup> Oscar B. Johanneson, *Henry George and His Philosophy: He Sought Equality of Opportunity to Use the Earth’s Resources as Well as the End of Land Monopoly*, 45 AM. J. OF ECON. & SOCIO. 379 (1987).

community solidarity.<sup>256</sup> Karp’s use of George was hardly a slam dunk for stronger authorial copyright at the expense of public libraries.

George’s *Poverty and Progress* explores structuring taxes “productively” so as not to depress incentives or rewards from labor and land.<sup>257</sup> His most famous innovation is a tax of wealthy landowners on what he called the “unearned increment” of rising land prices, a value the government may tax and redistribute to ameliorate poverty. It resembles an early form of capital gains tax on land only. This theory identifies a windfall to property owners based on societal changes (e.g., land values rising) wherein, absent government intervention, only already prosperous landowners reap the rewards. His theory “prescribed a land-value tax as a way of returning that collectively produced wealth back toward the commonweal.”<sup>258</sup> Unlike other taxes, George said, this tax on the “unearned increment” does not disincentivize investments. He compared its mechanism to copyrights (of all things!) as examples of a beneficial tax or temporary monopoly that does not interfere with productivity because, as he says in the above passage, copyright is not a monopoly on the things that actually matter—“the fact, knowledge, the laws or combination for similar production”<sup>259</sup> that are public domain material.

And this is where we come full circle. As an appeal to copyright’s balance between public access and private rights on behalf of his author-publisher clients, Karp cited the progressive theorist Henry George for the proposition that copyright rests on “the natural, moral right of each one to enjoy the products of his own exertion.”<sup>260</sup> He assures legislators this does not mean copyright will limit access to “ideas, facts or information presented in the copyrighted book” because “copyright only protects the author’s expressions, not the ideas, facts or information.”<sup>261</sup> This is the question squarely presented in *Feist*. Karp’s appeal is one of the only places in thousands of pages of legislative history that discusses the fact-exclusion in the context of sweat-of-the-brow, and it arises in the context of Karp arguing that sweat-of-the-brow should prevail. This is exactly what *Feist* says the Constitution does not allow because it “flout[s] basic

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<sup>256</sup> *Id.*

<sup>257</sup> *Poverty and Progress*, *supra* note 252, at 358 (Book IX, Chapter 2).

<sup>258</sup> Annika Neklason, *The 140-Year-Old Dream of ‘Government Without Taxation’*, THE ATLANTIC (Apr. 15, 2019), <https://www.theatlantic.com/national/archive/2019/04/henry-georges-single-tax-could-combat-inequality/587197/>.

<sup>259</sup> See *Poverty and Progress*, *supra* note 252, at 411. (“The copyright is not a right to the exclusive use of a fact, an idea, or a combination, which by the natural law of property all are free to use; but only to the labor expended in the thing itself. It does not prevent anyone from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of anyone else to do likewise.”)

<sup>260</sup> See *Copyright Law Revision Hearings*, *supra* note 223, at 122.

<sup>261</sup> *Id.*

copyright principles,” which *Feist* claims §102(b) makes clear.<sup>262</sup> But, to state the obvious, *Feist* does not refer to Progressive Era policies like George’s tax proposal, and §102(b) required the Court’s interpretation to justify its broader application in the public interest.

Karp invoked George to assert authors’ “natural rights” to charge license fees for all copies, even those librarians make for research, restoration, and repair. George’s theory is most innovative and interesting for its radical redistributivist impulse—taking from private investment and giving to the public domain. Most emphatically, it does not simply reserve for the public that which was already public property. And yet that is what Karp said in asserting that ideas, facts, and information belong to no one. *Feist* begins there but goes further to hold that the labor and investment in producing factual matter does not alone justify exclusive rights in its collection.<sup>263</sup> This was a precedent-setting legal change, which the legislative history and case law demonstrate remained undecided in 1976. Fast-forward fifteen years, though, and *Feist* claims to be merely restating a “constitutional requirement” and correcting previously misunderstood cases.<sup>264</sup>

As mentioned earlier, none of this means *Feist* is wrong. It just does not say enough—perhaps typical for Supreme Court decisions, which are jointly authored, resemble brokered deals, and frequently use general terms to fashion compromise, leaving debates about edge cases for later. But the edge cases are here now. Copyright disputes over the nature and scope of “facts” in the public domain and privately owned “original expression” of those facts arise with alarming regularity.<sup>265</sup> Were copyright owners to prevail in these cases, knowledge and useful information would be sequestered. In addition to the disputes already cited above, recent cases concern copyrighting annotated state statutes,<sup>266</sup> aircraft maintenance and repair manuals,<sup>267</sup> emergency room forms,<sup>268</sup> credit scores,<sup>269</sup> weekly average interest rates offered by banks,<sup>270</sup> residential property listings,<sup>271</sup> pesticide instructions,<sup>272</sup> evaluation criteria for

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<sup>262</sup> *Feist*, 499 U.S. at 353.

<sup>263</sup> *Id.* at 353-54.

<sup>264</sup> *Feist*, 499 U.S. at 346, 352, 354. *See supra* note 80 (describing basis for “constitutional requirement”).

<sup>265</sup> *See supra* notes 5-11 (describing scenarios and past cases) and Conclusion (describing pending cases).

<sup>266</sup> *Public.Resource.Org*, 590 U.S. at 259. *See also* *Am. Soc’y for Testing & Materials v. Public.Resource.Org*, 597 F. Supp. 3d 213 (D.D.C. 2022), *aff’d* 82 F.4th 1262 (D.C. Cir. 2023). *See also* *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002).

<sup>267</sup> *Honeywell Int’l, Inc. v. Western Support Grp., Inc.*, 947 F. Supp. 2d 1077 (D. Ariz. 2013).

<sup>268</sup> *Utopia Provider Sys. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313 (11th Cir. 2010).

<sup>269</sup> *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs.*, 893 F.3d 1176 (9th Cir. 2018).

<sup>270</sup> *BanxCorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280 (S.D.N.Y. 2013).

<sup>271</sup> *Salestraq Am., LLC v. Zyskowski*, 635 F. Supp. 2d 1178 (D. Nev. 2009).

<sup>272</sup> *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539 (E.D. Pa. 2005).

building products, components and methods,<sup>273</sup> and legal forms.<sup>274</sup> Many copyright owners say that these works are not factual but original expressions of expertise and judgment, which copyright law privatizes for sale or sequestering. Whether these works are factual or contain “facts” depends on what we mean by that term.

The sparse but illuminating legislative history alleviates some ambiguity by explaining how keeping “facts” in the public domain is important for the dissemination of knowledge, such as with news. This history provides a loose constitutional anchor in the First Amendment for the explanation of public domain “facts,” but little else. It does not help define the scope of “facts,” except to leave the debate concerning sweat-of-the-brow and rights in fruits of authorial labor to future adjudication. Part I provided some examples of debated public domain materials (*publici juris*) akin to “facts” grounded in new industries developing epistemological authority, like photography, financial services, news, and law. Part III examines the history of knowledge production in the nineteenth and early twentieth centuries, when the canonical cases that *Feist* relies on were being decided. It explains that twenty-first-century “facts” are the result of disciplinary expertise and social scientific pursuits, placing much more in the public domain at the expense of hard work and investment. But, importantly, such “facts” serve the interest of promoting progress of science and the useful arts as the Constitution demands.

### III. THE EMERGENCE OF “FACTS” AS A TWENTIETH-CENTURY CATEGORY OF TRUTH AND KNOWLEDGE

It turns out that “facts” as a category of “truth” developed slowly over time, reaching ascendancy in the mid-twentieth century along with the institutions (and their processes) that produce them. Of course, historical events, geographical details, and scientific truths were age-old subjects of knowledge and debate.<sup>275</sup> The emergence and diversity of “facts” is as much about the measure of knowledge as how it is produced. The very idea of the “fact-exclusion” could not arise in copyright without understanding how modern facts in all their variety came to be understood. This third path to *Feist* describes the development of institutions and industries producing facts at the turn of the

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<sup>273</sup> ICC Evaluation Serv. LLC v. Int’l Ass’n of Plumbing & Mech. Offs., No. 16-CV-54-EGS-ZMF, 2022 WL 3025241 (D.D.C. Apr. 27, 2022).

<sup>274</sup> Ross, Brovins & Oehmke, P.C. v. LexisNexis Grp., 463 F.3d 478 (6th Cir. 2006).

<sup>275</sup> See HAYDEN WHITE, CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987). See also M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD 1066-1307 (2d ed. 1993). As both White and Clanchy describe in their path breaking histories of medieval literacy, knowledge of historical events, metes and bounds of land claims, and seasonal harvest yields became important to record especially with the spread of legal claim-making and dispute resolution. These were records of “events” and “measures” (perhaps the precursors to “facts” and “data” today) and their contestability became more viable as, ironically, their recordings by multiple “authors” proliferated.

twentieth century, which are mentioned in both the cases and the legislative history—institutions such as law and courts; journalism and photography; information technologies (including libraries); and the social sciences. Modern facts arise from a nineteenth-century epistemological revolution and gain authority and prominence within the context of knowledge-producing institutions in the early twentieth century.

This Part argues that early twentieth-century pragmatist philosophy's challenge to universal truths combined with legal realist challenges to formalist jurisprudence eventually shape what is (or should be) copyright law's broad public domain in "facts." As the authority and influence of new knowledge-producing institutions develop (along with the increasingly dominant role of social sciences in shaping public policy and law), the facts they produced became less contestable and more self-evidently "facts."<sup>276</sup> But as their authority and influence grew—and were later challenged in the process of knowledge contestation—copyright law came to focus instead on the characterization of the new form of "expression" as "authored" (*i.e.*, a privatization of copyright) instead of on the value of common property (*i.e.*, the public interest in "science" inherent in the copyright system).<sup>277</sup> This third path to *Feist* is a story about the organization of knowledge production and shifting epistemological paradigms, which, taken together, are the prehistory of the twentieth-century fact-exclusion and more fully explain the context of the cases *Feist* relies on. The result justifies a very broad fact-exclusion—one as broad (if not broader) than the idea-exclusion expressly contained in §102(b).<sup>278</sup>

As described below, the story starts in the mid-1800s with contests over universal truths that culminated in early 1900s paradigm shifts in the new sciences, university structures, and understandings of law's function to promote the public good. Before debating whether a "fact" is in or out of copyright, the institutions or professional communities that produce "facts" require authority: an ability to command deference based on established disciplinary practice and

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<sup>276</sup> See, e.g., Dan Burk, *Method and Madness in Copyright Law*, 3 UTAH L. REV. 587, 595-96, 602 (2007) (describing this process based in attuned judgment and constrained choices determined by disciplines, with examples *inter alia* of rounding decimals or using telescopes to look at stars).

<sup>277</sup> *Id.* at 594-596 (criticizing evaluation cases for their apparent distinction between "subjective" ideas (opinions), which are copyrightable, and "objective" or "hard" ideas, which are "facts" and uncopyrightable). Burk writes that "it seems obvious that the valuations [of coins and cars published in competing books] are themselves valued for their accuracy, for their predictability, for their determinacy." *Id.* at 594. That there are competing books of valuations doesn't make the valuations any less authoritative in view of those relying on the books. And yet competition made their copyright status contestable in court. *Contra* Baker, 101 U.S. at 107 (holding that similar, but not identical, forms in competing accounting books are uncopyrightable).

<sup>278</sup> Thanks to Tyler Ochoa and Justin Hughes whose comments at IPSC 2022 (Stanford) and later in email correspondence helped me think through the relative breadth of "ideas" versus "facts."

expertise.<sup>279</sup> Copyright is a strange intervenor in this history, but as Margaret Chon writes, “copyright is one of many modalities of knowledge governance and is itself composed of numerous policy levers.”<sup>280</sup> The key copyright cases described in Part I that *Feist* relies on date from this earlier time period and have profoundly shaped copyright law. In 1895, sociologist Émile Durkheim published his canonical essay “What Is a Social Fact?”, which transfigured the burgeoning social sciences.<sup>281</sup> In that essay, Durkheim asserted the existence of “facts” produced by culture that are as durable as natural or scientific facts.<sup>282</sup> The existence and status of facts qua facts—from natural facts to institutional and social facts—developed at this time and continued to evolve as the copyright debate emerged. This history is central to a full understanding of modern facts in copyright law as a species of disciplinary knowledge produced through societal institutions and therefore in the public domain.

This third path also helps clarify the debate contained in the legislative records concerning the protection of the author’s labor as a matter of natural or moral right. *Feist* expunges from copyright law the sweat-of-the-brow doctrine that, until *Feist*, had been debated as both viable policy and law among prominent legal scholars and courts.<sup>283</sup> Collection, production, and

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<sup>279</sup> Margaret Chon writes about this difference between copyright “content” (which may be protected) and “knowledge” which perhaps cannot if it is “sticky knowledge” – accurate, authentic, reliable knowledge. She highlights the difference in French between “connaissance” and “savoir,” the latter of which is “reliable” in the certified, institutional way. Quoting Paul David and Dominique Foray, “Reliable knowledge (‘savoir’) means certified, robust knowledge that has been legitimized by some institutional mechanism (be it scientific peer review or collective memory and belief systems). Other forms of knowledge (‘connaissance’) also enable action (knowing how to do the gardening, DIY) but have not been put through the same tests as certified knowledge. What separates the two has less to do with the contrast between the scientific and the non-scientific than whether or not the knowledge has been subjected to institutional testing.” Margaret Chon, *Sticky Knowledge and Copyright*, 2011 Wis. L. REV. 177, 181 (2011). In this parlance, “facts” as developed in the early 20<sup>th</sup> century are a variety of “savoir.”

Robert Post has developed a similar theory around the First Amendment especially in the digital age and a “growing pessimism about the future of free speech in the United States.” Robert Post, *The Unfortunate Consequences of a Misguided Free Speech Principle* (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4255938/](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4255938/)) (“The best test of truth ... is not the marketplace, but instead the judgment of those trained to assess intellectual quality. And intellectual quality is inseparable from compliance with relevant disciplinary standards.”).

<sup>280</sup> Chon, *supra* note 279, at 202.

<sup>281</sup> DURKHEIM, *supra* note 63, at 1-13

<sup>282</sup> “Social facts” are “collective aspects of the beliefs, tendencies, and practices of a group that characterizes social phenomena.” *Id.* at 7. “Currents of opinion, with an intensity varying according to time and place, impel certain groups [to behave in certain ways]. ... These currents are plainly social facts. At first sight they seem inseparable from the forms they take in individual cases. But statistics furnish us with the means of isolating them. ... It is a group condition repeated in the individual because imposed on him.” *Id.* at 8-9.

<sup>283</sup> *See supra* note 21 (sweat-of-brow scholarship).

dissemination of “facts” can be hard work. Copyright’s first subject matter categories of “maps, charts, and books” were informational, fact-intensive works whose laborious production was meant to be incentivized by the grant of a fourteen-year copyright.<sup>284</sup> Throughout the nineteenth century, and until reproduction and distribution technology radically reshaped industries (such as journalism), the labor theory was entangled with the originality doctrine, which glorified a person’s intellectual labor as inseparable from the physical efforts of collecting information.<sup>285</sup> Indeed, the dignity of work and protection of a person’s independent labor was a political current running through the nineteenth and early twentieth centuries, undergirding socio-political movements from abolition to the Progressives.<sup>286</sup> As described in Part II, the dignity of labor even played a role in copyright law reform.<sup>287</sup> If facts were produced through hard work, and hard work was to be elevated and incentivized, then rendering facts public property produced through that hard work posed a political problem.

Responses to this political problem in copyright took the forms of philosophical, political, and economic theories like possessive individualism, laissez-faire capitalism, and radical subjectivity.<sup>288</sup> The effect was an exalted originality doctrine originating in *Burrow-Giles* and grossly enlarging the scope of copyright subject matter to the detriment of the public domain. This doctrine would culminate in *Bleistein v. Donaldson*, penned by Justice Holmes during his first year on the Court.<sup>289</sup> *Bleistein* is considered the culmination of *Burrow-Giles*’ originality doctrine glorifying “personality” and “singularity” in authored works that always have in them “something irreducible, which is one man’s

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<sup>284</sup> Copyright Act of 1790, 1 Stat. 124. For a comprehensive account of the constitutive relationship between the map-making and copyright doctrine, see ISABELLA ALEXANDER, *COPYRIGHT AND CARTOGRAPHY: HISTORY, LAW, AND THE CIRCULATION OF GEOGRAPHICAL KNOWLEDGE* (2023).

<sup>285</sup> Robert Brauneis recounts in *The Transformation of Originality* that “sweat of his own brow” is a more modern phrase akin to “intellectual labor” or “labor of the mind” or “labor and skill” found in earlier copyright cases. See Brauneis, *Transformation*, *supra* note 21, at 329 n.34 (citing *Amsterdam v. Triangle Publ’ns*, 93 F. Supp. 79 (D. Pa. 1950)). “Sweat of the brow,” Brauneis claims, did not appear in a copyright case until 1950. And it wasn’t used in “its recognized sense” he says until 1984 in the case of *Fin. Info., Inc. v. Moody’s Invs. Serv.*, 751 F. 2d 501, 506 (2d Cir. 1984). *Id.*

<sup>286</sup> This labor movement drew force from abolition, reconstruction, the early women’s movement for full citizenship, and progressivism’s push for social and economic welfare policies to address problems of poverty. CORINNE MCCONNAUGHY, *THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 167-170* (2013).

<sup>287</sup> *Supra* Part II.C.

<sup>288</sup> C.B. MacPherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* (1962) (describing these political theories). See also Phillip Hansen, *Reconsidering C.B. MacPherson: From Possessive Individualism to Democratic Theory and Beyond* 125–86 (2015).

<sup>289</sup> *Bleistein*, 188 U.S. at 251.



alone.”<sup>290</sup> *Bleistein* represents a doctrinal broadening of subject matter and an ideological shift in copyright law—a democratization of sorts, wherein any person can be a copyright author.<sup>291</sup> *Bleistein* is a “principal turning point” in copyright law’s development, arriving chronologically in the middle of the other cases discussed in Part I.<sup>292</sup> (As already mentioned, *Feist* itself cites *Bleistein* only once.<sup>293</sup>) But, as Barton Beebe notes, the case and its influence have a dark side.<sup>294</sup> Taken to its extreme, it hurts progressive causes that rely on the incontestability of public goods—a commonweal reliant on common property; and it celebrates individual hard work (with an emphasis on the individual) to the detriment of expanding social welfare and equal citizenship.<sup>295</sup>

This third path to *Feist* is thus the most helpful and the most complicated (political questions always are). The policy question of whether to protect an author’s labor to the detriment of the public domain and the public interest becomes a legal question when human labor produces what are called “facts” in copyright.<sup>296</sup> This quandary raises the specter of the debate between “facts” and “values”—an “ontological politics”<sup>297</sup> that preoccupied the new sciences (and the legal philosophies that drew on them) in the late nineteenth and early twentieth centuries when the canonical copyright cases leading to *Feist* were being decided.<sup>298</sup> This last Part describes that evolution, including a debate Justice Holmes was having about this very issue (but which did not explicitly appear in his copyright decisions). By situating *Bleistein* in this larger context, Part III aims to tame its bloated originality doctrine and reinforce the authority of institutions producing facts (as well as the importance of access to those facts) that are vital for rational debate over today’s pressing socio-political

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<sup>290</sup> Id. at 250-251. See also Beebe, *Aesthetic Progress*, *supra* note 22, at 330.

<sup>291</sup> Jessica Silbey, *Justifying Copyright in the Age of Digital Photography*, 9 U.C. IRV. L. REV. 405, 420-424 (2019) (describing the case, its reputation, and subsequent history). See also SILBEY, *AGAINST PROGRESS*, *supra* note 22, at 8 (2022) (describing *Bleistein*’s influence as lowering copyright originality so much that today “everything from everyday Instagram photographs to shampoo labels” may be copyrighted).

<sup>292</sup> Beebe, *Aesthetic Progress*, *supra* note 22, at 330.

<sup>293</sup> *Feist*, 499 U.S. at 359.

<sup>294</sup> See Beebe, *Aesthetic Progress*, *supra* note 22, at 319-20 (describing *Bleistein*’s “damaging influence” and starting “regressive cultural trends”).

<sup>295</sup> At the turn of the 20<sup>th</sup> century, political clashes between progressives and industrial magnates produced policy debates about how to promote a good society. Expanding citizenship privileges (welfare, voting, labor rights) and notions of the “common good” were at the forefront of these debates, but so was freedom of contract and the priority of private property. MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF PROGRESSIVE MOVEMENT IN AMERICA* 143 (2005).

<sup>296</sup> According to Brauneis, one explanation for the rise of copyright’s originality doctrine at the turn of the century was in response to the changing structure of the news industry. See Brauneis, *Transformation*, *supra* note 21, at 373.

<sup>297</sup> Law & Urry, *Enacting the Social*, *supra* note 54, at 390.

<sup>298</sup> As described *infra*, Part III.C.3., the modern reading of Holmes’s *Bleistein* opinion short-circuits this analysis and *Feist* fails to address it head on.

problems. Doing so revitalizes *Feist* and broadens its fact-exclusion for twenty-first-century copyright disputes.

*A. Pragmatism, the New Disciplines, and Situated Truths*

American pragmatism, said to originate with Charles Sanders Peirce in the late 1800s, was (among other things) a rejection of universalist thought and absolutism.<sup>299</sup> Peirce, like other pragmatists in his American cohort—William James, John Dewey, and Jane Addams<sup>300</sup>—propounded the notion that what is true should be tested with scientific experimentation, grounding truth in empirically observable reality.<sup>301</sup> While this may seem basic from a twenty-first-century perspective, an epistemology based on experience, rejecting the notions that truths are universal and what we know is stable, was innovative in the nineteenth century.<sup>302</sup> Pragmatism was not a theory of relativism; it was about situated truths, knowable and testable but contingent. Peirce was famous for developing the idea of “fallibilism,” an anti-Cartesian perspective holding that absolute certainty is unnecessary to accept something as true and that all knowledge requires is “fallible progress” based on self-correcting methods of inquiry.<sup>303</sup>

Just a few decades later, in the early 1900s—dubbed the “golden age” of Cambridge philosophy—G. E. Moore, Ludwig Wittgenstein, and Bertrand Russell developed a new form of analytical philosophy that also rejected idealism in favor of realism.<sup>304</sup> The methods developed in Cambridge, England, were more mathematical than empirical, based more on logic than lived experience. However, the conclusions and theories for which the Cambridge philosophers became both famous and influential confirmed the new understandings of the contingencies and contextual constraints of knowledge that were circulating among American pragmatists. All three British philosophers combined metaphysics with epistemology. Wittgenstein’s

<sup>299</sup> Catherine Legg & Christopher Hookway, *Pragmatism*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Apr. 6, 2021), <https://plato.stanford.edu/archives/sum2021/entries/pragmatism/> [hereinafter *Pragmatism Stanford Encyclopedia*]. See also Robert Tsai, *Legacies of Pragmatism*, 69 DRAKE L. REV. 879, 881 (2021).

<sup>300</sup> Jane Addams invented the profession of social work as an expression of pragmatist ideas and was awarded the Nobel Peace Prize in 1931. See *Pragmatism Stanford Encyclopedia*, *supra* note 299.

<sup>301</sup> Tsai, *supra* note 299, at 881-85 (describing the pragmatist’s “epistemological modesty” and practice of using “their mind and experience to sift through information acquired through external senses” while “resisting the inclination to pre-judge the meaning or value of that information”).

<sup>302</sup> WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 67 (1907) (the “pragmatist talk[s] about truths in the plural, about their utility and satisfactoriness”).

<sup>303</sup> See *Pragmatism Stanford Encyclopedia*, *supra* note 299.

<sup>304</sup> HERBERT HOCHBERT, RUSSELL, MOORE AND WITTGENSTEIN: THE REVIVAL OF REALISM (2001).

metaphysics famously described the world as consisting of facts, not objects; facts, he said, are a collection of states of affairs, which are themselves combinations of objects.<sup>305</sup> Wittgenstein was primarily concerned with the problem of logically representing facts and the connection between pictures and reality, asserting a distance between them but also an inevitable relation that demanded explanation. Moore's *Principia Ethica*, published in 1903, did to ethics what Wittgenstein did to facts by insisting on context to assess ethical mores and problematizing the notion of intrinsic nature or value.<sup>306</sup> The American pragmatists, including Justice Holmes, read and debated the work of these British philosophers.<sup>307</sup>

*Principia Ethica* rejects a universal definition of "good" with definable, intrinsic properties, asserting that what is taken as good are "intuitions" incapable of proof or disproof.<sup>308</sup> Moore instead embraces a modified form of consequentialism.<sup>309</sup> This philosophy resonated with the American pragmatists, some who adopted legal realism as their judicial philosophy and whose legal innovation would be to defer to iterative policies grounded in shifting but knowable situational facts about groups of people.<sup>310</sup> *Principia Ethica*'s last chapter departs a consequentialist frame and, perhaps paradoxically, asserts two "ideal" goods: human affection and the appreciation of beauty: "Personal affections and aesthetic enjoyments include all the greatest, and by far the greatest goods we can imagine."<sup>311</sup> Alasdair MacIntyre summarizes this part of *Principia* (while also critiquing it as "highly contentious"), saying that "[t]he achievement of friendship and the contemplation of what is beautiful in nature or in art become certainly almost the sole and perhaps the sole justifiable ends of all human action."<sup>312</sup> Moore's theory of ethics appears to swing between consequentialism and aesthetic idealism, which MacIntyre says are (and

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<sup>305</sup> LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 2.01 (1922).

<sup>306</sup> G. E. MOORE, PRINCIPIA ETHICA (1903).

<sup>307</sup> See Postal Card from Judge Pollock to Justice Holmes (Feb. 24, 1904), in HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 116 (Belknap Press 1961) [hereinafter HOLMES, CORRESPONDENCE].

<sup>308</sup> ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 15 (1981) [hereinafter MACINTYRE].

<sup>309</sup> *Id.*

<sup>310</sup> MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 209 (1992) ("the Brandeis Brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality"). This begins the rise of legislative facts that "inform[] a court's legislative judgment on questions of law and policy" and emerged with the Brandeis Brief, made famous in *Muller v. Oregon*, 208 U.S. 412, 419 (1908). See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942).

<sup>311</sup> MACINTYRE, *supra* note 308, at 15-16.

<sup>312</sup> *Id.*

probably have to be) logically independent of one another.<sup>313</sup> This debate becomes relevant for Holmes's *Bleistein* opinion.<sup>314</sup>

American pragmatism and Cambridge's "golden age" shake up the state of certainty—about what we know, the manner of pursuing truth, and the ideal object of law or life. This shake-up produces epistemological paradigm shifts that fracture disciplines, like philosophy, but that birth others, like sociology, psychology, economics, and urban studies. Thus begins the modern university with its "disciplines" backed by new methods of empiricism and fallibility, housing learned societies and journals that explain, authorize, and propel expertise in the new fields.<sup>315</sup> From skepticism about truth comes multiple forms and topics of truths, along with institutions and associations that propose new ways of knowing.

University leaders refrained from micromanaging the quality of this exponential output, leading to "the growth of professional societies and the creation of an organized peer review system."<sup>316</sup> The Modern Language Association was established in 1883; the American Economic Association in 1885; the *American Journal of Psychology* in 1887; and the *American Journal of Sociology* in 1895.<sup>317</sup> Until then, the job of assessing quality in scholarly and scientific work "was left in the hands of university presidents. . . . As time went on, the locus of authority to determine academic competence . . . was increasingly vested in faculty members, their academic departments and their peers at other universities."<sup>318</sup> In other words, the epistemological revolution of the late nineteenth century generated the modern institutions and organizations that produce what we think of today as disciplinary *knowledge*—humanistic, social, and scientific pursuits following generally accepted reality-based epistemic rules for establishing truth (or facts) about the world and its objects.<sup>319</sup>

<sup>313</sup> *Id.*

<sup>314</sup> Justice Holmes in *Bleistein* was evidently caught within this "highly contentious" debate. In Holmes's attempt to reconcile that which perhaps cannot be reconciled—consequentialism with aesthetic idealism—he birthed via *Bleistein* a problematic originality doctrine that grossly expanded copyright protection and unmoored it from a foundation in a reasonable commercial basis for anti-copying protection. *See supra* Part III.B.

<sup>315</sup> JONATHAN COLE, *THE GREAT AMERICAN UNIVERSITY* 43 (2012). "The founders of the research universities were linked to the new ideas of a host of thinkers in different fields. Those in the intellectual limelight included pragmatist philosophers and psychologists John Dewey and William James; legal philosophers such as Oliver Wendell Holmes Jr., and the stars of the new discipline of sociology—people like Lester Ward and Charles Sumner. The professional culture in law, medicine, and in many academic disciplines developed, and higher education witnessed enormous economic growth." *Id.* at 46.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 43.

<sup>319</sup> Jonathan Rauch calls these "reality-based inquir[ies]" "orderly, decentralized, and impersonal social adjudication" characterized by objective, iterative, and transparent processes of error-correction. RAUCH, *THE CONSTITUTION*, *supra* note 28, at 103.

This revolution eventually changed how courts decide cases and how legislatures inform legal policy.<sup>320</sup>

With the birth of the modern university came new “professions”—law, journalism, social work, accountants, and statisticians—some with their own schools, licensing requirements, and disciplinary experts.<sup>321</sup> For example, the first school of professional journalism opened in 1908 at the University of Missouri.<sup>322</sup> This followed the news industry’s reorganization in the 1880s as a response to the recent fake news crisis and “yellow journalism.”<sup>323</sup> The professional newsroom, with its fact-checkers, expertise, and authority, was born at this time.<sup>324</sup> The same was true of law. Not until the late 1800s did law schools proliferate, although they did not have entrance requirements or final examinations and were mainly vehicles for apprenticeships.<sup>325</sup> In 1890, when Harvard’s Christopher Columbus Langdell revamped the university’s legal education program with the case method as a more “scientific” method of studying legal doctrine,<sup>326</sup> most lawyers in the country had not graduated from a law school.<sup>327</sup> But the study of law—like journalism, medicine, and other professions—evolved quickly within institutions of higher learning, asserting qualitative standards of excellence for their practice and metrics of “truths” within each discipline.<sup>328</sup> In Jonathan Rauch’s explanation, this is the story of the “constitution of knowledge,” grounded in democratic processes that enable the social adjudication of disciplinary truths (“science” in the words of the Constitution) through impersonal, professional institutional mechanisms. The notion of “facts” as outputs of disciplinary communities arose in this historical context. Not until this time, therefore, could copyright law begin to wrestle with

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<sup>320</sup> See *supra* note 310.

<sup>321</sup> See COLE, *supra* note 315, at 46. RAUCH, *supra* note 28, at 100-03 (describing the world of “professional scholarship, science, and research,” journalism, government agencies, and law/jurisprudence).

<sup>322</sup> Betty Houchin Winfield, *Introduction*, in JOURNALISM, 1908: BIRTH OF A PROFESSION 9 (Betty Houchin Winfield ed., 2008).

<sup>323</sup> See Merrill Fabry, *Here’s How the First Fact-Checkers Were Able to Do Their Job Before the Internet*, TIME (Aug. 24, 2017, 10:00 AM), <https://time.com/4858683/fact-checking-history/> (describing the professionalization of journalism as a response to “sensational yellow journalism of the 1890s” and the early history of professional “fact-checkers” within Time Magazine as mostly performed by women).

<sup>324</sup> See *id.*; See also Jean Folkerts, *History of Journalism Education*, 16 JOURNALISM & COMMUN MONOGRAPHS 227 (2014).

<sup>325</sup> Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 800 (2003) [hereinafter *Moline*]; see also Hugh MacGill & R. Newmyer, *Legal Education and Legal Thought, 1790-1920*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA 36-67 (Michael Grossberg & Christopher Tomlin eds., 2008).

<sup>326</sup> Dorsey Ellis, Jr., *Legal Education: A Perspective on the Last 130 Years of American Legal Training*, 6 WASH. U. J. L. & POL’Y 157, 166 (2001).

<sup>327</sup> See *Moline*, *supra* note 325, at 801.

<sup>328</sup> See COLE, *supra* note 315, at 46.

what to do with “facts” in terms of its constitutional goal of “Progress of Science.”

*B. Legal Realism and Deference to Disciplinary Knowledge*

Oliver Wendell Holmes, considered a forerunner of legal realism,<sup>329</sup> was a participant in the above-described revolution within the philosophy of knowledge and its new institutions.<sup>330</sup> Legal realism was a reaction to legal formalism.<sup>331</sup> As Joseph Singer writes in the context of reviewing Laura Kalman’s *Legal Realism at Yale: 1927–1960*, “[t]he original realists sought to understand legal rules in terms of their social consequences. To better their understanding of how law functions in the real world, they attempted to unify law and the social sciences.”<sup>332</sup> The realists “hoped to make judicial decision-making more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine.”<sup>333</sup> A realist critique of nineteenth-century jurisprudence was similar to that made by pragmatists of universalist philosophy: “Rules do not decide cases; they are merely tentative classifications of decisions reached.”<sup>334</sup> The concern was that universal or formal principles applied to concrete cases in an increasingly complex and diverse society lead to inconsistent and unjust outcomes—abstractions divorced law from reality draining it of legitimacy.<sup>335</sup>

The realists pursued a “larger enterprise” than unifying law and social science:

The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and

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<sup>329</sup> See David Seipp, *Holmes’ Path*, 77 B.U. L. REV. 515, 553 (1997) [hereinafter *Seipp*]. But see Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 ANGLO-AM. L. REV. 81 (1991) (admitting that Holmes while understood as the “primary intellectual inspiration behind American legal realism” was in fact not a “forerunner of legal realism” but an “apologist for legal formalism”).

<sup>330</sup> An avid reader and writer beyond the law, Holmes’ letters and writings provide insight into the backdrop of his many decisions. See *Seipp*, *supra* note 329, at 553. See also Beebe, *Aesthetic Progress*, *supra* note 22, at 358-61, 368-69 (proposing extra-judicial influences on Holmes’ *Bleistein* opinion).

<sup>331</sup> Legal realism has been described as a “form of functionalism and instrumentalism.” Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468 (1988) [hereinafter *Singer, Realism*]. See also LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986).

<sup>332</sup> *Singer, Realism*, *supra* note 331, at 468.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 469. This echoes Holmes’s famous statement in *Lochner* that “general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.” *Lochner v. N.Y.*, 198 U.S. 45, 65 (1905) (Holmes, J. dissenting).

<sup>335</sup> See *Singer, Realism*, *supra* note 331, at 470; see also Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM L. REV. 809, 809-21, 838-42 (1935).

ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends.<sup>336</sup>

This enterprise included an attack on the “public/private distinction” and on “the idea of the self-regulating market,”<sup>337</sup> which Singer traces to, among other influential texts, Holmes’s *Privilege, Malice, and Intent* (1894).<sup>338</sup>

Pragmatism and the new sciences directly affected legal realism. The studies of socio-economic institutions and organizational behavior became the fodder on which realist judges based their decisions. When applying general rules to specific cases, judges could defer to experiences and behaviors that the new sciences explained—whether economics, urban studies, labor relations, or industrial production. Constitutional litigators know this historical practice to originate with the “Brandeis Brief,” what Philippa Strum describes as “the first brief that had more pages of statistics by far than of legal principles.”<sup>339</sup> Then-attorney Louis Brandeis filed such a brief in the 1908 case of *Muller v. Oregon*, justifying restrictions on work hours as reasonable for women to protect their health and well-being.<sup>340</sup> *Muller* was decided just three years after *Lochner v. New York* held otherwise for working men.<sup>341</sup> Holmes joined the majority in *Muller* and dissented in *Lochner*, believing that the state’s legislative factual findings amply supported the labor regulations protecting all workers. Brandeis would go on to author the famous *INS* opinion that *Feist* relies on, writing that “the general rule of law is that the noblest of human production—knowledge, truths ascertained, conceptions, and ideas—[become], after voluntary communication to others, free as the air to common use.”<sup>342</sup>

Legal realism can be understood as an abdication of judicial authority in favor of reasonable state (or federal) legislative judgment, which should be given substantial latitude. The alternative is for an unaccountable and elite judiciary, isolated from the facts and lived experience under consideration, to decide substantive government policy. When Justice Holmes in *Lochner* said in dissent that it is not the judiciary’s job to second-guess the legislature’s judgment when it rests on some rational basis, even if disagreement about that

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<sup>336</sup> See Singer, *Realism*, *supra* note 331, at 474.

<sup>337</sup> *Id.* at 475.

<sup>338</sup> *Id.* Singer also cites as influential Walter Wheeler Cook’s *Privileges of Labor Unions in the Struggle for Life*, 27 *YALE L.J.* 779 (1918).

<sup>339</sup> Philippa Strum, *Brandeis and the Living Constitution*, in *BRANDEIS AND AMERICA* 120 (Nelson Dawson ed., 1989). See also *Seipp*, *supra* note 329, at 517 (explaining Holmes said that lawyers need to study economics and statistics). See also *supra* note 310 (citing Horwitz and Davis).

<sup>340</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>341</sup> *Lochner v. N.Y.*, 198 U.S. 45 (1905).

<sup>342</sup> *INS v. AP*, 248 U.S. 215, 250 (1918). See also *supra* Part 1.B.3.

basis exists,<sup>343</sup> he embodied the then-pragmatist imperative of deferring to legislative facts as authoritative. These legislative facts derived from the legitimacy of the legislature itself, its representative nature, and its fact-finding practices, all fueled by the new social sciences that would substantiate Progressive social policies like welfare-sustaining programs and economic and industrial regulation benefitting laborers.<sup>344</sup> The *Lochner* crisis, preceding legal realism's heyday, was a failure of formalism: the Supreme Court denied local legislatures the ability to craft policies tailored to specific local contexts and instead prioritized universalist principles like "freedom of contract." *Lochner*'s dissents and eventual demise were a success of pragmatism (and its eventual jurisprudential instantiation, legal realism) by emphasizing factual investigations and "empirical research designed to answer questions about the efficacy of institutions and rules of law in aid of understanding what social policy was appropriate in each functionally defined area" of society.<sup>345</sup>

When Holmes wrote in *Lochner* that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*," he was writing about the New York labor law, which aimed to protect the safety of industrial workers,

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<sup>343</sup> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting).

<sup>344</sup> See HOROWITZ, *supra* note 310.

<sup>345</sup> John Henry Schlegel, *Legal Realism*, in 13 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCE 774 (2nd ed. 2015). Justices Harlan and Holmes each authored famous dissents in *Lochner*. Harlan cites as justification for the New York labor law various studies, including Professor Hirt's "Diseases of Workers" and the "Eighteenth Annual Report by the New York Bureau of Statistics of Labor." *Lochner*, 198 U.S. at 69. Harlan's dissent is based on the new facts of the day. Similarly, Holmes pens the famous line "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" criticizing the majority opinion for deciding the case "upon an economic theory which a large part of the country does not entertain." *Lochner*, 198 U.S. at 75. Justice Holmes writes: "General propositions do not decide concrete cases. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work." *Lochner*, 198 U.S. at 76.



who were in weak bargaining positions vis à vis employers.<sup>346</sup> This famous passage criticized constraining state legislatures with antique notions of “natural law.” Holmes’s dissent, which would become the majority thirty years later,<sup>347</sup> proclaimed that “[a constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.”<sup>348</sup>

Holmes was talking about labor law, but he could have been talking about copyright. Two years earlier in *Bleistein*, he said that copyrightable subject matter should not be constrained by judges’ elite sensibilities. The circus advertisements at issue in *Bleistein* were just as much copyrightable expression as the fine arts, he said:

If there is a restriction, it is not to be found in the limited pretensions of these particular works. *The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.* . . . [T]he act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to “illustrations or works connected with the fine arts” is not works of little merit or of humble degree, or illustrations addressed to the less educated classes. . . . Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is nonetheless a picture, and nonetheless a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus.<sup>349</sup>

We see here impulses of pragmatism’s consequentialism and deference to majoritarian preferences. We also see (in dicta) confirmation that even directories contain the requisite originality for copyright. Twenty years later, the

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<sup>346</sup> *Id.*

<sup>347</sup> *Lochner*’s overly formalistic concepts did not stand the test of time. The Supreme Court eventually adopted Holmes’s *Lochner* dissent as the majority rule embracing a more flexible view of judicial review in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which historicizes “freedom of contract” through the due process clause. That case says: “The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.” *Id.* at 392.

<sup>348</sup> *Lochner*, 198 U.S. at 76.

<sup>349</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (emphasis added).

Court of Appeals for the Second Circuit (affirming a district court decision by Judge Learned Hand) would repeat *Bleistein*'s language and protect a jeweler's catalog from copying by a competitor.<sup>350</sup> *Bleistein*'s holding expands copyrightable subject matter even to advertisements, catalogs, directories, and other commercial matters that may contain low originality or "authorship," as typically understood in terms of intellectual labor and creativity. Holmes's deference to the new industries, their laborers, "and people of fundamentally differing views" meant that anyone can be an author and almost everything is authored.

*Bleistein* is celebrated for its "aesthetic democracy" and for inaugurating the "aesthetic nondiscrimination" principle.<sup>351</sup> Its often-quoted sentences foreground the risk of judicial elitism in copyright:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. . . . That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.<sup>352</sup>

*Bleistein* results in copyright for the circus advertisement because, as Holmes says, "personality always contains something unique . . . a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."<sup>353</sup> This "personality" theory of copyright is *Bleistein*'s other legacy, lowering the originality standard below even *Burrow-Giles* (which reserves the possibility that "ordinary" photographs lacked originality<sup>354</sup>). By setting the originality bar at "personality," *Bleistein* trades the value of a person's labor for the value of individualism, measured here by market preferences and commercialism.<sup>355</sup>

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<sup>350</sup> *Jeweler's Circular Pub. v. Keystone Pub.*, 281 F. 83, 85 (2d Cir. 1922) ("It was at one time intimated in certain judicial opinions that directories were not entitled to copyright. But the law is now well established to the contrary in England. . . . Mr. Justice Holmes, writing for the court, speaks of directories as being capable of copyright."). See *supra* note 67 (discussing Justice Stevens's notes on *Jewelers* in his *Feist* file).

<sup>351</sup> Beebe, *Aesthetic Progress*, *supra* note 22, at 359 (citing LINDA DOWLING, *THE VULGARIZATION OF ART: THE VICTORIANS AND AESTHETIC DEMOCRACY* (1996)).

<sup>352</sup> *Bleistein*, 188 U.S. at 252.

<sup>353</sup> *Id.* at 250.

<sup>354</sup> *Burrow-Giles*, 111 U.S. at 59.

<sup>355</sup> Beebe, *Aesthetic Progress*, *supra* note 22, at 363.

Who needs sweat-of-the-brow if all human expression for which there is demand for copies contains something copyrightable?

Just two years after *Bleistein*, Holmes's *Lochner* dissent argues against the power of a "free" market to define rights and supplant legislative choices regarding contractual limits and labor standards. This view is plausibly inconsistent with *Bleistein*, which relied on markets to shape rights (in copyright), and with the Copyright Act, which did not expressly extend to advertisements.<sup>356</sup> Holmes's views seem in flux, shifting between abdicating judicial authority for aesthetics, his deference to legislatures, and his reverence for the practice of art (and the pursuit of science) as an ideal.<sup>357</sup>

Holmes's engagement with evolving strands of philosophical debate about both aesthetics and utilitarianism might explain his confusion. He read Moore's *Principia Ethica*, published the same year as *Bleistein*.<sup>358</sup> In Holmes's letter to Sir John Pollock, one of hundreds in their thirty-year correspondence, he appears to have expressed dismay with Moore's theory of the "good" as a universal ideal (as opposed to a contingent and situated value).<sup>359</sup> Pollock corrected Holmes in a response dated February 24, 1904:

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<sup>356</sup> "The advertisements were not fine art by even a broad definition of the term, and the *Bleistein* Court should not have granted them copyright protection. Present-day accounts of *Bleistein* strangely overlook the statutory context of Holmes's ruling. They celebrate his declaration later in the opinion that judges should not impose their own aesthetic standards when deciding copyright cases, but they omit the fact that this is precisely what he did in his highly tendentious statutory interpretation." *Id.*

<sup>357</sup> Holmes was an art connoisseur and his wife was an accomplished artist. Rebecca Curtin, *The Art (History) of Bleistein*, 69 J. OF COPYRIGHT SOC'Y OF THE USA 395 (2023) (describing Holmes's affection for and attention to his wife's artistic work as another explanation of his decision in *Bleistein*). Barton Beebe describes Holmes' reverence for the pursuit of knowledge and art in a 1902 speech at Northwestern University School of Law just one year before the *Bleistein* decision. Beebe, *Aesthetic Progress*, *supra* note 22, at 360. Holmes says in that speech, "[t]he justification of art is not that it offers prizes to those who succeed in the economic struggle, to those who in an economic sense have produced the most, and thus that by indirection it increases the supply of wine and oil. The justification is in art itself, whatever its economic effect." OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 272–73 (1920). Holmes goes on to say: "the opening which a university is sure to offer to all the idealizing tendencies—which I am not afraid to say, it ought to offer to the romantic side of life—makes it above all other institutions the conservator of the vestal fire." *Id.* at 275. Beebe describes *Bleistein* as having an "almost schizophrenic quality" when compared to Holmes's Northwestern University speech a year earlier in 1902. Beebe, *Aesthetic Progress*, *supra* note 22, at 360–61. As David Seipp writes, Holmes was known for his "playful cynicism" with many people failing to get the joke. *See Seipp*, *supra* note 329, at 558. Whether Holmes was being playful, hypocritical, changed his mind, or remained undecided on his views of copyright, it may be time to take *Bleistein* less seriously and to reconsider copyright originality.

<sup>358</sup> HOLMES, CORRESPONDENCE, *supra* note 307, at 116. Moore's lectures previously circulated as draft lectures. G.E. MOORE, PRINCIPIA ETHICA (Revised Edition) xiii (Thomas Baldwin, ed. 1993).

<sup>359</sup> This letter is missing from the correspondence, but Holmes' journal at the time indicates he read Moore's work. HOLMES, CORRESPONDENCE, *supra* note 307, at 116. The

I don't think you differ with the ingenious G.E.M. so much as you suppose. He does not set up an absolute good; on the contrary, he says that the predicate "good" in our various judgments of what is "good" is *sui generis* and unanalyzable, and therefore no universal external criterion of goodness can be assigned—such as pleasure-giving quality, utility however defined, or conformity to any one ideal. In short, so far as we know, there is not one good, but very many goods with apparently nothing in common but just being good. And the question—what ought we to judge good?—seems on this view to be rational only in the sense: By preferring what sort of "goods" do men and nations succeed? Not much catching the tail of the Cosmos there. I don't say that I agree with this view myself, but I think it at least worth going through. A great deal of the detailed criticism—on utilitarianism e.g.,—seems to me quite excellent.<sup>360</sup>

If we are to understand Pollock's assurance, Holmes was having an internal debate with Moore about the possibility of an ideal good, questioning the Cambridge philosopher's groundbreaking work, and perhaps also misinterpreting it given its somewhat confusing embrace of *both* utilitarianism and aesthetic idealism.<sup>361</sup> *Bleistein's* similarly confounding result—celebrating both aesthetic practice and market consequences as a justification for copyright protection—might reflect Holmes's extracurricular study of Moore. Prompted by Moore's celebration of the aesthetic as an ideal, *Bleistein* also celebrates it by blessing almost anything as authored expression despite the Copyright Act's ambiguity on the subject of advertisements as fine art. Holmes defers to market behavior in *Bleistein* as a measure of rational preferences of "men and nations" (as Pollock says), only to reject it as a guiding principle in *Lochner* two years later in deference to New York's labor regulations.

Holmes's unsettled philosophy of aesthetics and utilitarianism does not alleviate *Bleistein's* troublesome effect on twentieth-century copyright law. But it may explain the instability of the "two sides of *Bleistein*."<sup>362</sup> It also may justify limiting *Bleistein's* expansive reach and constraining its aesthetic nondiscrimination principle to pragmatism's core tenets. These include

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editor's footnote to "G.E.M" says: "In Holmes' Journal there appears among the volumes read in the early part of 1904, George Edward Moore, *Principia Ethica* (1903). The letter concerning the book, which he had apparently written to Pollack, is missing." *Id.* David Seipp describes Sir Pollock as "one of England's leading legal historians." *See Seipp, supra* note 329, at 532.

<sup>360</sup> HOLMES, CORRESPONDENCE, *supra* note 307, at 116-17.

<sup>361</sup> *See* MACINTYRE, *supra* note 308, at 15. *See supra* Part III.A.

<sup>362</sup> *See* Beebe, *Aesthetic Progress*, *supra* note 22, at 376 ("one side was driven by the imperatives of romanticism and the aesthetic. The other was driven by the imperatives of industrial capitalism, the very imperatives against which romanticism and the aesthetic at least in part defined themselves").

deference to institutional and disciplinary expertise, even when disputes exist concerning facts on which experts base their judgments. In this context of revitalizing *Feist*, note that *Feist* tacitly repudiates *Bleistein* by denying copyright to the directory in the case (Rural's phone book), and it expressly overrules another case, *Jeweler's Circular v. Keystone* (1922), as to sweat-of-the-brow. In this light, *Feist* counsels an even less deferential originality standard in tandem with a broader application of §102(b).

C. *Taming Bleistein and Broadening the Fact-Exclusion*

*Bleistein* was the beginning of Holmes's tenure on the Court, during which he became known for operationalizing his conception of "experience." Perhaps contrary to how *Bleistein* is understood today, "experience" is not "individual and internal but collective and consensual; it is social, not psychological."<sup>363</sup> This is to say that *Bleistein* should be read with more humility than it is today, as Holmes might have meant it in light of the full panoply of his judicial philosophy—not as a justification for copyright protection over all human expression exhibiting even a spark of "personality," but as merely one manifestation of Progressive Era and pragmatist theory that embraces diverse aesthetic forms reflecting changing socio-economic institutions and practices. *Bleistein*'s celebration of radical subjectivity or "personality," in other words, should not undermine (and indeed should give way to) the authoritative production of facts and their designation as objective truths, which produce institutional stability and ideological common ground.

When Holmes decided *Bleistein* in 1903, there was no free speech doctrine as we know it today.<sup>364</sup> There were, however, many crises of propaganda and misinformation at the turn of the twentieth century, which were eventually managed by journalistic standards, the protection of a free press, and the rise of university disciplines.<sup>365</sup> When in 1918, Brandeis proclaimed in *INS* that "knowledge, truths ascertained, conceptions, and ideas become after voluntary

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<sup>363</sup> LOUIS MENAND, *THE METAPHYSICAL CLUB* 343–45 (2001) (describing Holmes' jurisprudence).

<sup>364</sup> John Witt, *Weaponized from the Beginning*, 4 J. OF FREE SPEECH L. 715 (2023) [hereinafter Witt, *Weaponized*]. For historical accounts of First Amendment free speech law forcing a reexamination and critique of the contemporary approach, see, e.g., Joseph Blochner, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2167 (2015); ROBERT POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

<sup>365</sup> Early observers for the World War One-era crisis of propaganda and misinformation did not treat it as a problem of free speech law. Freedom of speech in 1919 had barely been invented as a judicial doctrine; courts would not begin to protect speech against repressive laws until at least the late 1920s and 1930s. "Absent a First Amendment to rely on, critics and advocates turned not to free speech doctrine in the courts ... but to mediating institutions that offered bulwarks against distortions in the domain of public opinion." Witt, *Weaponized*, *supra* note 364, at 718-19.

communication to others free as the air to common use,” he and Holmes were developing that early free speech doctrine in which freedom of information was critical to the testing and assessment of facts as foundations of knowledge.<sup>366</sup>

Holmes was paying attention when, in the early 1900s, philosophers like Peirce, Wittgenstein, and Moore, and new “social scientists” like Durkheim and Max Weber, began a century-long debate over the difference between “facts” and “values.”<sup>367</sup> This epistemological paradigm shift troubles copyright law’s fact-exclusion. If, as some believed, objectivity is impossible and human subjectivity both inevitable and celebrated, facts are always “created” by intellectual labor and therefore copyrightable. In *Bleistein*, this may have manifested as Moore’s highest ideal—the appreciation of beauty—as Holmes worked through the intersection of consequentialism and aesthetic contemplation in *Principia Ethica*. On the other hand, pragmatists and burgeoning legal realists established that objectivity may be contingent and contextual but still grounded in social processes and institutions that establish institutional authority and stability. That is, facts are often produced by individuals within institutions. And more important than protecting individual labor in every instance is sustaining those institutions that protect the public interest. This is what Brandeis said eventually in *INS*, and it is what *Feist* should be understood to say seventy-five years later.

The “modern notion of objectivity” producing a new understanding of “facts” arose from turn-of-the-century epistemological debates, professional

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<sup>366</sup> *INS*, 245 U.S. at 250 (Holmes, J. dissenting). In 1919, Justice Holmes authored another famous dissent in *Abrams v. United States*, a case in which the Supreme Court upheld the 1918 Sedition Act that criminalized critique of the United States’ war policies. *Abrams v. U.S.*, 250 U.S. 616 (1919). Disagreeing with the majority’s statutory interpretation and its finding of criminal intent to incite resistance to the U.S.’s war effort in Germany, Holmes pens the famous “fighting faiths” passage in which he melds theories of free speech, democratic resilience, and pragmatism, again espousing the humility with which he believes judges should approach contested issues of fact. “To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” *Id.* at 630.

<sup>367</sup> Law & Urry, *Enacting the Social*, *supra* note 54, at 1 (describing this debate as “ontological politics”).

organizations, and emerging institutions of learning.<sup>368</sup> Lorraine Daston and Peter Galison explain that “objectivity” of knowledge was advanced through, among other features of modern society, the new technologies of manufacturing, mechanical reproduction, and especially image-making (microscopy, lithography, and photography).<sup>369</sup> As Daston and Galison describe, these new technological practices and outputs depended for their believability on “epistemic virtue,” a “moral attribute of the people recognized as makers of knowledge.”<sup>370</sup> These early twentieth-century changes begat the further notion of “structural objectivity”—taming individual idiosyncrasies through professional expertise and a new idea of “trained judgment.”<sup>371</sup> Holmes was engaged with these ideas as an intellectual interlocutor and a jurist. His opinions about copyright law (and labor law) must be understood in this light to appreciate how *Feist* is a subtle but no less critical repudiation of a bloated originality doctrine that started with *Bleistein* and carried through the twentieth century.<sup>372</sup>

*Bleistein*'s deferential evaluation of copyright authorship betrays Holmes's allegiance to pragmatism as a process of knowledge-making.<sup>373</sup> His decision is thereafter marshaled as a misapplication of the aesthetic nondiscrimination principle, which freed copyright judges from being art critics but also helped identify minimal creativity in the output of information-producing industries, rendering their facts copyrightable and proprietary.<sup>374</sup> Privately-owned facts that do not circulate for testing, evaluation, contestation, and acceptance undermines the expertise and knowledge-producing institutions that Holmes celebrated as a pragmatist and early legal realist. Although *Bleistein* did not originate the sweat-

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<sup>368</sup> DASTON & GALISON, OBJECTIVITY, *supra* note 43 at 26-34.

<sup>369</sup> *Id.* at 42.

<sup>370</sup> Jan Golinski, *How to Be Objective*, 96 AM. SCIENTIST 332 (2008) (book review), <https://www.americanscientist.org/article/how-to-be-objective/>. See DASTON & GALISON, OBJECTIVITY, *supra* note 43 at 39-42 (describing “epistemic virtue”). See also STEPHEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 193 (1995) (describing “the role of trust in constituting systems of both social order and empirical knowledge. There have to be working answers to the questions ‘whom to trust?’ and ‘who tells the truth?’ if there is to be shared knowledge and shared social order.”).

<sup>371</sup> DASTON & GALISON, OBJECTIVITY, *supra* note 43 at 356-57 (structural objectivity); 19, 346-57 (trained judgment).

<sup>372</sup> See Joyce & Ochoa, *Reach Out*, *supra* note 31, at 308 (for proposition that *Feist* is a repudiation of *Bleistein*).

<sup>373</sup> Beebe describes Holmes' betrayal of pragmatism in terms of its deference to commercial activity instead of allegiance to aesthetic practice. Beebe, *Aesthetic Progress*, *supra* note 22, at 335, 345-50.

<sup>374</sup> For a discussion of cases in which factual works are incorrectly deemed original works of expression, see Dan L. Burk, *Madness and Method in Copyright Law*, 2007 UTAH L. REV. 587, 593-97 (2007) (criticizing application of § 102(b) and “fact/expression” dichotomy as based on “manifestly untrue” assertions about understandings of science in numerous cases).

of-the-brow doctrine, which was debated mid-century until *Feist*, *Bleistein* fed it by glorifying human creativity and the “singular[]” “personality” of each person who claims copyright authorship.<sup>375</sup> The effect of *Bleistein*’s inflated originality doctrine on the public domain of facts—resulting in cases that protect databases, informational catalogs, financial assessments, and evaluations<sup>376</sup>—could have been squelched by the realist revolution underway beginning with Holmes’s *Lochner* dissent. But it was not.

In *Lochner*, Holmes understood and embraced the newly emerging social sciences—organized in institutions and disciplines producing knowledge (and facts) that legislatures (and courts) can and should rely on—as an inevitable feature of law’s application.<sup>377</sup> To be sure, that knowledge is produced by human labor and within organizations, often through collective and collaborative practices. But at the time, scholars and policy advocates also understood that the value of public property serving the general welfare supersedes the importance of private ownership (and, for our purposes, copyright ownership). *Bleistein* appears to have come too early in Holmes’s tenure on the Court for his study of pragmatism as a process of knowledge-making, and its relation to aesthetics as a disciplinary practice, to have influenced him. *Lochner*’s formalism was not overruled until the 1930s; and *Bleistein*’s aesthetic nondiscrimination principle, which promises that anyone can be a copyright author (and almost anything can be copyrighted), remains good law and stronger than ever.<sup>378</sup>

The overextension of *Bleistein* predicts the twentieth-century expansion of copyright as a form of private property and the weakening of copyright’s core commitment to the public domain.<sup>379</sup> These outcomes run counter to turn-of-the-century debates about progressivism and capitalism (*i.e.*, critiques of labor and ownership) from which *Bleistein* originates. Holmes’s elevation of authorship as a way to celebrate democratic participation and protect labor—both Progressive causes misapplied in the copyright context—is in tension with the current scope of the fact-exclusion, which today is quite narrow in part due to *Bleistein*. This dichotomy makes the result in *Feist* (dispensing with sweat-of-the-brow and enlarging the public domain) all the more surprising *and* compelling. Given *Feist*’s legal roots and the intellectual history from which they sprung, a strong reading of *Feist* and its broader application is appropriate.

The result should be a revitalization of *Feist* for the twenty-first century, defining “facts” not as “pebbles waiting to be picked up”<sup>380</sup> but as knowledge produced within and through institutions and organizations characterized by

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<sup>375</sup> *Bleistein*, 188 U.S. at 250.

<sup>376</sup> Burk, *Madness and Method in Copyright Law*, 2007 UTAH L. REV. at 593-97.

<sup>377</sup> This is the “logic” in law that is “experience.” HOLMES, THE COMMON LAW 1 (1881) (“Lecture 1: Early Forms of Liability”).

<sup>378</sup> See *The Andy Warhol Found. for Visual Arts v. Goldsmith*, 598 U.S. 508 (2023), at Slip Op. 31-32 & n.19 (affirming the centrality of the aesthetic nondiscrimination principle to copyright law).

<sup>379</sup> SILBEY, AGAINST PROGRESS, *supra* note 22, at 1-12, 20-21.

<sup>380</sup> Hughes, *Ontology*, *supra* note 31, at 53.



contemporary epistemic virtues. This revised reading resets the metric for evaluating copyrightability and puts more pressure on that evaluation than current doctrine dictates. It prioritizes the public interest over the author, which *Feist* does too, but *Bleistein* arguably does not. Also, it reestablishes “Progress of Science and the useful Arts” as a collective good measured not by the aggregate of individual contributions (or “personalities,” to use *Bleistein*’s term) but by institutions and the communities they form. The rule is judicial deference to those institutions and communities—not to commerciality and the market.<sup>381</sup> This is not such a substantial change in copyright practice: expertise and disciplinary knowledge have been part of the adjudication of important recent copyright cases.<sup>382</sup> But it does shift legal doctrine and strategy, moving the focus of judicial analysis to the beginning of the copyright dispute—to subject matter protection instead of the affirmative defense of fair use—with the possibility of early and speedier dispositions. As explained in the conclusion, this should affect the outcome of recent disputes, resulting in a richer informational public domain and the judicial imprimatur of knowledge-producing institutions as authoritative and reliable, both of which help defend deliberative democracy.

#### CONCLUSION: FEIST’S FUTURE APPLICATION

A strong reading of *Feist*, as this Article recommends, would result in different outcomes in many important copyright cases.

**Evaluations.** In cases wherein the copyrighted work is a set of values or projections of value (e.g., about car prices or coin prices), copyright is often asserted over the values themselves. For example, in *CCC Information Services v. Maclean Hunter Market Reports*, Maclean Hunter (the “Red Book” publisher) asserted copyright over its car valuations produced from a selection, coordination, and arrangement of factors made by the book’s editors that, the Court said, “were based not only on a multitude of data sources, but also on professional judgment and expertise.”<sup>383</sup> Whereas the district court determined that the values were “like the telephone numbers in *Feist*, pre-existing facts that had merely been discovered by the Red Book editors,” the Court of Appeals for the Second Circuit disagreed and held the Red Book and its numerical predictions of value copyrightable.<sup>384</sup> The Court of Appeals described the valuations as “approximative statements of opinion by the Red Book editors,” rejecting the Defendant’s claim that the valuations were “ideas” or represented

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<sup>381</sup> Beebe, *Aesthetic Progress*, *supra* note 22, at 373 (describing *Bleistein* as defining aesthetic progress as “the market’s judgment of [the copyrighted work’s] worth”).

<sup>382</sup> See, e.g., *Google v. Oracle*, 593 U.S. 1, 31-32 (2021) (relying on amicus briefs describing the practices of computer programmers and software companies).

<sup>383</sup> *CCC Info. Servs.*, 44 F.3d at 63.

<sup>384</sup> *Id.* at 67. “Maclean’s evidence demonstrated without rebuttal that its valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather, they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions.” *Id.*

the result of a “method, process or procedure” that would be excluded under §102(b).<sup>385</sup> No one argued that the valuations were “facts.” But the Court’s lengthy discussion of *Feist*, resulting in a determination that the “compilation of informational matter” is copyrightable as original, demonstrates *Feist*’s influence.<sup>386</sup>

Significant scholarly criticism exists about *CCC*, the most relevant explaining that “all facts involve judgment and creative selection.”<sup>387</sup> Understanding facts as produced through expertise and judgment is a lesson from the history this Article recounts. The twentieth-century emergence of modern facts is the result of the new sciences and professional disciplines claiming epistemic authority for their work. The Red Book sought to be known as *the* authoritative source for used car valuations, and it succeeded in that it was the referenced standard for insurance payments and in some state statutes.<sup>388</sup> Under a strong reading of *Feist*, much of the Red Book should be in the public domain as containing facts about car values made by professionals with skill and knowledge purportedly superior to that of others.<sup>389</sup> Are the facts contestable? Yes. Does that make them any less facts according to the Red Book professionals’ expertise? No. Does that mean the Defendant can copy the whole Red Book? Probably not, but much more of it should be in the public domain than *CCC* allows.

There are many cases like *CCC*, concerning evaluations and ratings of a range of items and services, for almost all of which a strong reading of *Feist* would allow more copying than less.<sup>390</sup> Many of these cases analyze copyrightability in terms of idea-exclusion (and merger), which makes the analysis more complicated because the appropriate level of generality and the

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<sup>385</sup> *Id.* at 73.

<sup>386</sup> *Id.* at 63.

<sup>387</sup> Burk, *Method and Madness*, 2007 UTAH L. REV. at 596. *See also* Hughes, *Ontology*, *supra* note 31, at 68.

<sup>388</sup> *CCC Info Servs.*, 44 F.3d at 73.

<sup>389</sup> In some ways, this is a version of the copyright estoppel doctrine in which courts will not protect parts of the work held out by copyright owners to be factual, even if those parts turn out to be false. These cases are relatively rare and most recently have occurred in the context of historical fiction. *See Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020) (calling the issue one of “asserted truths”). “It would hinder, not promote the progress of science and useful arts to allow a copyright owner to spring an infringement suit on subsequent authors who built freely on a work held out as factual, contending after the completion of the copyrighted work, and against the work’s own averments, that the purported truths were actually fictions.” *Corbello*, 974 F.3d at 979.

<sup>390</sup> *Experian Info. Sols. v. Nationwide Mktg. Servs.*, 893 F.3d 1176 (9th Cir. 2018) (credit scores); *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp. Inc.*, 634 F. Supp. 2d 1226 (D. Colo. 2009) (healthcare ratings and awards for hospital and other healthcare providers); *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 497 F.3d 109 (2d Cir. 2007) (evaluation of settlement prices); *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999) (coin price evaluations).

dividing line between idea and expression are frequently fraught questions.<sup>391</sup> Deciding, instead, that these cases contain factual matter would be more straightforward.

**Manuals and Catalogs.** Cases concerning manuals and catalogs can be analyzed the same way. In these cases, the plaintiff asserts copyright over technical manuals, practice standards, and catalogs that organize parts and procedures for purchase or practice. In some cases, manuals are necessary to repair or keep track of maintaining critical equipment, such as airplanes.<sup>392</sup> In other cases, catalogs or code books are essential to the continued practice of a skilled profession—be it dentistry, medicine, airplane maintenance, or building construction.<sup>393</sup> It is frightening to think about airplane maintenance or safe hospital construction regressing because copyright law constrains access to this essential information. To be sure, paying for books that contain knowledge (or “science” in the constitutional sense) is how copyright is supposed to work. Yet a strong reading of *Feist* might prevent only the whole copying of these books—replacing them in the marketplace with near or exact copies.<sup>394</sup> And it would allow generous quotation and selective copying for use and improvements. Most of these cases resolve on fair use grounds and not at an earlier and more efficient

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<sup>391</sup> *Nichols v. Universal Pictures Co.*, 45 F.2d 119 (2d Cir. 1930) (“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out . . . Nobody has ever been able to fix that boundary, and nobody ever can.”); Hughes, *Ontology*, *supra* note 31, at 91 (discussing malleability of merger doctrine).

<sup>392</sup> *Honeywell Intern., Inc., v. West Support Grp., Inc.*, 947 F. Supp. 2d 1077 (D. Ariz. 2013).

<sup>393</sup> *Practice Mgmt. v. AMA*, 133 F.3d 1140 (9th Cir. 1998); *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7th Cir. 1997); *ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts*, 402 F.3d 700, 711 (6th Cir. 2005); *Facility Guidelines Inst., Inc. v. UpCodes*, No. 4:22-cv-01308-AGF, 2023 WL 4026185, (E.D. Mo. June 15, 2023); *Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148 (3d Cir. 2001) (tools/part numbers and requiring three trips to the Court of Appeals). See Hughes, *Ontology*, *supra* note 31, at 61-79 (discussing cases in terms of “naming facts,” “evaluative facts” and “legal facts”).

<sup>394</sup> This is how the first Copyright Act of 1790 worked, protecting “maps, charts, and books” from exact and whole copying. Fair use (or “fair abridgement”) was always a part of copyright law, but that concerned questions of shortening and summarizing. See Matthew Sag, *The Pre-History of Fair Use*, 76 BROOKLYN L. REV. 1371, 1377, 1398 (2011) (describing law distinguishing exact copying and comparative uses). *Feist* only implicitly wrestles with the dramatic change to copyright law under the 1976 Act, going from an opt-in system (under the 1909 Act, one had to register copyright for protection) to an opt-out system (under the 1976 Act, original works fixed in a tangible medium of expression are automatically protected). The new framing means now copyright’s *absence* requires justification, rather than its protection. The slipperiness of *Feist*’s reasoning is symptomatic of this implicit reframing as it tries to make what should be an obvious point (not everything is under copyright), but which is in fact less often the case. Also, copyright’s growing scope is related to the viability of infringement claims. If only parts of a work are protected, copying only those parts is plausibly infringement. Determining which parts of the work are in (or out) of copyright becomes more important as only parts of work (information and data) and not the whole work are copied..

stage of subject matter analysis, making for more protracted litigation.<sup>395</sup> Instead, when publishers assert that written works contain expertise and skilled knowledge, that information—which a strong reading of *Feist* would call factual matter—should be in the public domain as *publici juris*.

The case of *FMC Corp. v. Control Solutions* is a particularly egregious example of a court’s erroneous and stingy application of *Feist* in upholding copyright in a pesticide label’s instructions for use. Defendant Control Solutions copied FMC’s label as part of a regulatory filing to the Environmental Protection Agency.<sup>396</sup> Control Solutions produced a generic form of FMC’s expired-patented formula and used the instructions on FMC’s label to describe use of the exact same product. The pesticide was dangerous, and testimony of FMC employees explained that the label provided instructions for its most effective and safe use.<sup>397</sup> After extensive discussion of *Feist* and copyright’s idea-exclusion and merger rules, the court held that the label was protected expression and that its use by Control Solutions was not fair use.<sup>398</sup> The case was decided on a motion for a preliminary injunction, but the very long and thorough court opinion determined that the Defendant had no likelihood of success on the merits and that the public interest favored the Plaintiff. The court described the “public interest” as protecting copyright’s exclusivity, saying that “protecting a company’s rights to its intellectual property is in the public interest”; and that FMC had “invested considerable creativity, talent, resources, time and money to develop the . . . label”; and that “[t]he public interest is not served by permitting [Defendant] to pilfer and profit from FMC’s copyrighted work product.”<sup>399</sup> This notion of public interest is contrary to *Feist* and the cases it cites; it sounds much more like Irwin Karp’s 1976 testimony in support of authors’ rights (and sweat-of-the-brow), which *Feist* rejects.

A strong application of *Feist* in this case and ones like it would interpret the label and its indisputably expert instructions on the pesticide’s use as factual matter. The creative choices, expert judgment, and “talent, resources, time and money” spent to devise the instructions for the pesticide should not convert what is meant to be an authoritative explanation of use.<sup>400</sup> Cases like this resemble

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<sup>395</sup> See, e.g., *Google LLC v. Oracle Am., Inc.*, 593 U.S 1 (2020) (deciding software copyright case on fair use and reserving §102(b) question for another day). Compare *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-10 (2d Cir. 1992) (describing unprotectable elements as those dictated by efficiency and those constrained by external factors, such as compatibility needs).

<sup>396</sup> *FMC Corp. v. Control Sols. Inc.*, 369 F. Supp. 2d 539, 543 (E.D. Pa. 2005).

<sup>397</sup> *Id.* at 561.

<sup>398</sup> *Id.* at 561-67.

<sup>399</sup> *Id.* at 578 (citing *Klitzner*, 535 F. Supp. at 1259-60 (“the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources [that were] invested in the protected work”)).

<sup>400</sup> *Id.*

*Baker v. Selden* and are often decided on merger grounds.<sup>401</sup> But that analysis is fraught with traps and too easily manipulated in the copyright claimant's favor, which here frustrates the dissemination of information about what is admittedly the best and safest use of a dangerous product.<sup>402</sup> A strong reading of *Feist* declaring the instructions as a whole factual matter would avoid that result.

**Legal Matter.** In some ways, this category of works should be the easiest to declare public domain material under a strong reading of *Feist*, because *Wheaton v. Peters* says as much. Recently, however, the Supreme Court affirmed *Wheaton*'s holding under the "government edicts" doctrine, not under §102(b).<sup>403</sup> The government edicts doctrine says that no one can own the law because its author is "the people," and judges or legislatures work on the people's behalf.<sup>404</sup> *Georgia v. Public.Resource.Org*, which concerns state statutes annotated by private parties under the state legislature's guidance, extends the government edicts doctrine beyond laws to state-approved annotations of laws. Yet in many cases, the government edict doctrine is less easily applicable. Those cases confront the question as to whether a previously copyrighted work (not a statute), referenced by law or adopted by law as a standard or best practice, is similarly excluded from copyright protection.<sup>405</sup>

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<sup>401</sup> See, e.g., *PortionPac Chem. Corp. v. SaniTech Sys., Inc.*, 217 F. Supp. 2d 1238, 1247-49 (M.D. Fla. 2002) (sanitation reference manual including forms could be copied under merger doctrine); *Cont'l Micro, Inc. v. HPC, Inc.*, No. 95 C 3829, 1997 WL 309028, (N.D. Ill. 1997) (section 102(b) precludes protection of data compilation because it constituted "sets of directions designed to enable locksmiths to accurately cut keys"); *Publ'ns. Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) (holding recipes for yogurt unprotectable under 102(b)); *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (merger doctrine precluded copyright protection in sweepstake rules). For a thorough discussion of merger cases after *Baker v. Selden*, see Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y OF THE USA 417 (2016).

<sup>402</sup> Burk, *Method and Madness*, 2007 UTAH L. REV. at 596.

<sup>403</sup> *Public.Resource.Org*, 590 U.S. at 286-87.

<sup>404</sup> *Id.* at 259, 263. ("Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties. . . . In a democracy, the Court reasoned, 'the People' are 'the constructive authors of the law, and judges and legislators are merely 'draftsmen . . . exercising delegated authority.'")

<sup>405</sup> See *Am. Soc'y for Testing & Materials v. Public.Resource.Org*, 597 F. Supp. 3d 213 (D.D.C. 2022), *aff'd* 82 F.4th 1262 (D.C. Cir. 2023); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002); *Bldg. Offs. & Code Admin. v. Code Tech. Inc.*, 628 F.2d 730 (1st Cir. 1980); *Public.Resource.org v. Sheet Metal & Air Conditioning Contractors' National Ass'n, Inc.*, Case No. 13-CV-00815-SC (resolved in favor of *Public.Resource.org*, see stipulation and judgment, <https://www.eff.org/document/smacna-stipulation-and-judgement/>); Mike Masnick, *Sheet Metal & Air Conditioning Contractors Agree Not To Use Bogus Copyright Claims to Block Publication Of Official Standards*, *Techdirt* (Jul. 16, 2013, 11:03 PM), <https://www.techdirt.com/2013/07/16/sheet-metal-air-conditioning-contractors-agree-not-to-use-bogus-copyright-claims-to-block-publication-official-standards/>.

Consider the ten-year litigation between the American Society for Testing and Materials [ASTM] et al. and Public.Resource.Org, which was first filed in 2013 and finally concluded in 2023.<sup>406</sup> Plaintiffs are nonprofit professional organizations that develop private-sector standards to facilitate technical training, ensure compatibility across products and services, and promote public safety.<sup>407</sup> The standards they produce begin as voluntary guidelines for self-regulation, but oftentimes, federal, state, or local governments adopt these standards or incorporate them by reference into law.<sup>408</sup> The Plaintiffs sell the standards as downloadable PDFs or hard-copy books; purchasing the standards is the only way an interested party may obtain a copy. Public.Resource.Org, another nonprofit organization, aims to make “law and other government materials more widely available so that people, businesses, and organizations can easily read and discuss [the] laws and the operations of government.”<sup>409</sup> When the Plaintiffs’ standards become required reading to follow the law, Public.Resource.Org purchases a copy of the relevant standard and makes it available for free on its website.<sup>410</sup>

The Plaintiffs sued Public.Resource.Org for copyright infringement, and the district court found that they held valid and enforceable copyrights in the incorporated standards, and that Public.Resource.Org did not have a fair use defense. The Court of Appeals reversed the decision, finding that the fair use analysis required a case-by-case analysis for each Plaintiff, “leaving for another day the far thornier question of whether standards retain their copyright after they are incorporated by reference into law.”<sup>411</sup> In 2022, the district court ruled that the standards retained their copyright but that the Defendant engaged in fair use for those incorporated by reference into law or are identical in text to

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<sup>406</sup> *Am. Soc’y for Testing & Materials v. Public.Resource.Org*, 597 F. Supp. 3d 213 (D.D.C. 2022), *aff’d* 82 F.4th 1262 (D.C. Cir. 2023).

<sup>407</sup> “Each Plaintiff relies on volunteers and association members [to produce] . . . standards [that] include technical works, product specifications, installation methods, methods for manufacturing or testing materials, safety practices, and other best practices or guidelines. . . . ASTM has developed over 12,000 standards that are used in a wide range of fields, including consumer products, iron and steel products, rubber, paints, plastics, textiles, medical services and devices, electronics, construction, energy, water, and petroleum products, and are a result of the combined efforts of over 23,000 technical members. NFPA has developed over 300 standards in the areas of fire, electrical, and building safety, including the National Electrical Code, first published in 1897 and most recently in 2020. And ASHRAE has published over 100 standards for a variety of construction-related fields, including energy efficiency, indoor air quality, refrigeration, and sustainability.” *Id.* at 221.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* at 223.

<sup>410</sup> *Id.*

<sup>411</sup> *Am. Soc’y for Testing & Materials v. Public.Resource.Org.*, 896 F.3d 437, 441 (D.C. Cir. 2018).

standards incorporated by law.<sup>412</sup> Public.Resource.Org was nonetheless liable for copyright infringement of 32 of the 217 standards it posted, because the laws that incorporated the standards differed in “substantive ways.”<sup>413</sup> The range of interested amici underscores this litigation’s high stakes. Amici include the American Insurance Association, American National Standards Institute, American Society of Safety Engineers, International Association of Plumbing & Mechanical Officials, and American Society of Civil Engineers (on behalf of Plaintiffs) and 62 Library Associations, Nonprofit Organizations, Legal Technology Companies and Former Senior Government Officials (on behalf of Defendant).<sup>414</sup> Amici, on the Defendant’s behalf, explain their interests as access to the

text of the law for purposes [of] education, dissemination of knowledge, development of new and innovative technologies, public advocacy, and investigative journalism. . . . These purposes ultimately all work toward the larger project of a vibrant national discourse in the advancement of the critical project of constitutional self-government.<sup>415</sup>

Amici on the Plaintiffs’ behalf explain their interest as relying on

the objective, high quality research and guidance that underpins these safety standards. . . . Without copyright protection, the critical source of funding that makes possible the production of these world class standards will disappear, calling into question the future independence, quality and even existence of these standards.<sup>416</sup>

These interests directly reflect the twentieth-century shift in knowledge production and the rise of knowledge-producing institutions, which are implicit in *Feist*’s reasoning and compel a broader public domain in factual matters.

Generating objective knowledge according to disciplinary standards is vitally important to public welfare. When that knowledge becomes “law” to be followed in exact or approximate form, the interests that disciplinary knowledge serves magnify. As the Court of Appeals explained, “faithfully reproducing the

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<sup>412</sup> Am. Soc’y for Testing & Materials v. Public.Resource.Org., 597 F. Supp. 3d at 240-41.

<sup>413</sup> *Id.* at 241.

<sup>414</sup> Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc., Nos. 17-7035, 17-7039, 2017 WL 6055366 (D.C. Cir. Dec. 6, 2017); Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc., No. 17-7035, 2017 WL 6205552 (D.C. Cir. Dec. 6, 2017); Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc., Nos. 17-7035, 17-7039, 2017 WL 4251422 (D.C. Cir. Sept. 25, 2017).

<sup>415</sup> Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc., Nos. 17-7035, 17-7039, 2017 WL 4251422 (D.C. Cir. Sept. 25, 2017).

<sup>416</sup> Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc., Nos. 17-7035, 17-7039, 2017 WL 6055366 (D.C. Cir. Dec. 6, 2017).

relevant text of a technical standard incorporated by reference. . . for purposes of informing the public about the law obviously has great value.”<sup>417</sup> This is a version of the Defendant’s argument that “[t]echnical standards incorporated into law are some of the most important rules of our modern society. In a democracy, the people must have the right to read, know, and speak about the laws by which we choose to govern ourselves.”<sup>418</sup> It is a tragedy of the commons that debates over these standards continued for a decade, including two appeals, although not the kind of tragedy Garrett Hardin made famous in his 1968 essay.<sup>419</sup> It is a tragedy of the digital age commons, in which knowledge and information are relied upon for important regulations but are kept sequestered by copyright law from open debate, discussion, and evaluation. Standard-setting organizations produce these codes in unprecedented supply and claim copyright because the contents are “evaluative,” the product of human “expertise and judgment,” and because professional labor deserves remuneration. A strong reading of *Feist* privileging the role of expertise and knowledge-producing institutions to promote “the progress of science” would reject an authorial labor argument and designate these codes as factual matters in the public domain.

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This Article does not argue that professionals should work for free. But the cases that *Feist* relies on and the historical era that frames its reasoning explain that skilled labor does not justify copyright protection over its output and that sometimes, it is precisely skill and expertise that make a work “factual” public domain material. Further, the history and the cases *Feist* relies on make clear that copyright’s incentive theory insufficiently justifies a property right to subsidize knowledge-producing work, by and through knowledge-producing institutions, whose output can and should be promoted in other ways. Put differently, copyright is not just concerned with property incentives. History and experience demonstrate that copyright incentives are peripheral to knowledge-producing or data-driven industries’ bottom line, rendering claims for copyright’s necessity self-serving and overblown.<sup>420</sup>

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<sup>417</sup> *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 451 (D.C. Cir. 2018).

<sup>418</sup> *Freeing the Law with Public.Resources.Org*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/cases/publicresource-freeingthelaw/>.

<sup>419</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243-48 (1968).

<sup>420</sup> Copyright’s economic incentive rationale rooted in utilitarianism is exaggerated to the point of being inaccurate. The critical literature is vast and continues to expand. *See e.g.*, GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE U.S. RECORDING INDUSTRY* (2018); JESSICA SILBEY, *EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 276-279 (2015). *See also* Glynn S. Lunney, Jr. and Glynn Lunney, *Reexamining Copyright’s Incentives-Access Paradigm*, 49 *VANDERBILT L. REV.* 483 (1996); Margaret Chon, *Intellectual Property and the Development Divide*, 27



This Article began with troubling scenarios regarding the cartelization of climate data in the insurance market, copyrightability of building codes impeding access to the law, and restricted use of history to tell new stories about the past. The subsequent examples show that a stingy reading of *Feist* (and a typical reading of *Bleistein*) limits “facts” to discoveries or ideas, metastasizing rather than staunching these problematic scenarios. By contrast, a strong reading of *Feist* resolves them in favor of a richer public domain comprising more factual matters broadly construed as objective explanations about our world. Copyright should not impede the progress of science. When recalibrated according to a strong reading of *Feist* comporting with the history and legal precedent on which *Feist* relies, copyright can tolerate the contestability of facts and knowledge while still designating them public property. Copyright can thus serve the institutions that promote democratic self-governance—such as the university sciences, journalism, and law—by supporting their epistemic authority in public discourse as producers of facts and knowledge in the public domain. This path is the way forward in our information age and is true to the first principles of copyright law. *Feist* was decided before this age blossomed. As the information age is here to stay, a strong reading of *Feist* is both vital and just.

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CARDOZO L. REV. 2821 (2006); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQ. IN LAW 29 (2011); Eric Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FL. ST. U. L. REV. 623 (2011); Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012). As for copyright protection’s marginal relevance to data protection industries, see JEANNE FROMER AND CHRISTOPHER SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 56 (v.4.0 2022) (describing “continuing doubts about the wisdom of database protection” in light of European Union’s study that EU database protection had no beneficial impact on production of databases whereas U.S. database production has grown despite lack of copyright protection for fact-based databases). Research on standard setting organizations shows that sale of complementary products and services related to the standards (and not the books themselves) are the substantial contributor to market value. See, e.g., Timothy Simcoe, Stuart Graham and Maryann Feldman, *Competing on Standards? Entrepreneurship, Intellectual Property, and Platform Technologies*, 18 J. OF ECON. & MGMT STRATEGY 775 (2009). See also Mark Lemley and David McGowan, *Legal Implications of Network Economics Effects*, 86 CAL. L. REV. 479 (1998) (describing how access to a wide selection of complementary products and services creates network effects that drive market behavior).

**ASSESSING THE COPYRIGHT CLAIMS BOARD  
AFTER TWO YEARS**

by KATIE FORTNEY AND DAVID HANSEN\*

*ABSTRACT*

*On June 16, 2024, the U.S. Copyright Office celebrated the two-year anniversary of operations of the Copyright Claims Board (“CCB”), a novel new small claims court housed within the agency. The CCB was preceded by years of debate about the benefits and risks of such a small claims court. Proponents argued that the CCB would offer rightsholders a low-cost, efficient alternative to litigation in federal courts, allowing small creators to more effectively defend their rights. Opponents feared that the CCB would foster abuse, encouraging frivolous lawsuits while creating a trap for unwary defendants. This short article tests those arguments in one of the first detailed empirical reviews of the CCB’s first two years of operations based on data extracted from the CCB’s online filing system for the 880 claims filed with the court between June 2022 and June 2024.*

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*INTRODUCTION*

In June 2024, the US Copyright Office celebrated the second birthday of operations of its new copyright small claims court,<sup>1</sup> the Copyright Claims Board.<sup>2</sup> The CCB, which describes itself as “an efficient, streamlined way to resolve copyright disputes involving claims seeking damages of up to \$30,000 and ... designed to be less expensive and faster than bringing a case in a federal court,” was created through a last-minute addition to the must-pass December 2020

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\* Katie Fortney is the Copyright Policy & Education Officer with the University of California’s California Digital Library. David Hansen is Executive Director of the Authors Alliance. The views expressed here are our personal opinions and not those of our institutions. An earlier version of this paper, assessing the first year of the Copyright Claims Board, is available at <https://ssrn.com/abstract=4563726>.

<sup>1</sup> Holland Gormley, *The Copyright Claims Board Celebrates Its First Year*, LIBRARY OF CONGRESS: COPYRIGHT: CREATIVITY AT WORK (June 26, 2023), <https://blogs.loc.gov/copyright/2023/06/the-copyright-claims-board-celebrates-its-first-year>.

<sup>2</sup> *About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/about/> (last visited June 21, 2024).

Omnibus Coronavirus Relief Bill.<sup>3</sup> The Office spent about eighteen months setting up the new court and first started accepting cases on June 16, 2022.<sup>4</sup>

Debate over the need for a copyright small claims court in the U.S. dates back decades, and while it is not unique to the American system,<sup>5</sup> the CCB is certainly something of an experiment. The idea for the CCB started to pick up steam in 2006 when Congress held a hearing exploring the idea,<sup>6</sup> and then in 2013, the Copyright Office issued a lengthy report<sup>7</sup> on copyright small claims. The Copyright Alternative in Small Claims Enforcement Act (CASE Act) was introduced in 2016 and then,<sup>8</sup> in modified form, finally passed into law in 2020. This paper aims to review some of the most prominent arguments for and against the CCB and evaluate them in light of the data we now have about its first two years of operations.

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<sup>3</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1181.

<sup>4</sup> The Copyright Office conducted a number of rulemakings with public calls for comments to establish regulations for the operations of the CCB. *See, e.g., Copyright Office Proposes Small Claims Expedited Registration Procedures and FOIA Conforming Amendment*, U.S. COPYRIGHT OFFICE: CLOSED RULEMAKING: CASE ACT, <https://www.copyright.gov/rulemaking/case-act-implementation/expedited-registration/> (last visited July 18, 2024) (discussing Rules and Regulations, 87 Fed. Reg. 24056, 24056-7 (Apr. 22, 2022) (to be codified at 37 C.F.R. pts. 201, 221)); *Copyright Claims Board: Initiation of Proceedings and Related Procedure*, U.S. COPYRIGHT OFFICE: CLOSED RULEMAKING, <https://www.copyright.gov/rulemaking/case-act-implementation/initiating-proceedings/> (last visited July 18, 2024) (discussing Rules and Regulations, 87 Fed. Reg. 24056, 24056 (Apr. 22, 2022) (to be codified at 37 C.F.R. pt. 201)); *Small Claims Procedures for Library and Archives Opt-Outs and Class Actions*, U.S. COPYRIGHT OFFICE: CLOSED RULEMAKING, <https://www.copyright.gov/rulemaking/case-act-implementation/library-opt-out/> (last visited July 18, 2024) (discussing Rules and Regulations, 87 Fed. Reg. 13171, 13171-7 (Mar. 9, 2022) (to be codified at 37 C.F.R. pt. 223)); *Copyright Claims Board: Representation by Law Students and of Business Entities*, U.S. COPYRIGHT OFFICE: CLOSED RULEMAKING, <https://www.copyright.gov/rulemaking/case-act-implementation/representation/> (last visited July 18, 2024) (discussing Rules and Regulations, 87 Fed. Reg. 20707, 20707-15 (Apr. 8, 2022) (to be codified at 37 C.F.R. pts. 201, 232, 234)).

<sup>5</sup> *See generally* Christian Helmers et al., *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s I.P. Enterprise Court*, BERKELEY TECH. L.J. COMMENTARIES (2018).

<sup>6</sup> *Remedies for Copyright Small Claims: Hearing Before the Subcomm. on the Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2005-2006).

<sup>7</sup> *See generally* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REP. OF THE REGISTER OF COPYRIGHTS 1 (2013) [hereinafter COPYRIGHT SMALL CLAIMS].

<sup>8</sup> Copyright Alternative in Small-Claims Enforcement Act of 2016, H.R. 5757, 114th Cong. (2016).

*I. ARGUMENTS FOR AND AGAINST THE CCB*

A wide range of rightsholder organizations such as the Copyright Alliance,<sup>9</sup> Graphic Artists Guild,<sup>10</sup> Authors Guild,<sup>11</sup> and others supported the passage of the CASE Act, along with several non-copyright organizations such as the ABA<sup>12</sup> and the U.S. Chamber of Commerce.<sup>13</sup> Their support was based in large part on the hope that the copyright small claims court created by the CASE Act would make it easier for creators to bring infringement suits without the expense of going to federal court, which was previously the only forum for litigating copyright claims.<sup>14</sup> One of the arguments was that federal litigation can be notoriously time-consuming and costly, making it difficult for some rightsholders to pursue claims unless there are large amounts at stake.

Lex Machina, a legal analytics firm,<sup>15</sup> reports that the average copyright case in federal district court decided at a summary judgment stage (no trial) takes 543 days.<sup>16</sup> For a case that goes to trial, it takes an average of 832 days.<sup>17</sup> In addition

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<sup>9</sup> See generally *CCB Explained: About the Copyright Claims Board*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/education/copyright-claims-board-explained/> (last visited July 18, 2024) (This entire page is dedicated to help claimants or potential claimants navigate the CCB, including an entire webinar series aimed to help educate creators).

<sup>10</sup> See generally Rebecca Blake, *Copyright Office Solicits Feedback on Copyright Small Claims Board*, GRAPHIC ARTISTS GUILD: COPYRIGHT SMALL CLAIMS UPDATES (May 29, 2022), <https://graphicartistsguild.org/copyright-office-solicits-feedback-on-copyright-small-claims-board/> (“The Guild joined the comments submitted by the Copyright Alliance and the Coalition of Visual Artists” to provide feedback to the CCB on their proposed procedures.)

<sup>11</sup> See generally *Copyright Claims Board Opens for Business, Giving Authors a Viable Way to Sue Infringers*, THE AUTHORS GUILD: INDUSTRY & ADVOCACY NEWS (June 14, 2022), <https://authorsguild.org/news/copyright-claims-board-opens-on-june-16/> (“The culmination of a long effort by the Authors Guild and other creator organizations, the CCB is intended to serve as an affordable and practical alternative to federal litigation for resolving smaller copyright claims.”)

<sup>12</sup> See Judy Perry Martinez, *The Case for the CASE Act*, THE HILL: CONGRESS BLOG (Oct. 21, 2019, 3:30 PM), <https://thehill.com/blogs/congress-blog/judicial/466742-the-case-for-the-case-act/>.

<sup>13</sup> See generally Letter from Neil L. Bradley to the Members of the U.S. Congress (May 2, 2019), reprinted in *U.S. Chamber Letter Supporting S. 1273 and H.R. 2426, “Case Act,”* U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/intellectual-property/us-chamber-letter-supporting-s-1273-and-hr-2426-case-act> (last visited July 19, 2024).

<sup>14</sup> Terrica Carrington & Keith Kupferschmid, *CASE Act Signed into Law: What This Means*, COPYRIGHT ALLIANCE (Jan. 7, 2021), <https://copyrightalliance.org/case-act-signed-into-law/>.

<sup>15</sup> *Lex Machina Releases 2021 Copyright and Trademark Litigation Report*, LEX MACHINA, <https://lexmachina.com/media/press/lex-machina-releases-2021-copyright-and-trademark-litigation-report> (last visited June 21, 2024) (Lex Machina does not report on CCB claims).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

to the time these suits take, federal district court litigation is complex and expensive.<sup>18</sup> These suits are often accompanied by hundreds of legal filings and attorneys' fees. The average federal copyright lawsuit, according to the American Intellectual Property Law Association, costs more than \$275,000.<sup>19</sup> Thus, the Copyright Alliance, one of the most outspoken supporters of the CCB, has argued that "visual artists, authors, and songwriters are hurt the most by the high cost of federal litigation because the individual value of their works or transactions is often too low to warrant the expense of litigation and most attorneys won't even consider taking these small cases. As a result, these infringements regularly go unchallenged, leading many creators to feel disenfranchised by the copyright system. In effect, these creators have rights but no remedies."<sup>20</sup>

Opponents of the CCB, which included public interest copyright organizations such as Public Knowledge, the Electronic Frontier Foundation, and Authors Alliance,<sup>21</sup> on the other hand, worried that it would foster abuse and frivolous litigation.<sup>22</sup> Copyright trolls are already becoming more prevalent,<sup>23</sup> and adding another tool to their toolbox that lowers the costs of bringing suit seemed unwise. Opponents also objected to the specific design of the CCB. First was that although the CCB has been described as providing a remedy for "small claims," it is empowered to award damages of \$15,000 per incident with a limit of \$30,000 in damages per proceeding, which includes statutory damages where no proof of harm is necessary.<sup>24</sup> Those types of damage awards far exceed what almost any other "small claims" court can provide and could represent a major financial hit for many defendants.<sup>25</sup>

Perhaps most concerning to opponents before the enactment of the CASE Act was that while the CCB is described as voluntary (defendants have the option to "opt out," and plaintiffs can refile in federal court if they choose), if defendants ignore or fail to respond to a suit, the CCB could issue a default determination

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<sup>18</sup> See generally Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010).

<sup>19</sup> AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, 2021 REPORT OF THE ECONOMIC SURVEY (2022).

<sup>20</sup> *Fees Associated with Bringing or Defending a Case Before the CCB*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/faqs/fees-bringing-defending-case-ccb> (last visited Aug. 16, 2023) [hereinafter COPYRIGHT ALLIANCE, *Fees Associated*].

<sup>21</sup> Note one of the authors of this paper, David Hansen, is Executive Director of Authors Alliance. Authors Alliance's positions on the CASE Act prior to its passage preceded his tenure as Executive Director and he had no role in formulating them.

<sup>22</sup> See, e.g., Meredith Filak Rose, *The Case Act: Small Claims, Big Risks*, PUBLIC KNOWLEDGE (Nov. 17, 2017), <https://publicknowledge.org/the-case-act-small-claims-big-risks/>.

<sup>23</sup> Matthew Sag, *Copyright Trolling: An Empirical Study*, 100 IOWA L. REV. 1105 (2015).

<sup>24</sup> 17 U.S.C. § 1504(e) (2024).

<sup>25</sup> PUBLIC KNOWLEDGE, *supra* note 22 (noting that the CCB damage awards range is five times higher than most existing small claims courts in the United States).

against them.<sup>26</sup> This and other features prompted concerns that, as enacted, the system could be deeply unfair to unsuspecting defendants—enough so that some experts raised concerns about its constitutionality,<sup>27</sup> which has yet to be challenged in court.

After two years of operation, we wanted to understand how the CCB is doing in relation to these arguments for and against. Is the CCB a bastion for copyright trolls? Have hapless defendants unknowingly fallen subject to costly default determinations? Or has the system made it easier, cheaper or faster for rightsholders to see a resolution to legitimate infringement claims? To try to answer these questions, we looked at publicly available data extracted from the CCB’s electronic case filing system, eCCB.<sup>28</sup> Extracted data and calculations performed using it are available here,<sup>29</sup> and scripts and documentation are available here.<sup>30</sup>

Part III of this paper provides data and some description of CCB operations, with a special focus on aspects of CCB operations that are of most interest for assessing arguments for and against the creation of the CCB, such as the speed and efficiency of the system, the ability of the CCB to effectively resolve disputes, the types of claimants and defendants who participate, and so on. Part IV contains our analysis of this data, looking in particular at what answers we have to the questions identified above. Part V concludes with reflections on the limitations of this study’s limitations and thoughts on what future changes might improve the CCB.

### I. WHAT HAS THE CCB DONE AFTER TWO YEARS OF OPERATIONS?

To understand what the CCB has done over the last two years, it is first helpful to understand the process that people who want to use the CCB to pursue copyright claims have to go through. In short, they must navigate a few stages.<sup>31</sup>

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<sup>26</sup> See, e.g., Katherine Trendacosta, *A Bad Copyright Bill Moves Forward With No Serious Understanding of its Dangers*, EFF: DEEPLINKS BLOG (July 18, 2019), <https://www.eff.org/deeplinks/2019/07/bad-copyright-bill-moves-forward-no-serious-understanding-its-dangers>.; The CCB is empowered to enter a “default determination” that includes monetary awards against a respondent that does not appear. 15 U.S.C. § 1506(u). However, the CCB does not have enforcement authority and so for a claimant to enforce a CCB final determination against an uncooperative respondent, the claimant would need to pursue an order through a federal district court. See 15 U.S.C. § 1508 (2023).

<sup>27</sup> Pamela Samuelson & Katherine Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689 (2018).

<sup>28</sup> *About eCCB*, COPYRIGHT CLAIMS BOARD, <https://dockets.ccb.gov> (last visited Aug. 16, 2023).

<sup>29</sup> Kate Fortney, *Aggregate Data about Claims Filed with the Copyright Claims Board* (July 12, 2024), <https://bibliobaloney.github.io> (This is a data collection site generated by a set of Python Scripts which are run once a week to collect newly available documents from eCCB and analyze the resulting data).

<sup>30</sup> *Id.*

<sup>31</sup> *Claimant Information*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/claimant/> (last visited July 18, 2024).

- They file a claim online at the CCB’s portal, which includes creating an account;<sup>32</sup>
- their claim must be compliant;<sup>33</sup>
- it must be served on the respondent;<sup>34</sup> and
- the respondent must let the sixty-day opt-out window elapse without opting out of CCB proceedings.<sup>35</sup>

Once the opt-out window has passed, the proceeding becomes “active” and a scheduling order is issued.<sup>36</sup> Then the parties can engage in limited discovery,<sup>37</sup> have hearings and conferences,<sup>38</sup> and eventually receive a final determination where the CCB may award damages.<sup>39</sup>

With that process in mind, the rest of this section presents descriptive data about the claims filed with the CCB from June 16, 2022 to June 15, 2024 (inclusive). Figures reported below are derived from the data reported at <https://bibliobaloney.github.io/>.

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<sup>32</sup> *eCCB*, in COPYRIGHT CLAIMS BOARD A 1 (2024) [hereinafter COPYRIGHT CLAIMS BOARD HANDBOOK] (“eCCB is an electronic filing and case management system for the Copyright Claims Board. Parties and their representatives... must use eCCB in [their] CCB proceeding... absent exceptional circumstances.”).

<sup>33</sup> *Compliance Review*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32 (“When a claim or counterclaim is filed, the Copyright Claims Board (CCB) reviews it to make sure that it provides enough information to enable the respondent or counterclaim respondent to answer it, and it complies with the Copyright Act and the CCB’s regulations.”).

<sup>34</sup> *Service of the Claim*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32 (“The CCB itself cannot serve a respondent. It is the claimant’s responsibility to find someone (other than the claimant) to deliver the necessary documents.”).

<sup>35</sup> *Opting Out*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32 (discussing the “opting out” right that a respondent can invoke sixty days after they are served).

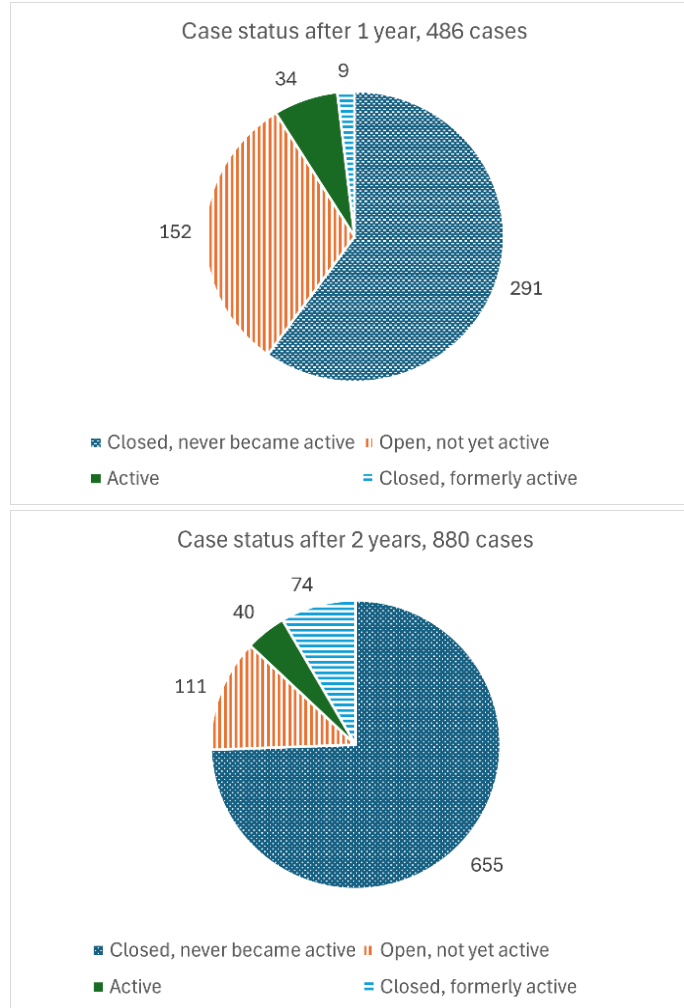
<sup>36</sup> *See The Active Phase*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32 (outlining a brief overview of what parties can expect during the active phase).

<sup>37</sup> *See generally Discovery*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32.

<sup>38</sup> *See generally Hearings*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32.

<sup>39</sup> *Damages*, in COPYRIGHT CLAIMS BOARD HANDBOOK, *supra* note 32 (describing the limits and issues parties may want to raise when the court is determining how much to award as damages).

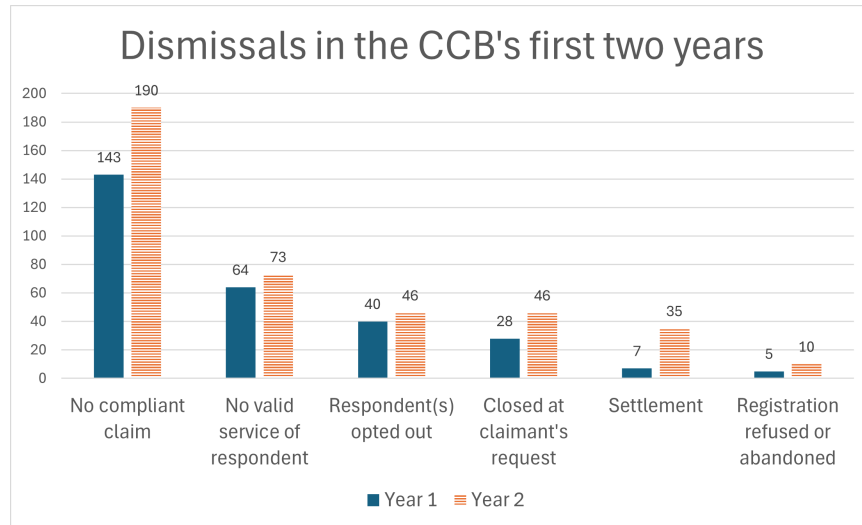
Figure 1 - CCB Case Status After One Year and Two Years of Operations



In the first two years of the CCB, 880 claims were filed. Only 114 of these 880 claims - about 13% - had been issued scheduling orders and made it to the active phase by June 15, 2024. Meanwhile, 729 cases had been closed, most of them dismissed without prejudice. Dismissed without prejudice means that the merits weren't reached, and the claimant could choose to file a new claim about the same facts. The remaining claims were either awaiting review by the CCB or waiting for action from the claimant, such as filing an amended claim or filing proof of service.



Figure 2 – Dismissals in the CCB's First Two Years



**What's happening with all these closed cases?** Most of them were dismissed because the claimant failed to file a compliant claim, which means they did not comply with some of the procedural or substantive requirements laid out in CCB regulations or in the CASE Act itself. When this happens, the CCB issues an order to amend, a helpful document explaining to the claimant what the problems are with their claim and how to fix them.

Claimants have two chances to try to fix their mistakes in an amended claim (that makes three chances total, counting the initial claim). Still, many don't: in the first two years, fewer than 50 claims were dismissed because their claim was still non-compliant after the third try, but 286 were dismissed for failure to file an amended claim after an order to amend.

**Why can't claimants file a compliant claim, even when given additional chances?** Sometimes, the claimant needs to provide more information to demonstrate the basic elements of copyright infringement. For example, the claimant may not have included facts that would indicate that the respondent had access to the claimant's work to copy it, or they may not have included supporting files to show that the claimant's work and the respondent's were substantially similar. Of the 323 orders to amend the CCB issued in the first year, failure to state facts sufficient to support access and substantial similarity were common problems, showing up about 110 times each (sometimes in the same order to amend). In year two, the CCB issued 385 orders to amend, and the top two reasons were again failure to state sufficient facts to support access and substantial similarity. Copyright parlance like "substantial similarity" isn't necessarily familiar to the average self-represented copyright owner, so the CCB's orders to amend provide helpful guidance about the elements of a copyright infringement claim, how a particular claim falls short, and what kind of additional information

a claimant could provide in an amended complaint in order to remedy deficiencies.

**Many claims have problems that can't be fixed.** At least 64 orders to amend pointed out that claimants were trying to pursue cases against foreign respondents over whom the CCB has no jurisdiction.<sup>40</sup> Over 175 orders cited copyright registration problems. When a claimant files an infringement claim but hasn't submitted an application for registration through the Copyright Office for a work allegedly infringed, the claimant has to abandon the current claim then decide if they want to pursue copyright registration and file a new claim.<sup>41</sup>

**Service is also a problem.** Once a claim is certified as compliant, the claimant needs to properly serve the respondent with the claim and other documents about the proceeding.<sup>42</sup> This step is crucial, but also not one most people are familiar with, and 137 claims were dismissed in the first two years because claimants didn't file documentation showing that they'd accomplished valid proof of service. Other procedural problems were the cause of smaller numbers of dismissals, like the eight dismissed for failure to provide the respondent's address or the ten dismissed because payment for filing the claim failed.

**Some proponents of a copyright small claims tribunal complained about the CCB's opt-out provision,** claiming that it would render the CCB ineffective. In the first two years, only 86 claims were dismissed because respondents opted out, representing about 12% of the 687 cases dismissed. This number is smaller than the number dismissed because of the claimant's failure to serve and dwarfed by the 300-plus dismissed for the claimant's failure to file a valid claim. It's also

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<sup>40</sup> Melissa C. Shannon, *Need-to-Knows of the New Copyright Claims Board for Small-Value Copyright Claims*, FISH & RICHARDSON BLOG (Feb. 10, 2023), <https://www.fr.com/insights/thought-leadership/blogs/need-to-knows-of-the-new-copyright-claims-board-for-small-value-copyright-claims/> (“[T]he CCB cannot hear claims against foreign respondents or government or state entities. The CCB limits the type of respondents that can be sued by requiring each respondent's U.S. address to file the claim.”).

<sup>41</sup> *See generally About the CCB*, COPYRIGHT CLAIMS BOARD: FREQUENTLY ASKED QUESTIONS, <https://ccb.gov/faq/#:~:text=To%20bring%20a%20claim%20with,simultaneously%20with%20filing%20the%20claim> (last visited July 25, 2023) (A claimant does not need to register their work before bringing a claim, but they must at least be in the process of doing so. According to the CCB, a claimant must either “(1) have a registration from the Copyright Office for the work(s) at issue or (2) have submitted an application to register the work(s) either before or simultaneously with filing the claim.” Additionally, claimants with an active claim may seek expedited review of the application by requesting a “small claims expedited registration” through the eCCB portal. If the application is denied, the CCB will dismiss the claim without prejudice, allowing the claimant to refile their claim once they are able to secure a proper registration for their work.).

<sup>42</sup> *Service of the Claim*, *supra* note 34.

smaller than the number of cases dismissed either at the claimant's request or as the result of a joint request following a settlement, at 116.

**Many cases end up in the “default pipeline,”** which supports concerns from CCB opponents that the CCB may be a trap for unwary defendants. Some respondents don't opt out, but they also don't do anything else. The CCB files an order for them to register for the eCCB, the CCB's online case management system, then, as necessary:

- a second notice to register,
- a first default notice,
- a second default notice,
- an order for the claimant to enter their direct statement and evidence,
- a proposed default determination, and
- a default determination.

Let's call this the default pipeline. At the end of the first year of CCB operation, there were as many open cases in the default pipeline (16) as there were open cases with respondents who had filed something in eCCB (15). Twelve cases that had been issued scheduling orders were later withdrawn or dismissed; in five of those, this was without the respondent ever having filed anything in eCCB.

By the end of the second year of operations, the numbers were not improving much: thirteen (13) of the thirty-nine (39) active cases fell within the default pipeline. Were these respondents not effectively served? Do they not believe the CCB is a real tribunal? Do they not understand how to engage with the system? We don't know, but the lack of participation is troubling from a due process perspective.

Settlement is another potential path to resolution for claimants. Of course, parties are free to reach an agreement about a copyright dispute with or without the CCB, but settlement facilitation is one optional phase of CCB proceedings.<sup>43</sup> Data about settlements as an endpoint for CCB claims is limited. 74 claims were dismissed at the request of claimants in the first two years, and the claimant doesn't have to say whether there was a settlement involved or not. If the parties jointly agree, a claim can be dismissed *with* prejudice following a settlement, which happened 42 times. The parties don't have to disclose the terms of their settlement, but in some cases, they do, and ask to have them incorporated into a final determination if the case has reached the active phase before settlement:

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<sup>43</sup> *CCB Proceedings Phases*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/proceedings> (last visited July 8, 2024). There is a mandatory pre-discovery conference that covers a wide range of things, and one of them is the potential for a settlement conference. The post-discovery conference covers this as well, but a settlement conference is not mandatory. See *The Active Phase*, *supra* note 36 at 3; 37 CFR § 222.18.

- In *Flores v. Mitrakos*,<sup>44</sup> the respondent agreed to change their behavior, but the claimant did not seek, and was not awarded, damages.
- In *Armatus Dealer Uplift, LLC v. Wooden Automotive Consultants LLC*,<sup>45</sup> the respondent agreed to pay \$9000.
- In *Pinwheel Crafts LLC v. Pettit*,<sup>46</sup> the respondent agreed to remove infringing items from Amazon.com and product images from other online retailers. The claimant sought the maximum award available, but no damages were agreed upon in the settlement document.
- *Paramount Pictures Corporation v. JMC POP UPS LLC*,<sup>47</sup> a suit over JMC’s “Coming to America” themed pop-up restaurant. JMC denied all claims of infringement but agreed in the settlement agreement to cease the use of creative elements of “Coming to America” in the future. In its complaint, Paramount sought the full scope of damages available to it, but the part of the confidential settlement agreement that was provided to the Board for inclusion in the final determination included no agreement about payment of damages.
- *Kenna Sato Designs, LLC v. Lisitsa*,<sup>48</sup> a suit against an Etsy reseller who purchased and resold unauthorized stickers from a Chinese manufacturer. The Etsy seller admitted infringement and agreed to pay \$300.

Additionally, in *Ora v. Warner Chappell Music*,<sup>49</sup> the case didn’t exactly settle. Ora tried to withdraw the case, normally resulting in it being dismissed without prejudice. Warner Chappell objected to the notion that Ora could bring his claims again, given that Warner Chappell had already invested months in the CCB process, and they considered the claims to lack “a reasonable basis in law or

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<sup>44</sup> Final Determination, *Flores v. Mitrakos*, No. 22-CCB-0035 (CCB, Feb. 15, 2023).

<sup>45</sup> Final Determination, *Armatus Dealer Uplift, LLC v. Wooden Automotive Consultants LLC*, No. 22-CCB-0269 1 (CCB, July 5, 2023).

<sup>46</sup> Final Determination, *Pinwheel Crafts LLC v. Pettit*, No. 22-CCB-0251 1 (CCB, Oct. 19, 2022).

<sup>47</sup> Final Determination, *Paramount Pictures Corporation v. JMC Pop Ups LLC*, No. 22-CCB-0112 1 (CCB, Oct. 23, 2023).

<sup>48</sup> Final Determination, *Kenna Sato Designs, LLC v. Lisitsa*, No. 23-CCB-0172 1 (CCB, Nov. 14, 2023).

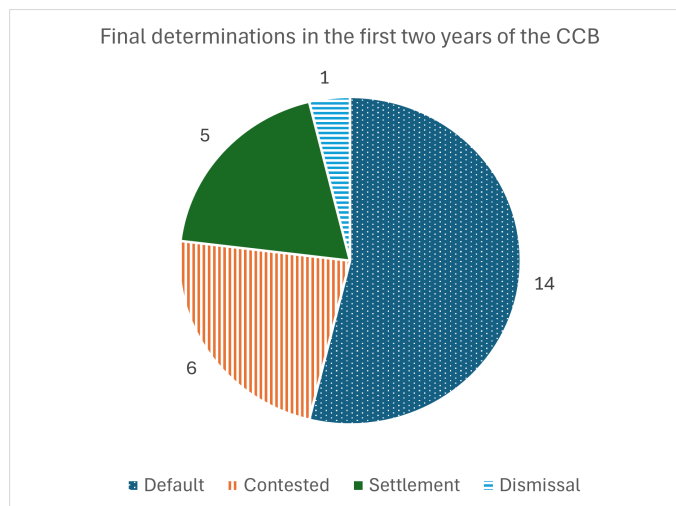
<sup>49</sup> Final Determination, *Scott Douglas Ora, individually, and in his derivative capacity as trustee of the Leo Robin Trust, on behalf of the Leo Robin Trust v. Warner Chappell Music*, No. 22-CCB-0072 1 (CCB, June 27, 2023).

fact.”<sup>50</sup> Both parties subsequently agreed to a dismissal with prejudice. Presumably, no damages were awarded to the claimant.

**Final Determinations.** After the first two years of operations, the CCB has issued twenty final determinations that were not the result of a settlement, six of which were final determinations in cases where both claimant and respondent participated. One of those six is currently pending a review by the Register of Copyrights—the first such test of the CCB’s internal appeal process.<sup>51</sup>

The other fourteen were final determinations in cases where the respondent was in default. Additionally, the CCB formally approved a settlement in five cases (out of the 50 total cases in which parties settled—the remaining 45 without the formal blessing of the CCB) and dismissal with prejudice in one more case—the *Ora* case mentioned above.<sup>52</sup>

Figure 3 – Final Determinations in the First Two Years of the CCB



Across the six final determinations in contested cases, three were decided in favor of the complainant, and three in favor of the respondent.<sup>53</sup> Across these final

<sup>50</sup> Response for Respondent, *id.* at 2.

<sup>51</sup> See Final Determination, *Morly Investments Pty Ltd (imprint: The High Street Publishing Company) v. The Walt Disney Company*, No. 22-CCB-0015 1 (CCB, July 15, 2024).

<sup>52</sup> Final Determination, *Ora*, No. 22-CCB-0072 at 1.

<sup>53</sup> Compare Final Determination, *Shocked v. McInnes*, No. 22-CCB-0263 1, 5-6 (CCB, Feb. 8, 2024) (finding that the Respondent did not satisfy his burden for his affirmative defense of fair use), and Final Determination, *Corjulo v. Mandrell*, No. 22-CCB-0008 1, 6 (CCB, Dec. 14, 2023) (finding that the Respondent did not satisfy his burden for his affirmative defense of fair use and had no other viable defenses for this claim), and Final

determinations, the CCB issued written decisions averaging about nine pages in length explaining its reasoning, including robust discussions of relevant legal concepts such as contributory liability and copyright defenses such as fair use, first sale, and unclean hands. In the four cases where fair use was raised as a defense, the CCB concluded that three of the cases favored the claimant, and one favored the respondent. For the three contested cases where the CCB decided in favor of claimants, the CCB awarded a total of \$4,000 in damages.<sup>54</sup>

For the fourteen final determinations in cases of default, the CCB conducted reasonably detailed analyses of each case, indicating an unwillingness on the part of the CCB to just rubber stamp claims. This is good news for absent respondents, though the analysis was mostly focused on whether the evidence showed adequate substantial similarity and whether the claim showed evidence for damages. The CCB did not, on its own initiative, consider other potential defenses. And, in at least three cases, the CCB dismissed claims against one or more respondents—even with no defense presented—because the claimant failed to produce evidence that the particular respondent was the party at fault. In no default cases, however, did the CCB independently raise any potential defenses, such as fair use.

Default respondents were largely held liable for damages, however. Across all fourteen default cases with final determinations, the CCB awarded a total of \$54,150 in damages, which averages to \$3,868.<sup>55</sup> Generally, when the CCB finds

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Determination, *Oppenheimer v. Prutton*, No. 22-CCB-0045 1, 10 (CCB, Feb. 28, 2023) (finding that the Respondent did not satisfy his burden for his two affirmative defenses of fair use and unclean hands), *with* Final Determination, *Shocked v. Billington*, No. 22-CCB-0058 1, 7 (CCB, Apr. 3, 2024) (dismissing the original claim with prejudice due to the claim being meritless and the claimant found to be in bad faith), *and* Final Determination, *Comedy Spotlight Productions, Inc. v. Store on Sunset LLC, et al.*, No. 23-CCB-0035 1, 6-7 (CCB, Mar. 8, 2024) (dismissing the claim with prejudice due to the affirmative fair use defense), *and* Final Determination, *Morly Investments*, No. 22-CCB-0015 at 9 (dismissing the claim with prejudice due to insufficient evidence that would give rise to direct, contributory, or vicarious liability).

<sup>54</sup> Final Determination, *Shocked*, No. 22-CCB-0263 at 10 (awarding Claimant \$750 in statutory damages); Final Determination, *Corjulo*, No. 22-CCB-0008 at 10 (awarding Claimant \$2,250 in statutory damages); Final Determination, *Oppenheimer*, No. 22-CCB-0045 at 10 (awarding Claimant \$1,000 in statutory damages).

<sup>55</sup> Final Determination, *Say It Visually, Inc. v. America's Real Estate Brokers, Inc.*, 23-CCB-0134 1, 12 (CCB, May 28, 2024) (awarding Claimant \$8,400 in statutory damages); Final Determination, *Say It Visually, Inc. v. America's Real Estate Force Corporation*, No. 22-CCB-0245 1, 12 (CCB, May 28, 2024) (awarding Claimant \$10,200 in statutory damages); Final Determination, *Schirmacher v. Allora*, No. 22-CCB-0183 1, 9 (CCB, Feb. 16, 2024) (awarding Claimant \$7,000 in statutory damages); Final Determination, *Hirsch v. Southern Chinese Daily News, LLC*, No. 22-CCB-0255 1, 9 (CCB, Feb. 14, 2024) (awarding Claimant \$3,600 in statutory damages); Final Determination, *Oakes v. Heart of Gold Pageant System Inc., et al.*, No. 22-CCB-0046 1, 15-6 (CCB, Jan. 24, 2024) (awarding Claimant \$4,500 in damages, of which \$2,250 is awarded jointly and severally against both Respondents and the remaining \$2,250 solely to Repondent Heart of Gold); Final Determination, *Bronner v. EssayZoo*, No. 22-CCB-0012 1, 10 (CCB, Nov. 20, 2023)

in a claimant's favor, and a claimant provides evidence sufficient to persuade the Board that the actual damages were of a given amount, the CCB awards three times that amount.

**Trolls. The CCB system is being used by aggressive and prolific copyright litigants,** but we haven't seen the volume of copyright-troll litigation from them as we've seen in the past in federal district courts. In other words, while known copyright trolls are using the CCB, at least so far, we don't see evidence of rampant abuse or trolling within the CCB itself. This may be in part because the CASE Act took these concerns seriously by allowing the Copyright Office to create rules to discourage it, such as limiting the number of claims a plaintiff can file within one year.<sup>56</sup> The number of repeat filers was low – only sixteen filers had five or more claims.<sup>57</sup> The first two years' filings include, however, 21 claims filed by Higbee and Associates (sometimes referred to as a "troll" though the label may not exactly fit),<sup>58</sup> and 20 by David C. Deal (another known and aggressive serial copyright litigant).<sup>59</sup> The very first case in which the CCB issued a final determination on the merits was in favor of David Oppenheimer, who has separately filed more than 170 copyright suits in federal courts (though he has only filed one claim before the CCB).<sup>60</sup>

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(awarding Claimant \$1,200 in statutory damages); Final Determination, Dermansky v. Rule 62, Inc., No. 22-CCB-0005 1, 12 (CCB, Nov. 1, 2023) (awarding Claimant \$1,350 in statutory damages); Final Determination, Urbanlip.com Ltd. v. Faviana International Inc., No. 22-CCB-0137 1, 9 (CCB, Nov. 1, 2023) (awarding Claimant \$2,600 in statutory damages); Final Determination, Joe Hand Promotions, Inc. v. The Village Restaurants LLC d/b/a Indian Village Restaurant & Lounge, et al., No. 22-CCB-0100 1, 14 (CCB, Oct. 4, 2023) (awarding Claimant \$3,300 in statutory damages); Final Determination, Joe Hand Promotions, Inc. v. Arif Skyline Cafe LLC, et al., No. 22-CCB-0098 1, 13 (CCB, Sept. 22, 2023) (awarding Claimant \$3,000 in statutory damages); Final Determination, Hursey v. Hakimian Global LLC, No. 22-CCB-0219 1, 9 (CCB, Sept. 22, 2023) (awarding Claimant \$3,000 in statutory damages); Final Determination, Hursey v. QUINNEY, No. 22-CCB-0163 1, 9 (CCB, Aug. 31, 2023) (awarding Claimant \$3,000 in statutory damages); Final Determination, Hursey v. Lavaca LLC, No. 22-CCB-0056 1, 9 (CCB, Aug. 24, 2023) (awarding Claimant \$3,000 in statutory damages).

<sup>56</sup> 17 U.S.C. § 1504(g) ("The Register of Copyrights may establish regulations relating to the permitted number of proceedings each year by the same claimant under this chapter, in the interests of justice and the administration of the Copyright Claims Board.")

<sup>57</sup> Fortney, *supra* note 29 (Under the section titled "Claimants," a list of claimants appearing on 3 or more claims is available).

<sup>58</sup> Matthew Sag, *So, you got a copyright infringement demand letter from Higbee & Associates?*, MATTHEW SAG BLOG (Aug. 20, 2019), <https://matthewsag.com/so-you-got-a-copyright-infringement-demand-letter-from-higbee-associates/>.

<sup>59</sup> Allison Dunn, *Thanks to Trolls, Photo Copyright Lawsuits and Lawyers Face Reputational Hurdles*, LAW.COM (Mar. 24, 2023), <https://www.law.com/2023/03/24/thanks-to-trolls-photo-copyright-lawsuits-and-lawyers-face-reputational-hurdles/>.

<sup>60</sup> Jeffrey Bilman, *Is This Asheville Photographer a Wronged Artist or a 'Copyright Troll'?*, THE ASSEMBLY (July 17, 2023), <https://www.theassemblync.com/politics/photography-copyright-infringement-lawsuit/>.

*Table 1 – Claimants Who Brought Five or More Claims Through the CCB*

Claimants	Cases
Joe Hand Promotions, Inc.	48
Michelle Shocked	15
Games Workshop Limited	12
Amy Do	10
Keith F. Bell	10
Julie Dermansky	9
David Bibiyan	9
World Media Alliance Label Inc	9
Langston M Childs	8
Dana Hursey	8
Jean M Guerrero	8
Pinwheel Crafts LLC	6
Floatsup, LLC	5
William Grecia	5
Helen Walters	5

*Table 2 - Representatives Who Brought Five or More Claims Through the CCB<sup>61</sup>*

Law Firm	Cases
Jekielek & Janis	48
The Law Office of David C. Deal, P.L.C.	20
The Law Firm of Higbee and Associates	21

<sup>61</sup> Note that some firms file with name variants, such as “The Law Firm of Higbee and Associates” versus “Higbee & Associates.”



<b>Law Firm</b>	<b>Cases</b>
H. Roske & Associates LLP	12
Leichtman Law PLLC	10
Doniger / Burroughs	6
Burns the Attorney, Inc.	6
The Brickell IP Group, PLLC	5

The biggest repeat claimant is Joe Hand Promotions, who—represented by Jekielek & Janis—filed forty-eight claims in the CCB’s first two years. The CCB seems to be working for them: by the time of this writing, Joe Hand had obtained \$6,300 in damages awards, and 11 cases have been dismissed with prejudice following a settlement. Joe Hand has also been a prolific filer in federal court, with 433 cases filed in federal district courts in the same time period as the first two years of operations of the CCB.<sup>62</sup>

Whether the CCB is a winning strategy for claimants like Joe Hand remains to be seen. Joe Hand seems to persist—of its total 48 claims: 29 were filed in the first year of the CCB and another 19 in the second year. Of those 48 total, 11 were dismissed without prejudice, and 22 were dismissed with prejudice. As of the two-year anniversary, eight were waiting for the expiration of the opt-out window, three were waiting for proof of service to be filed, and one was awaiting initial review. Of the dismissed cases, there were a few where Joe Hand didn’t properly serve the respondent, or the respondent opted out, but most were either a settlement or were dismissed at the request of the claimant (which indicates but doesn’t confirm some type of out of court settlement).

We don’t yet know how the CCB influences behavior outside of the formal process. As mentioned above, there have been 42 cases so far in which the parties reached a settlement and either jointly requested dismissal with prejudice or asked the Board to include the terms of that settlement in a final determination. Parties can also settle and request a dismissal *without* prejudice, which has happened five times.<sup>63</sup> We have also seen 74 cases closed at the claimant’s request. In four of these occasions, a claimant has mentioned a settlement in their request to have their claim dismissed. We don’t know for sure but suspect that more of the dismissals at claimants’ request are the result of some sort of agreement between claimant and respondent. However, because so many of the claims filed have either incurable problems or would need a lot of revision to become compliant,

<sup>62</sup> LEX MACHINA, *supra* note 15

<sup>63</sup> *E.g.* Notice of Settlement and Joint Request for Dismissal at 1, *Nina Designs Ltd. v. Skemp*, No. 23-CCB-0348 (Jan. 25, 2024).

it's also possible that some claimants are requesting dismissal rather than investing more time in pursuing a claim that they have learned may be weak. Encouraging settlement without using judicial resources is typically viewed as a positive, but so far, the CCB-to-settlement pathway is actually far lower than what we see in federal district courts (about 82% of copyright cases brought before a federal district court settle, based on Lex Machina reports).<sup>64</sup>

Large-scale copyright shakedowns—basically, demand letters with a threat of legal action if potential defendants don't pay a large financial fee upfront—have been a hallmark of troll operations in the past.<sup>65</sup> For savvy recipients of those letters, they've realized that litigation is costly for plaintiffs and that most troll operations have no real interest in actually filing suit. Now that the CCB has minimized at least some of the financial barriers to filing suit, it remains to be seen how potential defendants are responding. It's probably impossible to tell just by looking at CCB filing data, but other research might reveal what's going on.

## II. LESSONS LEARNED

Though it is still very early in the CCB's operations, we can see some emerging trends that are worth watching:

**Defaults may be a real concern**, though we do see evidence of the CCB itself mitigating the effect of nonresponsive respondents by addressing concerns with initial filings—rejecting or partially rejecting claims in at least three cases that reached a final determination on default. But still, more than half of the final determinations issued by the Office were in cases of default, and in all but one of those cases, at least one respondent was held liable for damages. Though it has only happened once so far, the CCB has also not indicated it will take a lenient approach to respondents who choose to participate in the process too late or who do not opt out in the correct way—the one instance in which the defendant later filed with the CCB asking the CCB to reconsider its decision, it declined.<sup>66</sup>

**It's also too early to tell if the damage awards from the CCB will be high or low.** Opponents feared that the \$30,000 damage cap per case would be too high, inviting claimants to file frivolous cases that could be financially ruinous for unsuspecting defendants. So far, the CCB has awarded damage awards ranging from a maximum of \$10,200 to a low of \$750 (it also approved of two settlements

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<sup>64</sup> LEX MACHINA, *supra* note 15 at 23 (Copyright cases “settle 82% of the time, one of the largest proportions of settlements in any Lex Machina practice area.”).

<sup>65</sup> Lindsey M. Mead & Mikhail Murshak, *Under the Bridge - The Rise of Copyright Trolls in the Intellectual Property Space*, BIZTECH LAW BLOG (Feb. 5, 2024), <https://www.michiganitlaw.com/rise-of-copyright-trolls-in-intellectual-property> (“The ask in a demand letter can often exceed \$10,000 - even \$30,000, depending on the circumstances.”).

<sup>66</sup> Dave Hansen, *A Copyright Small Claims Update: Defaults and Failure to Opt Out*, AUTHORS ALLIANCE (Feb. 1, 2024), <https://authorsalliance.substack.com/p/a-copyright-small-claims-update-defaults>.

with damage awards of \$9,000 and \$300). But, this is only across a few dozen cases, and we are unsure what future cases will hold. It's hard to say what claimants are expecting based on the data we have (demands are made in a free text field). However, we can say that in the first two years, there were a fair number of claims (378 of 880), where claimants opted for a lower damages range (less than \$5000) in exchange for a more streamlined process.

**The CCB (or maybe just copyright in general) is hard for unrepresented claimants to navigate.** The CCB's online doors have been open for anyone in the world who can meet the requirements to file a valid claim since June of 2022. The CCB employs six full-time attorneys (three as CCB Officers and three as copyright claims attorneys) and has a website full of guidance, including a comprehensive handbook and its own electronic filing and case management system. And yet, the vast majority of CCB claims in the first two years have been dismissed because claimants without attorneys have a hard time filing a valid claim and figuring out the service of process. Data has improved on respondents participating—in the first year, roughly half of respondents in active cases did not participate at all, but at the two-year mark, about two-thirds are participating through written filings. That's a pretty good improvement, but it's still concerning that so many respondents fail to participate at all. As a point of reference, for copyright cases in federal district court, Lex Machina indicates that only about 7% of copyright cases end in default judgments (which indicates little or no participation from defendants).<sup>67</sup>

Of the claims that the CCB had reviewed in the first year, 90% of claims from represented claimants had been certified as compliant; for claims from self-represented claimants, only 46% were compliant. In the first two years, unrepresented claimants accounted for over 75% of claims filed, but only 22% of those that made it to the active phase. Copyright is a specialized area. Even lawyers, when they aren't copyright specialists, can find it confusing. So, we don't think it should be surprising that the CCB's goal of being "accessible to anyone, with or without an attorney"<sup>68</sup> is a difficult one.

We also don't think this is due to the CCBs lack of effort from the CCB. A quick read of non-compliant cases that have been kicked out of the system shows an almost extraordinary effort by the CCB to explain to complainants how they can address legal and procedural deficiencies.

**The CCB Process is slow.** One of the chief goals of the CCB is to be streamlined and efficient. Discovery is limited, and hearings are held online.<sup>69</sup>

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<sup>67</sup> Using Lex Machina data for copyright cases filed in the ten years between June 1, 2014 and June 1, 2024, which shows 53,574 copyright cases filed and 3,536 resolved through default judgments.

<sup>68</sup> COPYRIGHT CLAIMS BOARD, *supra* note 2.

<sup>69</sup> *See generally Discovery, supra* note 37; *See also Hearings, supra* note 38 ("Toward the end of the proceeding, the CBB may decide to hold a virtual hearing with the parties to discuss the merits of the case.").

However, after one year, the CCB had only issued one final determination on the merits, *Oppenheimer v. Prutton*,<sup>70</sup> and that was in a case that skipped over initial CCB procedural steps by being transferred from a district court.

After two years, the CCB's pace had not improved: it had issued final determinations in twenty cases (twenty-six if you count approved settlements), with the average length from filing to resolution of 413 days, still longer than a year. For the five contested cases that both started and ended at the CCB, the median time to resolution was 546 days, and the average time was 530 days. Default cases fared better, but not much—though the respondents did not participate, these cases still took an average of 440 days to resolve, with a median of 423 days. Compared to Federal District Court, this is not a favorable result; Lex Machina indicates that for the 3,526 default judgments in copyright cases filed over the last ten years, the median time to resolution was 239 days.

Maybe that's the best hope for a CCB claimant attracted by the CCB's promise of efficiency: that the respondent doesn't show up, and after twelve-fourteen months of filing paperwork with the CCB, they get a default determination. Compared to an average of about eighteen months in federal district court to get a decision on summary judgment, the CCB so far does not seem to be much faster. We also do not know whether these default determinations result in actual dollars paid to claimants. Though the CCB is empowered to issue default determinations with damage awards, it does not have the authority to issue the kinds of enforcement mechanisms that federal courts do, such as garnishment, writ of execution, or judgment lien.<sup>71</sup> Unless a default respondent agrees to pay the damage award against it, claimants would be forced to initiate another judicial proceeding in another court to actually enforce their damage award.<sup>72</sup>

That said, we won't really know what kind of a time commitment a claimant should expect until we have *several* cases that start out with a claim filed with the CCB, continue to an active phase where the respondent engages in the process, and result in a final determination on the merits. After two years, we only have five such cases.

**The CCB is cheap for claimants but an expensive system, given early results.** Looking at efficiency from another angle, we can conclude that across the 880 claims filed, the Office collected at least \$35,200 in initial filing fees (\$40 initial filing fee) and \$6,840 from the additional \$60 fee the CCB charges after a scheduling order is issued (114 cases have had scheduling orders after the first two years).<sup>73</sup> This is a fraction of what these claimants would have paid if they pursued their claims in federal court, which typically has filing fees of several

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<sup>70</sup> *Oppenheimer*, No. 22-CCB-0045 at 10.

<sup>71</sup> 28 U.S.C. §§ 3201-3206 (2024).

<sup>72</sup> 17 U.S.C. § 1508(a) (2024) (outlining the process for applying to a federal district court to confirm and enforce relief awarded by the CCB by reducing the award to judgment).

<sup>73</sup> For an in-depth discussion on the fees associated with filing a claim, see COPYRIGHT ALLIANCE, *Fees Associated*, *supra* note 20.

hundred dollars, not to mention many other court costs associated with litigation.<sup>74</sup> So, the system is surely cheaper for claimants and seems to achieve its objective of lowering financial barriers that are otherwise high with traditional federal litigation.

However, the costs of operating the CCB far exceed the fees it collects and the damages it has awarded to claimants. The Copyright Office, in its budget request for 2021, requested \$2.2 million in ongoing yearly costs for the CCB (plus \$1 million in start-up costs).<sup>75</sup> Ignoring annual mandatory salary increases that would be reflected in future years, that amounts to about \$5,000 for each of the 880 claims filed in the first two years. That figure doesn't seem *so* bad, but it looks much worse when judged in terms of results: that same \$4.4 million in operations costs over two years has resulted in only \$4,000 total awarded to claimants through a final determination on the merits by the CCB, with an additional \$54,150 awarded in cases of default. For a system that was touted as "a venue where small creators can actually enforce their intellectual property rights and finally bear the fruit of their work,"<sup>76</sup> the CCB has borne little fruit in terms of actual dollars to creators. As we've noted, the shadow of the CCB may be influencing other enforcement actions, such as out-of-court settlements, and it could be influencing copyright usage norms more broadly. But whether that's true is, at this point, just speculation without a much larger study of awareness of and response to the CCB among both rightsholders and users of copyrighted works. It seems that unless the CCB rapidly begins to resolve more suits, its operating costs are destined to far exceed the damages it is expected to award for at least a while to come.

### CONCLUSION

Our data looks at just the first two years of operations of the CCB, so we acknowledge it may be premature to fully judge the success of the CCB based on the limited data available. And, presumably, the CCB is still working out the kinks in a new system. We do see some concerning signs that copyright troll-like actors are leveraging the system, but the numbers are still small compared to what has been seen in federal district courts in the past.

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<sup>74</sup> See COPYRIGHT SMALL CLAIMS, *supra* note 7, at 8 (citing AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, REPORT OF THE ECONOMIC SURVEY 2011, at 35 (2011)) (The median cost for copyright claims of relatively low economic value, less than \$1 million, is an estimated \$350,000).

<sup>75</sup> *Senate Budget: Testimony Before the Subcomm. on the Legis. Branch of the S. Comm. on Appropriations*, 117th Cong. 1-10 (2021) (Statement of Shira Perlmutter, Register of Copyrights and Director, U.S. Copyright Office).

<sup>76</sup> Tillis Introduces Bipartisan Legislation to Protect Middle-Class Creators From Copyright Infringement, THOM TILLIS: PRESS RELEASES (May 2, 2019), <https://www.tillis.senate.gov/2019/5/tillis-introduces-bipartisan-legislation-to-protect-middle-class-creators-from-copyright-infringement>.

The biggest challenge so far has been getting complainants to file compliant claims, and it seems to us that this may be a difficult area for the CCB to improve on. The CCB has already gone to great lengths to explain the process and to help complainants correct errors early in the process, and many of these errors are due to failure to comply with basic requirements that cannot be changed unless the CCB is willing to sacrifice basic procedural safeguards for respondents (something we think it should not do). The one area the Copyright Office and the CCB may be able to do some work to save more non-compliant claims is by making it easier for claimants to simultaneously file for copyright registration when filing (175 orders to amend cited registration issues as a reason a claim was non-compliant). This would not, however, rescue the many other claims that were deemed non-compliant for a variety of other less procedural problems. Despite the hope of advocates and legislators and the admirable efforts of those working at the CCB, the early results from the CCB lead us to think that it may just be that complex copyright disputes are ill-suited for a self-service small claims tribunal.

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**COPYRIGHT BOUNDARIES, OR MAKING QUILTS IN THE SHADOW  
OF THE COPYRIGHT CLAIMS BOARD**

by ELIZABETH TOWNSEND GARD\*

*How do we understand copyright from a maker or artist's perspective? Do we think about copyright as we create, or after the fact? What role does the new opportunity for small claims at the Copyright Claims Board impact on the choices we make as creators? This piece looks at the act of creating through quilt and fiber arts, and then turns to what we know so far about the Copyright Claims*

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\*John E. Koerner Endowed Professor of Law, Tulane University Law School. This journey has been taken every step of the way with the Quilting Army and the Just Wanna Quilt community. You will hear their voices. They are brilliant, smart, funny, kind, and giving quilters. They have made this project more than I can imagine. Thanks in particular to Mary Fons, Pam Weeks, Willow Olson, Scott Fortunoff, Cheryl Whited, Andi Barney, Judy Walker, Edith Gross, and Joel Sellers. Thanks also to my former research assistants turned quilt entrepreneurs, Ricardo Gonzalez and Corrie Dutton, who were part of this journey from the beginning. And to Janice Sayas, who is always willing to play and help me with the latest crisis. To my research assistants Raquel Gaines, Brijan Kana, Veronica Catanese, Kristin Ivey, and Missy Byrd, and to Bill Manz for editing, formatting, and bluebooking. To Blaze D'Amico and Brian Frye for their thoughtful comments. To the Copyright Society Fellows editing this piece, including Tess Bradley (J.D. expected 2025), Kristin Ivey (J.D. expected 2026), Veronica Catanese (J.D. expected 2026), Brijan Kana (J.D. expected 2026), and Rachel Lewis (J.D. expected 2026). And to the museums that welcomed me, showed me quilts, and talked about quilts including the International Quilt Museum, the quilt collection at Michigan State University, the Henry Ford Museum, the Art Institute of Chicago, the New Orleans Museum of Art and the New England Quilt Museum. Thank you to Fred Yen, whose guidance and patience cannot be underestimated. We worked through this paper in a way that was reminiscent of when he was my professor in law school. I am grateful for the thoughtful conversations and pushing me to think deeper, as well as the time to let the article grow up, so to speak. This paper has been presented at the Works in Progress IP Conference, St. Louis, MO (2022), as the 2022 Gerald D. Hosier IP Law Scholar Lecture, Center for Intellectual Property Law & Information Technology, DePaul College of Law, and an early draft was circulated as part of the CLE materials for the Mid-Year Copyright Society of the USA Conference (virtually), 2022. A special thanks to Sid Gard, an artist, writer, and editor, who gave their time and thoughts to the final draft, and has been on this quilting journey from before it became a project. We quilted together starting when they were five, following a long tradition in our family of women teaching children handwork and sewing. When Sid was 13, we took a six-week quilt tour of the U.S. at the start of the project; Sid designed our booths at the International Quilt Market and International Quilt Festival; Sid is co-authoring the *Just Wanna* series; and is the co-curator (with Pam Weeks) of a quilt exhibit about copyright and quilting, debuting at the New England Quilt Museum in January 2025. We have written together and sewn quilts together. I admire their work as an artist, quilter, writer, and editor. Their insight knows no bounds. I can't imagine this project without them.

*Board. In the end, it asks the question: what is the role of law in the process of creativity?*

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*INTRODUCTION*

*In the end, it all comes down to this: making something again is easy, making something new is brave and making something personal is essential.*  
Tula Pink, artist, famous quilter and commercial fabric designer<sup>1</sup>

*Formally trained as a painter, [fiber artist Bisa] Butler constructs her work from an intricate array of textiles, choosing the needle as her paintbrush and fabric in place of paint.*

Michèle Wije, “Photograph and Quilt Making Transformed”<sup>2</sup>

It is the Fall 2021. I am sitting on a bench in the Impressionist wing at the Art Institute of Chicago in front of that famous painting with people in the rain with umbrellas.<sup>3</sup> I am waiting to see the Bisa Butler quilt show.<sup>4</sup> There are so many people waiting to see the last weekend of the show that they have started a virtual line. To see quilts. It is amazing. Eight hours away, at the International Quilt Museum in Nebraska, there is a 50-year retrospective of the first major art show featuring quilts; it reenacts the Whitney Museum show that changed how we think about quilting.<sup>5</sup> Between these two exhibits tells the story of quilts and art, and of course, for me, the underlying copyright story. I wonder what that painting is that I’m viewing. You would know it if you saw it.

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<sup>1</sup> TULA PINK, *TULA PINK’S CITY SAMPLER: 100 MODERN QUILT BLOCKS* (Kraus Craft 2013).

<sup>2</sup> Michèle Wije, *Photograph and Quilt Making Transformed*, in *BISA BUTLER: PORTRAITS* (Art Institute of Chicago 2022).

<sup>3</sup> Gustave Caillebotte, *Paris Street; A Rainy Day*, 1877, oil on canvas, 212.2 x 2.76.2 cm, Art Institute of Chicago, Chicago, <https://www.artic.edu/artworks/20684/paris-street-rainy-day>.

<sup>4</sup> *Bisa Butler: Portraits*, ART INSTITUTE OF CHICAGO, <https://www.artic.edu/exhibitions/9324/bisa-butler-portraits>. (Nov. 2020-Feb. 2021).

<sup>5</sup> “In 2021, the International Quilt Museum (IQM) at the University of Nebraska-Lincoln is celebrating the 50th anniversary of the groundbreaking exhibition, *Abstract Design in American Quilts*. The 1971 exhibition, presented by the Whitney Museum of American Art in New York City, was the first time a major New York art museum displayed historical quilts on walls more commonly used to display modern art such as abstract expressionist paintings. The Exhibition is remembered as a pivotal moment in the intersecting histories of art, craft, and design. The pieced antique quilts from the Jonathan Holstein and Gail van der Hoof Collection went on to travel across the U.S., and to Europe and Japan. A last-minute addition to the Whitney’s summer schedule, *Abstract Design in American Quilts*, far exceeded the reach and impact its creators initially anticipated. In short, it became a cultural phenomenon, attracting unexpectedly large and enthusiastic audiences, quickly selling out its catalog and garnering outsized praise from eminent critics”. “A stunning revelation.” —Hilton Kramer, *New York Times* art critic, July 3, 1971, *The Whitney Museum of Arts Quilt Exhibition at 50*, *THE QUILT SHOW*, <https://thequiltshow.com/blog/history/the-whitney-museum-of-arts-quilt-exhibition-at-50> (Jul. 6, 2021).



Gustave Caillebotte, *Paris Street; A Rainy Day*, 1877, oil on canvas, 212.2 x 276.2 cm, Art Institute of Chicago, Chicago.

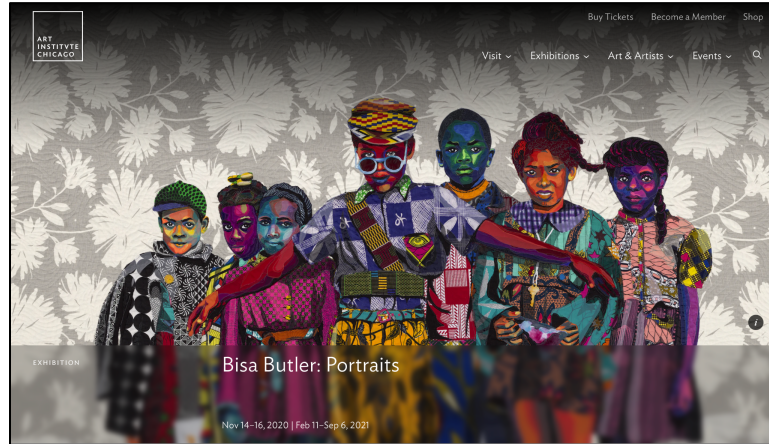
This is an essay about the process of creating and the relationship of creativity to copyright. And also about creating and enforcing one's rights associated with that creation. What role does copyright play in the creative process, and how might that be altered by the (now) Copyright Claims Board? We will use quilting as our guide.

I finally get into the exhibit. Bisa Butler creates portraits—huge portraits—using stunning solid colors for faces and hands, and her patterned fabric from Africa for the clothing. The portraits can take hundreds of hours to create.<sup>6</sup> A theme based on Maya Angelou's *I Know Why the Caged Bird Sings* runs through the exhibit, depicting African-Americans across two centuries.<sup>7</sup> Butler uses layering and thread painting techniques. It's clear that she began with a photograph, an underlying work, but we do not know how much she has changed it. Did she think about copyright? About fair use? Did she get clearance for the

<sup>6</sup> Liz Logan, *Artist Bisa Butler Stitches Together the African American Experience*, SMITHSONIAN MAG. (July 24, 2020), <https://www.smithsonianmag.com/arts-culture/bisa-butler-stiches-together-quilts-african-american-experience-180975397>

<sup>7</sup> For more, see *I Know Why the Caged Bird Sings ~ Bisa Butler* (Mar. 23, 2021), <https://www.jigidi.com/jigsaw-puzzle/16z6qhk7/i-know-why-the-caged-bird-sings-bisa-bulter>

photos she used? Did she inquire as to the public domain status? How much does the law impact on her choices as an artist? And how protective will she be if someone tries to reproduce the fabrics she has created or create knock-offs of her work?



*The Art Institute of Chicago's website, introducing Bisa Butler: Portraits. The artwork used is called "The Safety Patrol," (2018). See <https://www.artic.edu/exhibitions/9324/bisa-butler-portraits>. This piece was also sold in the gift shop as a print.*

It turns out that Bisa Butler used photographs from the Farm Security Administration Database, taken around World War II of African Americans, and photographs of anonymous African Americans from 1870-1910.<sup>8</sup> In both cases, the photographs are in the public domain.<sup>9</sup> She also uses fabric from Ghana, Nigeria, and South Africa, as well as cottons, wools, silks, and velvets.<sup>10</sup> Based only on the photographs she used, it seems clear she thought about copyright, meaning the law impacted her choices as an artist. Her work is stunning. They are transcendent. There is no question they are art pieces. They are hanging on the

<sup>8</sup> Grace Edquist, *Depth, History, and Reverence: the Intricacies of Bisa Butler's Quilted Portraits*, VOGUE (March 3, 2020), <https://www.vogue.com/article/bisa-butler-artist-interview>.

<sup>9</sup> The Farm Security Administration Database government photos were not protected by copyright, and the others are likely out of copyright due to their age. See 17 U.S.C. §§ 105; 304, and 303(a).

<sup>10</sup> See Artsy Chow Roamer, *Giving Back: History, Identity, & Legacy*, ARTSY CHOW ROAMER, <https://www.artsychowroamer.com/blog/2020/12/7/bisa-butler-giving-back-identity-history-and-legacy>.

walls of the Art Institute of Chicago—big banners outside advertise them.<sup>11</sup> They are *so* copyrighted.

As far as categorizing copyrightable works, art quilts are easy—they look like things that are copyrightable. They hang on walls. They look like paintings. Bisa Butler’s quilts are art quilts. But what about quilts that we generally think of as functional quilts? That quilt your grandmother or aunt made you to celebrate your birth, graduation, or marriage. How do they fare under the copyrightability test?

When this paper began, I wanted to explore the relationship of the role of law in creativity. It was a series of case studies, using fiber arts as a way of understanding the practice, process, and results of creativity in light of the law.<sup>12</sup> Then, just as I was finishing a first draft of this paper, the CASE Act passed in December 2020, and the paper became about the intersection of creativity and enforcement.<sup>13</sup> I then waited to see just what the Copyright Claims Board would be, who showed up, what the claims themselves would be, and how the claims worked their way through the system. Now, once the CCB began, the wait was for the data to come in. Two years of data seemed reasonable. And as I was waiting, *Andy Warhol* was decided.<sup>14</sup> With all of this, the question surrounding creating kept changing and expanding. We are now at the end of the second year of the CCB, as of June 2024. How are we to understand creating works and enforcing copyrights? What does copyright look like in 2024?

There is a physics to copyright, which includes how much room we have to create before we intrude on the boundaries of other copyrighted work. We all can use non-protectable elements, public domain works, and potentially fair use. We can ask permission to use works. We can also as makers ask the question of whether what is being created is too insignificant to be bothered with (e.g. not commercial enough, personal use, etc.) or if the borrowed use is actually a benefit to the original copyright holder (e.g. fan celebrating works, covers, snippets from a concert on YouTube or TikTok that all promote the original work).<sup>15</sup> How will the new Copyright Claims Board (“CCB”) change that physics of *creating*? I would suggest not much. But perhaps down the road now with the addition of *Andy Warhol*? Perhaps.

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<sup>11</sup> Bisa Butler Portraits, photograph of the Art Institute of Chicago by *Margaret Fox*. See Sarah Barnes, *Bisa Butler Is Exhibiting Over 20 of Her Amazing Quilted Portraits at the Art Institute of Chicago*, MY MODERN MET (Aug. 25, 2021), <https://mymodernmet.com/bisa-butler-art-institute-of-chicago/>.

<sup>12</sup> For this paper, my focus is on quilting, both in terms of traditional pieced quilts and art quilts, as they provide a window into the subject of underlying works, common public domain.

<sup>13</sup> Copyright Alternative in Small-Claims Enforcement Act of 2020 (the CASE Act), Pub. L. No. 116–260.

<sup>14</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

<sup>15</sup> See Sidne K. Gard & Elizabeth Townsend Gard, *Fame: A Conversation about Copyright, Borrowing and Soup*, UNIV. OF HOUSTON L. REV. (forthcoming 2024).

So, this is an odd article because copyright has become (or maybe always has been) odd. Part II looks at the spaces of fiber arts, and in particular art quilting and traditional quilting as a means of understanding the creative process. What does copyright tell us about what creatives can and can't do? Where are the boundaries in the act of creating? Part III then turns to look at what the CCB tells us about creating. What cases are being filed, and what signals are we getting from the Board relating to creativity? This is done with the final determinations to claimants. Part IV turns briefly to the *Andy Warhol* case: can we understand the boundaries between original artist and subsequent artist in a new light? In short, this essay asks how do we understand where creating fits within copyright? Let's step into the world of quilting as a means of exploration.

### I. *QUILTING AS CREATING COPYRIGHTED WORKS*

Quilting turned out to be a perfect venue to look at copyright: there are millions of quilters each making dozens to hundreds of quilts, all using common blocks, patterns, photographs, and a myriad of techniques. They are making all kinds of quilts, from traditional to modern to art quilts. They are insanely resourceful. Quilting is done both by professionals and hobbyists, for charity, for families, and for sale.

My questions focused on where the law intersects with that creativity:

- When does something I make become protectable?
- When does something I create potentially infringe on someone else's work?
- When do community customs come into play?
- How does idea/expression actually work in practice?
- How does *thinking about copyright during the creative process* help or hurt the artistic process itself? And what role does the law play in the process of creativity?

In many ways, these are questions that could be asked of any art form—where are the boundaries of non-protectable elements and motifs, and what an artist creates? However, quilting provides a particularly useful area of review, as they have *numbered and cataloged* non-protectable quilt blocks, along with recognizing and labeling common techniques, types of artistic expression, and ways of working.<sup>16</sup> And over the course of about six years, I made about 125

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<sup>16</sup> See Barbara Brakman, *Encyclopedia of Pieced Patterns*: “This book is the perfect resource for identifying blocks and getting inspiration for your quilts! You’ll find line drawings and colored versions of 4,000+ blocks, plus their names and publishing information! Sewing patterns are not included.” The book blurb gets it wrong, and believes that the author holds copyright on all of the blocks because she numbered them, and also

quilts in the process of thinking about these questions too. Creating quilts turned out to be a great space to also contemplate the meaning of copyright as part of the creative process. Let's return to the Art Institute of Chicago.

*A. Back to Butler and Other Quilters*

Bisa Butler did not start out as a typical quilter. She earned her BFA from Howard, and an MFA from Montclair State University.<sup>17</sup> It was during a fiber arts class that she found quilting as her medium.<sup>18</sup> But she is using techniques that all quilters do: starting with an idea, choosing fabrics, creating the top, stitching it together. Her story is both magnificent artistry beyond words and also, like many quilters, an example of an artist doing their craft. Butler's work sits within a larger world of both art and quilting.

Many reading this may not realize that quilting is expected to approach being a \$5 billion industry by 2026, with over 12 million quilters.<sup>19</sup> The larger craft industry reached \$85 million "active creatives" in North America (people who have done at least one creative project in the last year) and generates \$35 billion dollars in annual sales.<sup>20</sup> That's a lot of creativity. Butler's work sits, in part, within that tradition.

Quilting can be all encompassing, from books and magazines to an Internet filled with YouTube tutorials, podcasts, and Pinterest boards, from exhibits at museums to the local 4-H clubs, from Joann's Fabric to small locally owned quilt shops. There are national and local quilt shows, along with over eight quilt museums in the U.S.<sup>21</sup> Major companies like Brother, Bernina, and Singer dominate the market in sewing machines, along with niche companies like

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that the numbering system is protected by copyright, which is questionable. The blurb also believes that the blocks that are older than 1970 are not protected by copyright, again, a weird cut-off and not based on any legal principle. The blocks are common blocks, made over a number of centuries. The book identifies the year and source the author found when doing research in the 1960s and 1970s. The system is also used by the Quilt Index, a national repository of images of quilts from institutions and states.

<sup>17</sup> *Bisa Butler: Portraits*, ART INSTITUTE OF CHICAGO, <https://www.artic.edu/artists/116361/bisa-butler> (last visited July 30, 2024).

<sup>18</sup> Bisa Butler, *About Bisa Butler*, BUTLER ART, <https://www.bisabutler.com/about-5> (last visited May 19, 2024).

<sup>19</sup> Abby Glassenberg, *The Size of the Quilting Market: Quilting Trends Survey Results 2021*, CRAFT INDUSTRY ALLIANCE (Apr. 3, 2021), <https://craftindustryalliance.org/the-size-of-the-quilting-market-quilting-trends-survey-results-2021>.

<sup>20</sup> *Id.*

<sup>21</sup> This includes the International Quilt Museum, the New England Quilt Museum, the Virginia Quilt Museum, San Jose Museum of Quilts & Textiles, The National Quilt Museum, Rock Mountain Quilt Museum, Wisconsin Museum of Quilts, Iowa Quilt Museum, the Pacific Northwest Quilt & Fiber Arts Museum, Missouri Quilt Museum, Kona Hawai"ian Quilt Museum, Levy County Quilt Museum, The Southeastern Quilt & Textile Museum, Quilt Heritage Museum, Great Lakes Center, Textile Center, Latimer Quilt & Textile Center, and Texas Quilt Museum.

Handquilter, Juki, Grace, Janome, and others. There are large and small quilt-related companies, many family run, and interestingly, many that are multigenerational. One of the largest fabric companies, JafTex, has as its president a fourth generation fabricator.<sup>22</sup> We have the American Quilt Study Group,<sup>23</sup> and one university, University of Nebraska-Lincoln, even has a Quilt Studies program, as well as being home to the International Quilt Museum.<sup>24</sup>

This doesn't even begin to describe the passion, personal investment, and time each quilter dedicates to not only the quilting, but building and stocking one's studio with fabric, thread, and accessories, traveling to quilt shows, taking classes, joining guilds, making charity quilts (we are a very giving community), and talking about quilting, whether with our online Facebook friends (where there are small to huge communities), at quilt guild meetings, or the friends we make along the way. We are often working professionals, empty nesters, or moms with small kids quilting when they sleep. We see quilting as our own time, and we take up "A Room of One's Own" and as much space in our homes as we can find.<sup>25</sup> We often become aggressive hobbyists and many start businesses that relate to quilting in one way or another. We come in all shapes and sizes, gender identities, and backgrounds. We sew in many styles - modern, traditional, improv, art, and with many techniques - piecing, foundation, English paper piecing, and applique, to name a few.

**Traditional Quilts.** This is probably what you think of when you think of quilting. Blocks repeating, or a sampler quilt. Think *Boisson v. Banian*, 273 F.3d 262 (2d Cir. 2001), a case about an alphabet quilt. These come in many forms and ways of construction from machine piecing to paper piecing and foundation piecing. There are a number of software programs that help design quilts using traditional blocks, including Electric Quilt, QuiltPro, and QuiltSoft. And many pattern makers make their bread and butter off of rehashing traditional patterns for beginning quilters to purchase (and then get incredibly protective of their "original" designs). Traditional quilting is plagued with copyright questions. At what point is something considered to have enough creativity to gain copyright protection? Using one common block repeating enough? Is the selection, arrangement, and coordination of how they are repeating? Does it force us into a novelty-like conversation? If the basic traditional quilts are not protectable, then when is a pattern sufficiently original (the directions, etc.) to be protected? How does the system work, exactly? And when something does strike the community as original, how much of a property right is given to that originality? It is a

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<sup>22</sup> JAFTEX, <http://www.jaftex.com> (last visit Jul. 26. 2022).

<sup>23</sup> AMERICAN QUILT STUDY GROUP, <https://americanquiltstudygroup.org> (last visited May 12, 2024).

<sup>24</sup> INTERNATIONAL QUILT MUSEUM, <https://www.internationalquiltmuseum.org>. See also *Quilt Studies*, UNIVERSITY OF NEBRASKA, LINCOLN, <https://cehs.unl.edu/tmfd/textile-historyquilt-studies-distance-learning-option-iii> (last visited May 19, 2024).

<sup>25</sup> VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Hogarth Press, 1929).

community that is created in mimicking, copying, and reproducing the same quilts. It's part of the DNA.

**Modern Quilts.** Beginning around 2010, a movement that defined itself as sparse, black-and-white, elegant, and distinctly “new” developed. Modern quilting was born, but while looking a bit more hip, uses the same shapes, language and tools as traditional quilting. Copyright questions come to mind instantly: will their works that are more like minimalist art be protected by copyright? At what point is their work protectable? And how much is the idea the expression? When does merger occur? There are certain motifs, scenes a faire and stock characters that we see in their work. When does something originally expressive turn into merely an idea? Can we trace that occurrence?

**Art and Protest quilting.** Art quilts come in every manner imaginable. Bisa Butler's quilts are an example. Related are protest quilts, often incredibly powerful. We see examples with Black Lives matter, and the work of Chawne Kimber, and also after the election of Trump. *Threads of Resistance* was a particularly important exhibit.

In the Summer of 2017—just after becoming a full professor—I decided to start a new, fun, (what I thought would be) simple project: copyright and quilting. I would sew and think about copyright. I was introduced to a woman, Judy Walker, who had immersed herself in quilting. She invited me to her home where she opened me up to a world of quilts, and also her “stash” of fabric. Me, along with two research assistants, spent three days cataloging the selvedge licenses on fabric, and soon it was evident that the world was a lot bigger than I had previously believed. Judy was just the beginning. Then, in the Fall of 2017, I went to the International Quilt Market in Houston, the main trade show at that time for quilting. A whole new layer of this world emerged of inventions, entrepreneurs, artists, and consumerism. Some copyright questions too. From there, I started interviewing more people, and soon I realized that I wanted to share these interviews with others— and so the Just Wanna Quilt podcast was launched on Feb 5, 2018. And starting in 2018, I started to ask quilters about the role of copyright in their process, through a Facebook group I created, Just Wanna Quilt, and also a podcast of the same name.<sup>26</sup> A small research project came first and then the podcast followed.

For the podcast, I wanted to understand the ecosystem that quilting sat in. And as part of this, I had the experience of running a booth at a one of the largest's quilt shows and also a booth at the main trade show, self-publishing books, gaining a four-book contract with a craft publisher (with my co-author, Sidne K.

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<sup>26</sup> In 2018, I began the podcast, *Just Wanna Quilt*, which has over 300 public episodes and 25,000 subscribers. We have had close to 1 million downloads. This was always what we called a “research” podcast. We did no advertising. We discussed people's lives, hobbies and businesses, and at the end of the hour, for the last fifteen minutes, I asked them about copyright and other IP issues that might have arisen with their work.



Gard), sold longarm machines (yes!), and tried all kinds of tools, techniques, kits, styles, and ideas for quilts. I also purchased way too much fabric (a sign of an American quilter these days), and I even have two wholesale accounts to purchase bolts of fabric. Many of my closest friends now come from the quilting world, my quilting family. What started out as a small academic project changed my life. And Sid and I are now getting ready to put on an exhibit on copyright and quilting in January 2025 at the New England Quilt Museum.<sup>27</sup> I am in deep, and throughout all of this, I think about copyright.

Before delving into the copyright questions, let's learn a little more about quilting itself. Whatever the style, quilting is really two processes: 1) the creation of the quilt top, and then 2) quilting together the top, the batting (in the middle), and the backing. Just as paintings have categories such as Impressionist or Cubist, so do quilts. Quilts can be traditional (think of a repeating pattern called blocks or a sampler quilt), abstract, applique, or art. They can be from a particular cultural group - Amish, Gee's Bend, or Hawaiian. And they can be made with different techniques. Bisa Butler used raw applique as the main technique. All of these categories describe the top of the quilt. The quilting—the binding of the three layers together— can be done by hand (sometimes on big quilting hoops), free motion machine quilting (most common on domestic sewing machines), or automated on a longarm (the latest thing). Quilts can take months to make or merely hours. They can be meant to be used and cuddled, cherished as family heirlooms, or hung on a wall. Quilting is both an art form and a craft, full of common tropes, techniques, and a common language. It is historic and contemporary.

What drew me to quilting was its rich tradition of common (public domain) blocks and passed on techniques. When I started I didn't realize that there were protest quilts, social justice quilts, modern quilts, quilts for massive drives for charity, and so much more. The quilting world is so much bigger than most realize. Bisa Butler's work lives within this world. And yet it also lived, for a time, at the Art Institute of Chicago.

There is no doubt that the Bisa Butler show at the Art Institute brought into focus quilting portraits and art quilts in the same way the abstract show in the Whitney challenged our notions that quilts could be art.<sup>28</sup> The Whitney show, fifty years earlier, showed traditional quilts that resembled abstract art, or at least what qualified as abstract to the collectors Jonathan Hostein and Gail van der Hoof.<sup>29</sup> There were sixty-one quilts, and they were chosen because they matched the aesthetic of modern non-objective paintings of the 1960s.<sup>30</sup> The show was

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<sup>27</sup> Copyright Through Quilting, New England Quilt Museum, January-March 2025.

<sup>28</sup> As included on the International Quilt Museum website INTERNATIONAL QUILT MUSEUM, <https://www.internationalquiltmuseum.org/exhibition/adaq50> (last visited July 26, 2022).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

powerful. What is interesting is that the colors the quilters chose is what made them feel modern—that is still true. But the quilts themselves, mostly from the 19th century, represented very traditional, core patterns that form the backbone of quilting: log cabin, nine-patch, sawtooth, crazy quilt, basket, strip quilting, double Irish chain, square in a square, flying geese, baby's block, roman square, to name the most recognized blocks.<sup>31</sup> Quilting has a strong tradition of naming blocks so that we have a common language. The quilts of the *Whitney* show were these kinds of quilts.



In many ways, quilts bring us to the most basic questions: when do we go from unprotectable to protectable? This is one of the questions I ask every night as I quilt. When do common blocks create something protectable? When do circles create a copyrighted work?

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<sup>31</sup> *Id.*

*B. The Act of Creating with an Eye on Copyright*



Long before Butler’s exhibition at the Art Institute, I had begun a routine back in New Orleans. It started that summer of 2017 and continues to this day. At about 10 pm when the family is off somewhere else in the house and I’m done with the work I need to do, I stumble up to bed, having to pass the quilting “studio” to get there. Most nights, I detour and stay a few hours. I quilt and think about copyright. We’ve already found the heart of the struggle: When does something I make transform from a non-protectable element to a protectable, copyrighted work? My copyright musings are embedded in the process of making each quilt.

As I worked with Fred Yen (at the time the Editor-in-Chief of the Journal of the Copyright Society), we talked about how to convey this ongoing inner (and outer) dialogue, and how to write about thinking about copyright as part of the creation process. I’ve broken it down by some examples of concepts in copyright, familiar to us all. But there are many more.

*1. Idea/Expression and Property Boundaries*

These turn out to be a hard concept to understand in the quilt studio, or maybe any artistic practice. When does an idea turn into an expression that is protectable, and how far does that property right extend? How do you communicate what is protectable and what is not to others who might want to make what you have just made? And what happens when your idea is to borrow from a variety of patterns and techniques? How much have you created a derivative work, and could it be seen as unauthorized? What happens then, and how much do you need to alter to

make it legitimately either its own work or a derivative work? This is, in great part, what our book *Just Wanna Copyright for Makers* has ended up focusing on.<sup>32</sup>

Let's go back to Bisa Butler's work. The idea of taking a photograph and using fabric to paint the contours is not protectable. The idea of taking purple, pink, and blue solid fabrics to use as skin is also not protectable. The idea of clothing having patterns but the skin being in solids is not protectable. And yet when she creates the work, there is no doubt that a copyrightable work has been born. If another artist comes along, how much of what Butler has done can he take and replicate?<sup>33</sup> What is the property right in her work? What is the boundary of that property right?

Take, for instance, Lyric Kinard, who also works with photographs and the same color palettes to create portraits. Lyric teaches techniques to average everyday quilters on how to create these portraits.<sup>34</sup> However, she is clearly not as careful about using copyrighted images as Butler is. She has even advertised with them. How do we understand the use? How are these portraits different from Butler's?



<sup>32</sup> Sidne K. Gard & Elizabeth Townsend Gard, *Just Wanna Copyright for Makers*, C&T PUBLISHING (forthcoming Dec. 2024).

<sup>33</sup> Interestingly, at this moment, none of Butler's works appear to be registered with the U.S. Copyright Office, not even the exhibition catalog. One wonders if this oversight will change with the upcoming Copyright Claims Board under the CASE Act. Will artists recognize and take advantage of the new system, or does enforcing copyright not actually enter into their thinking? One more layer to a complicated story.

<sup>34</sup> She writes, "[P]lacement and proportions for making realistic shapes, what makes a photo good to work with, how to trace a photo to make a pattern for applique, how to use apps to speed the pattern making process, and tips for quilting human faces." 3rd Live Class Open Enrollment + Pioneer Quilt Guild, Lyric Montgomery Kinard, 2021.

And, similarly, award winning quilter Hollis Chatelain is famous for her courses for fiber artists. She teaches multi-week courses geared to the study of the technique on a more deeper level. Many fiber artists study for years with her to continue to work on their techniques. All of these examples use photographs and images, not just as inspiration but as the underlying work on which they build.



And finally, take the example of Gio Swaby.<sup>35</sup> In 2023, art quilter Gio Swaby also had an exhibit at the Art Institute.<sup>36</sup> Hers did not have banners outside, but was in the fiber area of the museum, in the basement. It was a beautiful exhibit. She uses photographs as well, but transforms them by using the longarm to stitch black lines that paint the outlines of a photograph and then adds bits of fabric as accents. They are in the same genre as Butler, Kinard, and Chatelain, but they are also entirely different.

<sup>35</sup> GIO SWABY, <https://www.gioswaby.com/> (last visited July 30, 2024).

<sup>36</sup> Gio Swaby: Fresh Up, ART INSTITUTE OF CHICAGO (April 8-July 3, 2023), <https://www.artic.edu/exhibitions/9869/gio-swaby-fresh-up>.



These four artists—Butler, Kinard, Swaby, and Chatelain—use the same techniques: photographs as a base, covered in fabric and thread painting techniques. But they produce very different works. Distinguishable. Copyrightable. Do we intuitively know the boundaries? Are there unspoken rules of how far one could go? Do harms like passing-off come into play, where copyright might fail? How do you communicate those boundaries to artists? Is it something one can communicate?

## 2. *Someone Else's Idea*

I have an idea to take a 3" square of every fabric I own and sew them together by color, otherwise known as an "inventory quilt." Actually, this was *someone else's idea*, a quilter that goes by Jessica Quilter.<sup>37</sup> I changed the shape of her version from hand-pieced hexagons to machined-pieced squares (out of laziness and efficiency). I arrange them by color, a kind of rainbow. But she did that first. I think most people would see that I had significant inspiration from her work. At what point is mine an infringement of hers?

But wait! Was that her original idea? I reach out to Jessica and ask for permission to create my own, and also to have my Facebook group create their

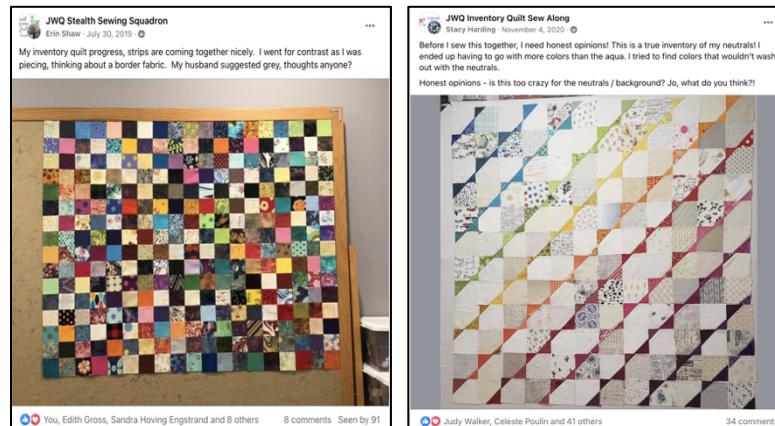
<sup>37</sup> Jessica Quilter, <https://jessicaquilter.com/>. The inventory quilt is featured on her website, as part of "Quick Tutorials: Four Scrap Quilt Projects," available for \$6. <https://jessicaquilter.com/products/quick-tutorials-four-scrap-quilt-projects-pdf>.

own as well. She is flattered. I give her credit for the idea of an inventory quilt. Did I need to do this? I think about the right of attribution (and does VARA extend to quilts?). The idea of the inventory quilt is, of course, not protectable. But where do copyright boundaries begin, and could my version of an inventory quilt have been considered infringing without these steps? Must we all be more cautious? Will the CCB make it so we have to be more cautious?



*Jessica Quilter's original version*      *Mine*

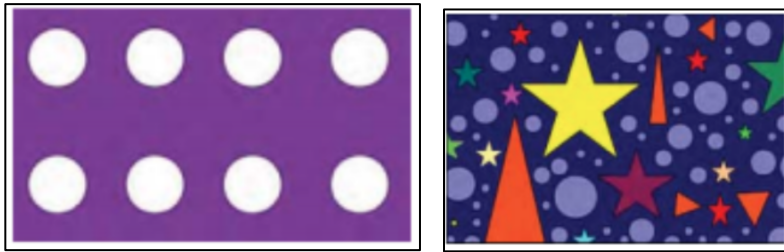
And here are some more. (We started a sub-Facebook group).



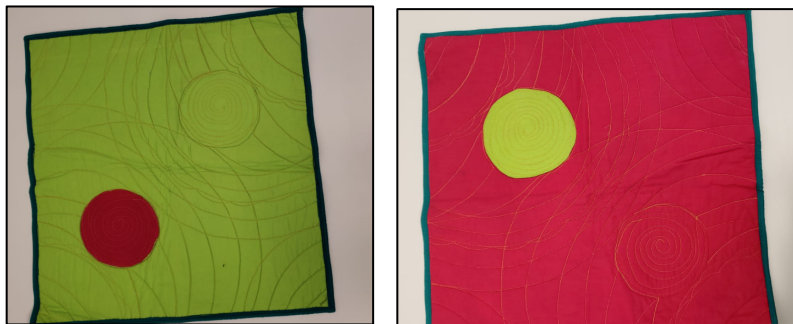
### 3. Modicum of Creativity

When does a quilt have enough modicum of creativity? With Butler's work, there is no question she has created a copyrightable work. Many times, it seems,

that is where we should begin the inquiry; not every quilt that is created, not every piece of art, rises to copyrightability. Let's go back to the quilt studio. I start with a set of fabrics—all solids—and decide I want to use a particular shape or set of shapes. I'm exploring geometry and color. I take unprotectable shapes and unpredictable solid color fabric, and combine them into my own version of something. At what point is what I create enough for copyright protection? Would a single color background with a single shape in a different color be enough?<sup>38</sup> Would the answer be different if you were a painter? The Copyright Office's Compendium III tells us that a domino-like drawing (two sets of four circles on two rows) is not enough to gain protection but a jumble of shapes is.<sup>39</sup> The first, the purple one, is, according to the Compendium, not protectable; the second one is.



What about this collection of circles by a fellow quilter, Misty-Anne Marigold. Are these quilts protectable? What if she disclaimed the decorative quilting? And we know that the more circles, the more likely of protection. When do Misty-Ann's circles have enough creativity to become something protectable?



<sup>38</sup> A new paper that I'm working on asks these questions in more detail: when do we know when a work has risen to not just copyrightability, but registrability? We will be submitting a variety of quilts to the Copyright Office to see what response we get.

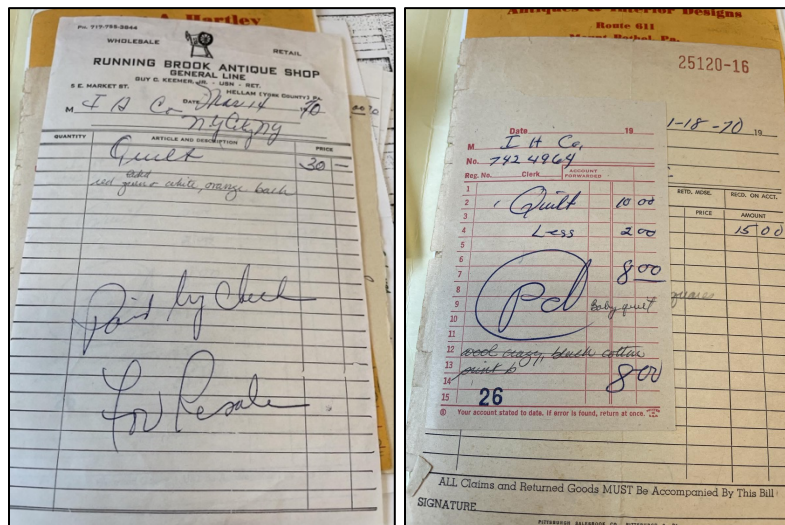
<sup>39</sup> U.S. Copyright Office, Compendium of U.S. Copyright Practices § 101 (3d ed. 2021).

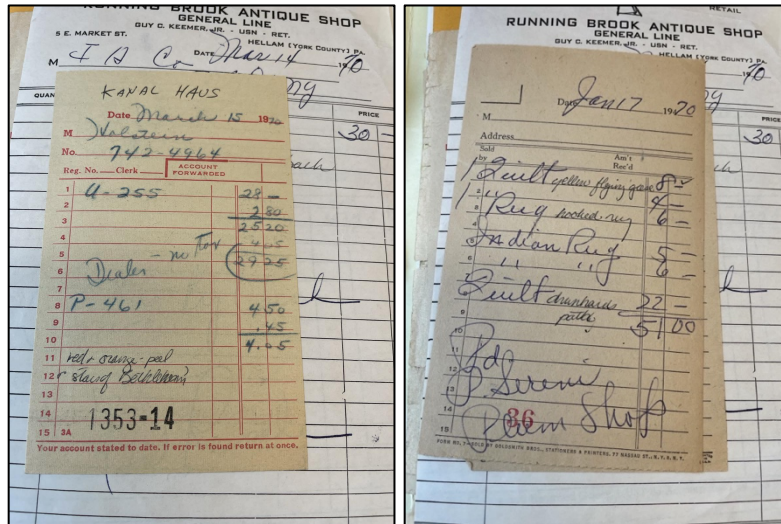


And in the end, is copyright protection the end goal? Should this be something artists are reaching for? Or should they be focused on their artistic expression? Does it matter? (Brian Frye, an artist and law professor, believes it does not.) And what would the status be if this was a painting? So many paintings, including famous geometric paintings.

4. *Could Most Traditional Quilts be Unprotectable?*

This line of questioning becomes particularly important when you flash forward to wanting to reproduce old quilts. It is often impossible to determine the copyright status and so many of them are orphans, sold at auction and the author is long-unknown but they are not old enough to be fully cleared from potential copyright protection. For instance, a number of quilts were donated to the International Quilt Museum, but when you go to the archives connected to those quilts, you find handwritten receipts saying “quilt,” with no reference to which quilt. And the quilt that had been sold has no provenance or labeling on it, and certainly no copyright notice.



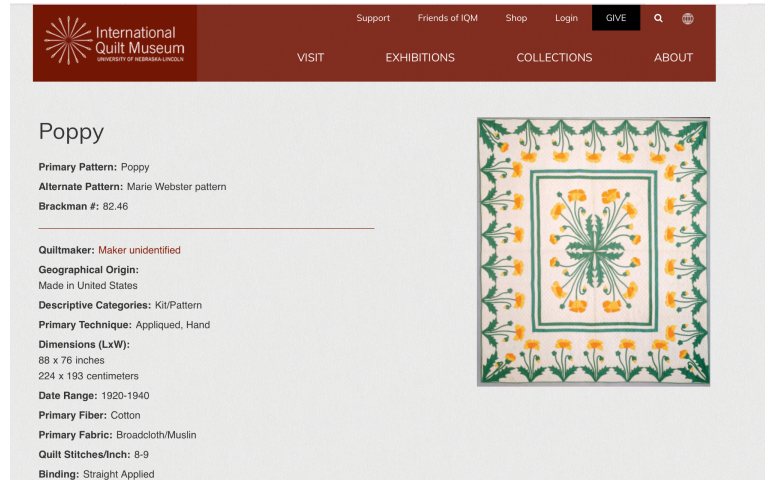


Without copyright notice and transferred in one way or another, eventually finding their way to an auction, a thrift store or antiques shop, is that enough for publication? Or are they all still unpublished, and therefore covered by Section 303(a)? And then there is the anonymity factor. If there is a name related to the quilt, do we take the copyright status more seriously? Copyright has a mechanisms to deal with anonymous works, but that would put these orphans under copyright for quite some time. These are the questions I ponder as we work on another project of reproducing patterns of quilts held by museums around the world. Sometimes the museums mark the quilts (or at least the images of the quilts) with CC0, while sometimes they are claimed to be under copyright. This doesn't seem to be based on solid copyright law, but risk from the museum's part. And so another layer is thrown in: how does someone coming to these quilts actually know the status? There is no consistency with what we are finding.

And another hiccup. We don't know if the quilt we are seeing in front of us is from a published pattern or is an original. I think about the early 1900s Marie Webster quilt kits, a famous quilter who had a huge commercial kit business.<sup>40</sup> With a bit of research, you would know these are out of copyright because they were published in magazines and kits were sold, and we can trace them back to their first publication or sale. Take these examples, the International Quilt Museum lists Marie Webster as the creator, but the *maker* (the one who put the kit together) is unknown. We know that the maker doesn't gain copyright (usually)—that they are just reproducing the kit under an implied license when

<sup>40</sup> See Marie Webster, Quilters Hall of Fame, <https://quiltershalloffame.net/marie-webster/>.

you purchase a kit. But we are not always so lucky with most patterns. I ponder and keep sewing.



*An example of a Marie Webster kit made by an unknown maker. This version is housed at the International Quilt Museum.*

I keep thinking about all of those not-famous kits out there, and patterns in all of those 19th/early 20th century magazines and newspapers. How would you ever know if the quilt you were looking at came from one of those? I think the saving grace is that so many of the patterns and motifs in quilting are so ubiquitous, no one would think they were under copyright, at least with patterns that have been around a long time.

### *5. Something New from Something Long Established*

I have an idea to make a quilt that is a traditional pattern. A long known pattern. I choose a disappearing four-patch block, using two fabrics. We have many names for common blocks. I get a bit tired half way through and decide to do only half disappearing/half regular four patches. And I add unusual borders. I'm very pleased with my creation. I've taken something traditional and made it my own. I've fixed my ever changing idea into fabric. I think about the records I might need to keep to prove when and how I created this very simple quilt. Maybe I shouldn't post what I'm doing, just in case someone might "steal it." Someone might get upset that I subconsciously infringed their design; someone might steal mine (whatever); or maybe none of this is protectable, and so post, post, post. But maybe what I did is just not good enough, and might be ridiculed on social media. Maybe I shouldn't post.

### 6. *First Sale Doctrine and Licensed Sports Fabrics*

As mentioned already, part of the project has included starting the *Just Wanna Quilt* Facebook group, which now has over 4,500 members and who post about quilting and (yes) copyright. So, what's up tonight? "What about licensed fabric," someone asks. Good question. I ask the group about their experiences. Philipa C. commented:

I basically only use licensed fabrics. I sell [my creations using them] at markets and on Etsy. I've had two accounts suspended because of questions about licenses but that's 2 in 5 years. One was *Minecraft* fabric and Etsy got a complaint and they suspended the listing and I was told to work it out with the complainant. I just left it. The products sold at [in person] markets [instead]. The second one was some *Doctor Who* fabric—same story. Same action by me. I wasn't sure how to combat the complaint even though other *Doctor Who* fabric products weren't challenged in my shop and there was[sic] plenty of other products in the same fabric on Facebook....

Other quilters and makers comment that they use licensed fabrics including Kermit, Snoopy, Transformers, Disney Princesses, John Deere, Winnie the Pooh, Sports teams, Harry Potter, DC Comics, My Little Pony, among others. Will these kinds of disputes find themselves at the CCB? And who might bring them?

The question turns into a different conversation: how far can you go in what you make if you purchase authorized, licensed materials? I share my own experience. I buy a *Star Wars* quilt kit (I did), and I make it for the Public Interest Law Student auction (I did), and it fetches a mighty price (it did). I donated it. I paid for the kit. I mixed my labor with the directions given, and added a little bit more flair. Does this act of sewing give me the right—first sale—to do with it what I want? The local quilt shop thought it didn't. Couldn't I get in trouble, the owner asked? Never crossed my mind.

I purchased Saints fabric to make masks during COVID-19 (I didn't). I've paid retail for the fabric (I didn't). I sell the masks online (I didn't). Does this fall under First Sale, or does it violate the "personal use" license printed on the selvedge of the fabric? Some sellers of masks found themselves getting into trouble. But then there is the question of notice. What happens when the local quilt shops cut the same Saints fabric into fat quarters, where three of the four pieces of fabric will not have the license? How would the quilter know? Is this enforceable? Etsy will be the enforcer, of course, but how should I respond?

These are just a few examples of the sets of questions I've been asking every night for years. There are gobs more. I muse. I sew. I ponder. I've made about 125 quilts in six years. I've asked myself a lot of copyright questions. Throughout my time in the studio, I take breaks and I reach out to the Facebook group to see what they think and the experiences they have had. My Facebook group *Just*

*Wanna Quilt* has become a de facto headquarters for reporting problems and asking copyright questions. Sometimes they are quibbles that are silly. Some are more serious. And until the CASE Act, most of these were resolved by either Section 512, with a cease-and-desist letter, often public humiliation/social media pressure (it can get brutal), or the copyright holder and/or accused infringer just give ups. How will who we are and the actions we take change now that there is a place to claim small, alleged infringement? It's still too early to tell even two years in...we've not had a quilting claim, even though I try to encourage them to file. (Believe me, I ask.)

But the question is still there. How would the CCB impact on this balance of creating and creativity, and would it supply the compensation that smaller players were looking for when infringement occurs?

## II. ENTER THE COPYRIGHT CLAIMS BOARD

If I actually gain copyright in one of my quilts, I have the right to enforce that copyright.<sup>41</sup> Now we have an affordable means to do that, right? The jury is still out on that. But this is not an analysis of the CCB. We have a lot of those papers (even in the Copyright Society Journal in this issue!).<sup>42</sup> What I wanted to know is do we get an indication on how the CCB is approaching creativity—and the boundaries of that—through the Final Determinations over the first two years. Now there are other ways to attack this question: the claims being filed, the noncompliance responses to those claims, etc. But the final determinations are claims that made it all the way through the process and the three-panel officers wrote an opinion about the situation. Do we find the kinds of questions I am pondering as part of those final determinations? Are makers like my quilters testing boundaries or thinking about the role of copyright within the making process? I imagine you would guess, no. I would say that some boundaries are being confirmed by the Final Determinations, and in at least one case, some of the questions I am asking here briefly entered into the conversation. Let's contextualize what the CCB is, and then look at some of the final determinations so far. The system was created for photographers and others who felt the current system gave them no place to have their infringement claims addressed. The nagging question remained: Would this work to alleviate that problem? And for me, would it support or hinder creativity?

### A. Background

On December 21, 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), as part of the COVID-19 relief

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<sup>41</sup> One of my current projects aims at registering common, traditional quilts to see when the Copyright Office sees them as copyrightable.

<sup>42</sup> See Katie Fortney & David Hansen, *Assessing the Copyright Small Claims Board After Two Years*, 70 J. COPYRIGHT SOC'Y 140 (2024).

package, and six days later, on December 27, 2020, Donald Trump signed it into law.<sup>43</sup> The law is spelled out in the new Section 15 of the 1976 Copyright Act, which lays out not only the subject matter and damages, but also the construction of the Copyright Claims Board.<sup>44</sup> It is dense and full of detail. In short, the system created a voluntary (you can opt-out), virtual, and less expensive alternative to federal court.<sup>45</sup> It also focuses on four kinds of subject matter: Section 106 rights, declaration of non-infringement of a Section 106 right; claims and counterclaims under Section 512(f), and “legal or equitable defenses related to the claim or counterclaims.”<sup>46</sup> Damages are limited.<sup>47</sup> The process is streamlined and online. And so the Copyright Office got to work on building a new adjudication system, the Copyright Claims Board.<sup>48</sup> This meant creating structures, an online platform, hiring a staff, and building resources that would communicate the new system not just for copyright attorneys, but the general public as well, as the new small claims system was billed as “pro se” friendly.<sup>49</sup> And as they built the system, they put out several “Calls for Comments” totaling nine in all.<sup>50</sup>

The first Call from the Copyright Office was general and procedural focused; a kind of what do you think, y’all?<sup>51</sup> The call itself focused on procedure: the opt-out procedures; initiating a procedure, including notice; service of process and

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<sup>43</sup> Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, Div. Q, Title II, § 212 (2021).

<sup>44</sup> 17 U.S.C. § 1501, et. al.

<sup>45</sup> *Frequently Asked Questions, About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://www.ccb.gov/faq> (last visited Jul. 27, 2022).

<sup>46</sup> 17 U.S.C. § 1504(c).

<sup>47</sup> *Frequently Ask Questions*, *supra* note 45.

<sup>48</sup> *Id.* See also, *About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/about/index.html#fees> (last visited Jul. 27, 2022).

<sup>49</sup> *Copyright Small Claims and the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://www.copyright.gov/about/small-claims> (last visited Jul. 27, 2022).

<sup>50</sup> *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings*, COPYRIGHT CLAIMS BOARD, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Jul. 27, 2022).

<sup>51</sup> *Comments and Reply comments*, CASE ENFORCEMENT ACT REGULATIONS, <https://www.regulations.gov/document/COLC-2021-0001-0001/comment?pageNumber=2>, and the usual players were there, and some others too: Google, Amazon, Verizon, Electronic Frontier Foundation, various library associations and individual librarians/general counsel representing academic libraries including Library Copyright Alliance, University of Michigan, University of Illinois, and AALL, Author Alliance, the American Bar Association, the Internet Archive, Patreon, Science Fiction and Fantasy Writers of America, Computer and Communications Industry Association, Public Knowledge, Engine, Songwriters Guild of America, Coalition of Visual Artists, MPAA, RIAA, Software and Information Industry Association, AIPLA, Spotify, University information Policy Officers, Association of Medical Illustrators, and the Copyright Alliance.

designated agent; library and archive preemptive opt-out; practice and procedure including discovery, protective orders, and Respondent's Default and Claimant's Failure To Prosecute; smaller claims; evidentiary rules; fees; permissible number of cases; conduct of parties and lawyers; and a catch-all category of "other subjects." Forty-eight comments and reply comments were posted.<sup>52</sup> What I was curious about was how creative artists (broadly defined) responded to the new small claims and this general call.

The Copyright Alliance represented nearly every major creator group, including photographers, artists, and others.<sup>53</sup> That makes it important to understand where they stood. The Copyright Alliance outlined a step-by-step process that they believed the Copyright Office should adopt, and were most enthusiastic about a template to fill in the complaint.<sup>54</sup> They went so far as to suggest they need to include a docket number as well.<sup>55</sup> My question was, did they discuss *the what*: copyrightable subject matter, and making sure that the nature of creating was protected both from infringement and over protection. No. They did include their thoughts on fair use, however: "Several commenters suggest that claims involving fair use should be excluded from the CCB. This suggestion is completely unworkable and should be given no consideration by the Office. Suggesting that excluding any case that involves a fair use defense is simply these commenters' way of trying to undermine the CASE Act since many CCB cases may include fair use claims, regardless of the soundness of the claims."<sup>56</sup> They

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<sup>52</sup> *Copyright Alternative in Small-Claims Enforcement Act Regulation*, COPYRIGHT CLAIMS BOARD, <https://www.regulations.gov/document/COLC-2021-0001-0001/comment> (last visited Jul. 27, 2022).

<sup>53</sup> The Comments and Reply Comments by the Copyright Alliance represented the American Photographic Artists (APA), the American Society of Media Photographers (ASMP), the Author's Guild, Creative Future (a non-profit coalition with over 560 companies and organizations and more than 260,000 individuals from film, television, music, book publishing, photograph, and other creative industries), Graphic Artists Guild, Independent Publishers Association (IBPA), Music Creators North America (MCNA), National Music Council of the United States (NMC), National Press Photographers Association (NPPA), North American Nature Photography Association (NANPA), Professional Photographers of America (PPA), Recording Academy, Society of Composers and Lyricists (SCL), Songwriters Guild of America (SGA), Songwriters of North America, and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA).

<sup>54</sup> Copyright Alliance, Docket No. 2021-1, Comments of the Copyright Alliance, APA, ASCRL, ASMP, the Authors GuildS GUILD, Creative Future, DMLA, Graphic Artists Guild, IBPA, MCNA, NMC, NPPA, NANPA, PPA, The Recording Academy, SAG-AFTRA, SCL, SGA, AND SONA, COLC-2021-0001-0024

<sup>55</sup> *Id.* at 12.

<sup>56</sup> *Id.* at 20.

recognized also that fair use is part of the 512(f) analysis, which may also be overseen by the CCB.<sup>57</sup> That's it. Nothing else regarding subject matter.

The Coalition of Visual Artists added comments to their Copyright Alliance comment, with organizations focused on visual arts.<sup>58</sup> Theirs were also procedural. No discussion of how to address specific issues arising in visual arts. In general, they wanted the process to be accessible to pro se litigants.

The Songwriters Guild of America also joined the Copyright Alliance comments, and added their own.<sup>59</sup> Both SGA and SCL have been deeply involved in the legislative process concerning from the beginning (with SGA's advocacy concerning small claims initiatives stretching back nearly two decades), and have filed numerous and extensive comments regarding its enactment and implementation with Congressional Offices, the United States Copyright Office, and other US Governmental departments and agencies.<sup>60</sup> They were concerned with the opt-out procedure and filing fee burdens.<sup>61</sup>

The Science Fiction and Fantasy Writers of America (SFWA), which consists of over 2000 commercially published sci-fi writers, also shared their apprehension of the CCB: "Although it's difficult to envision exactly what kinds of cases will be brought before the CCB, we can say that it will not be useful for many if not most of SFWA's membership, that is, writers who publish novels and short fiction."<sup>62</sup> In particular, they had three concerns: locating infringers, fearing the opt-out system, and fearing that to be successful, you would need a lawyer, which would be expensive.<sup>63</sup> They also discussed the procedural questions proposed, and end with larger warnings: "We do not want to see a process in which the only infringers who are caught up in the system are grandmothers or their equivalents, who post memes or other material on the Web under their real names and can be easily talked into opting in. It would be ironic and defeat the fundamental purpose of the CASE Act if the result was that the only people who find themselves before the CCB are those who are least likely to cause significant damage."<sup>64</sup> This is really the only place I found someone expressing these fears regarding creativity.

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<sup>57</sup> *Id.*

<sup>58</sup> They include which include American Photographic Artists, American Society of Collective Rights Licensing, American Society of Media Photographers, Digital Media Licensing Association, Doniger/Burroughs PD, Graphic Artists Guild, National Press Photographers Association, North American Nature Photography Association, Professional Photographers of America, and Shaftel and Schmelzer.

<sup>59</sup> *Comments of the Songwriters Guild of America, Inc. Joined by the Society of Composers & Lyricists Endorsed by Music Creators North America, Inc.*, Songwriters Guild 2 (2021), [http://columbialawreview.org/wp-content/uploads/2009/03/1\\_Simons.pdf](http://columbialawreview.org/wp-content/uploads/2009/03/1_Simons.pdf).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 3.

<sup>62</sup> Science Fiction and Fantasy Writers of America, *Comments Concerning Proposed Regulations for the CASE Act*, COLC-2021-0001-0033\_attachment\_1.pdf.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.



One particularly odd configuration was related to fair use and the Electronic Frontier Foundation (EFF). EFF is also concerned about jurisdiction issues and fair use, and reminds the Copyright Office that jurisdiction is covered by Section 1506(a)(2). EFF wants the CCB to decline to hear cases where fair use applies.<sup>65</sup> In contrast, the MPAA, RIAA, and SIIA in their Reply Comment urge defenses be allowed, including fair use.<sup>66</sup> They recognize that not including defenses like fair use would “significantly diminish the utility of this forum.”<sup>67</sup>

This is just a small sample of the comments. When I read this, I became concerned that the process of creation might get lost in the procedure of the system. How does a small claim court impact the process of creating? How will the CCB be able to quickly understand various areas of creative specialization, like we’ve seen with quilting? Will that be up to the plaintiffs or defendants? No one seemed that concerned that the CCB would help to draw micro boundaries of creativity.

#### *B. Reviewing the CCB: Final Determinations*

We have had a lot of articles evaluating the first year of the CCB, and likely we will have more with the close of the second year. What I want to focus on here is the CCB interpreting the boundaries of copyright. To do that, I decided to focus on final determinations.

The CCB process has many steps, and at any of those steps, the process can end. To reach the end of the game, so to speak, the last step is the Final Determination. So far there have been less than two dozen in the first two years. What I wanted to know is whether we see questions of creativity and copyrightability at the heart of any of the arguments. So far, we mostly see cases of unauthorized uses of professional photographs on commercial websites, where

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<sup>65</sup> “Given the fact-intensive nature of fair use and the wide variation in fair use case law across different jurisdictions, the Copyright Office should consider instructing the CCB to decline to hear cases where fair use is or is likely to be raised. The Copyright Office should consider creating regulations that instruct the CCB to determine if a claim is likely to have fair use implications. If it does, the claim should not be accepted and the claimant should not be allowed to serve the would-be respondent.” *Id.* at Science Fiction and Fantasy Writers of America.

<sup>66</sup> Science Fiction and Fantasy Writers of America, *supra* note 62. “Congress clearly intended that CCB will adjudicate cases involving fair use. See 17 U.S.C. §1504(c)-1504(c)(5) (“The [CCB] may render determinations with respect to . . . [a] legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.”); see also H.R. Rep. No. 116-252,10 at 25 (noting in the context of default that “the Board [CCB] is expected to carefully scrutinize the available evidence, and consistent with district court practice, [] consider applicable affirmative defenses *such as fair use*, where warranted by the circumstances of the case.”) (emphasis added). Congress surely would not have intended that the CCB consider fair use *sua sponte* when the respondent defaults, but not when it appears to assert such a defense.”

<sup>67</sup> Science Fiction and Fantasy Writers of America, *supra* note 62.

the Board awards three times the licensing fee to the Claimant, with an average award of about \$1000 per work.<sup>68</sup> As noted, that was what the CCB was designed

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<sup>68</sup> Of the 20+ final determinations so far, ten have been focused on unauthorized use of professional photographs on commercial websites. The CCB awarded \$1000 in statutory damages to David Oppenheimer, for unauthorized use of a photograph being used on a website. Final Determination, David G. Oppenheimer v. Douglas Pruttton, No. 22-CCB-0045 (Feb. 28, 2023). <https://dockets.ccb.gov/document/download/2220>. The Work in question was created for a client for PacifiCare, and she also uploaded versions of the shoot for licensing as stock images. Using a reverse-image tracking technology, claimant discovered that one of his photos was being used on a business website without permission. The Board decided as a deterrent to set damages as three times Hursey's lost licensing fee. Final Determination, Hursey v. Lavaca, No. 22-CCB-0056, (Aug. 24, 2023), <https://dockets.ccb.gov/document/download/4770>. Roger E. Quinney had committed copyright infringement, and the Board awarded to Dana Hurley \$3000. Same scenario in many ways as the previous one — Hursey finds an unlicensed photograph being used on a commercial website. Again, three times the licensing fee. Final Determination, Dana Hurley v. Roger E. Quinney, No. 22-CCB-0163, (Aug. 31, 2023), <https://dockets.ccb.gov/document/download/4845>. An award of \$3000 in statutory damages to Joe Hand Promotions for copyright infringement. Here the claimant specializes in commercially licensing sporting events to commercial locations. Here the work was a boxing event that was televised, and registered as a copyrightable work. Claimant collects a licensing fee from establishments to show the event. Respondent had not gotten a license. The Board granted statutory damages as 3 1/2 times the licensing fee, or \$3000. Final Determination, Joe Hand Promotions, Inc. v. Arif Skyline Cafe, LLC, No. 22-CCB-0098, (Sept. 22, 2023), <https://dockets.ccb.gov/document/download/5151>. There were others as well by Joe Hand Productions that had similar outcomes, including Final Determination, Joe Hand Promotions, Inc. v. The Village Restaurant, October 4, 2023, this time for \$3300 in statutory damages, which was between three and four times the licensing free. Final Determination, Joe Hand Promotions, Inc. v. The Village Restaurant, No. 22-CCB-0100, (Oct. 3, 2023), <https://dockets.ccb.gov/document/download/5377>. And there was a third case, Final Determination, Joe Hand Promotions v. Mary A. Dawson, No. 23-CCB-0071, (Jan. 2, 2024), <https://dockets.ccb.gov/document/download/6482>, but here the Board did not find personal liability against the respondent. Urbanlip, a UK photo licensing agency filed a copyright infringement claim against Faviana for using a photograph without a license on their commercial fashion website. The Board awarded \$2600, which was three times the licensing fee. Final Determination, Urbanlip.com LTD v. Farina International, No. 22-CCB-0137, (Sept. 26, 2023), <https://dockets.ccb.gov/document/download/5731>. Claimant received \$1350 in statutory damages for unauthorized use on a commercial website of claimants photographs. Again, this is three times the licensing fee. Final Determination, Dermansky v. Rule 72, No. 22-CCB-0005, (Nov. 1, 2023). Corjulo, a photojournalist took photographs on a four-month long project, and later he found them displayed without his permission on a commercial website. In this case, we see respondent make a fair use defense, which the Board does not aggr with. The Board awarded \$750 per image infringed for a total of \$2,250 in statutory damages. Final Determination, Daniel C. Corjulo v. Scott Mandrell, No. 22-CCB-0008, (Dec. 14, 2023), <https://dockets.ccb.gov/document/download/6285>. Claimant, a professional photographer, holds the copyright in two photographs of Columbia University gynecologist Robert Hadden, who was indicted for sexually assaulting his patients. Respondent owns a website

for: photographers. So we see many photographers upset that they are not getting paid a licensing fee when their images are used on websites—that’s a lot of what we see.

For me, this brings up a lot of questions. Photographs are easily registered (up to 750 under one application), and it appears that they have a very low threshold for copyrightability. Think quilt blocks. There’s a little bit of choice in what fabrics you choose when creating a quilt or a series of blocks. But is that enough? What is the right modicum? We also see that copyrightability in other areas is more arduous, including logos and jewelry, with many more application rejections.<sup>69</sup> We have now created a system of enforcement, focused on photographs which have sometimes the thinnest and most quickly reviewed for the purposes of copyright registration.<sup>70</sup> Is this system disproportionately benefiting one group? I think we might need to revisit the meaning of photographs, copyright registration and enforcement, particularly with the CCB’s triple damages for unauthorized use of photographs found on websites. One group gets protection and enforcement that is kind of out of balance with the rest. But at the moment, the new world and lesson seems to be: use an unauthorized photograph on your website? Play triple the damages in licensing fees, should the claimant file with the CCB, and you don’t opt out of the proceedings. Could this be something that happens with quilts and other creative areas? How would the CCB know what is non-protectable and what reaches copyrightability? And what happens if there isn’t a licensing fee involved? I am thinking again about the orphan quilts.

Besides the photographers, we know that others are also using the system. We have instances of literal coping including a final determination for a professor’s prompt uploaded to EssayZoo, an unauthorized broadcast of a boxing

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www.scdaily.com, a Chinese language news publication, which used the image without paying a licensing fee, and placing the photograph near commercial advertising. Statutory damages of \$3600 was awarded, \$1800 for each photograph used. Final Determination, Steven Hirsh v. Southern Chinese Daily, No. 22-CCB-0255, , (Feb. 14, 2024), <https://dockets.ccb.gov/document/download/7037>. Tom Schirmacher, a professional photographer, discovered unauthorized use of a photograph on a commercial website. The Board awarded \$7,000, or three times Schirmacher’s lost licensing fee. Final Determination, Tom Schumacher v. Allora Medical Spa, No. 22-CCB-0183, (Feb. 16, 2024), <https://dockets.ccb.gov/document/download/7056>

<sup>69</sup> Zvi Rosen, *Examining Copyright*, 69 J. COPYRIGHT SOC’Y 481(2023).

<sup>70</sup> Elizabeth Townsend Gard and Blaze D’Amico, Comment for Artwork Group Registration Category, March 28, 2024, <https://www.regulations.gov/document/COLC-2024-0003-0001/comment>

match,<sup>71</sup> a *pro se* musician that got a little confused,<sup>72</sup> and we also had the first Final Determination of the system be a question of ownership.<sup>73</sup> So mostly literal copying. But there are two that are interesting, for our purposes.

We have had one Final Determination settlement related to a *craft!* Let's take a closer look.<sup>74</sup> Pinwheel Crafts created fairy silhouettes and registered them with the U.S. Copyright Office. The respondent, Mary L. Pettit, allegedly used Pinwheel's artwork and sold infringing products online. The CCB issued an order to Amend Noncompliant Claim. This happens a lot, giving us insight into what makes it over the basic threshold. In this case, the CCB was asking for proof of access and substantial similarity. And so, Pinwheel Crafts amended the claim.

We get a response from the respondent, Mary Pettit! She is making a non-protectable argument. There appears to be a check-box just for that "The portions of the work you used are not protected by copyright." She responds:

Fairy silhouettes of all types and in myriad styles and poses have been known long before Claimant's allegedly protected work was allegedly

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<sup>71</sup> Against an award of \$3000 in statutory damages to Joe Hand Promotions for copyright infringement. Here the claimant specializes in commercially licensing sporting events to commercial locations. Here the work was a boxing event that was televised, and registered as a copyrightable work. Claimant collects a licensing fee from establishments to show the event. Respondent had not gotten a license. The Board granted statutory damages as 3 1/2 times the licensing fee, or \$3000. Final Determination, Joe Hand Promotions, Inc. v. Arif Skyline Cafe, LLC, No. 22-CCB-0098, (Sept. 22, 2023), <https://dockets.ccb.gov/document/download/5151>

<sup>72</sup> Michelle Shocked files to CCB claims, one that she was awarded \$750 for and the other that should never have been filed. Michelle Shocked was awarded \$750 in statutory damages for copyright infringement. Shocked is the copyright holder of a musical work and sound recording, both titled "Anchorage." Part of the song was played with authorization on an online show "Get Off My Lawn." Respondent asserted a fair use defense. The Board did not find fair use, and awarded the minimum in statutory damages of \$750. Final Determination, Shocked v. McInnes, No. 22-CCB-0263, (Feb. 8, 2024), <https://dockets.ccb.gov/document/download/6941>. Shocked filed a second CCB claim against James Billington. This one is more complicated. Someone bought at Goodwill a bootleg copy of Shocked works for a \$1, and resold it on eBay for \$13.95. She filed a claim against Billington. The Board found that this claim should not have been filed. Had the Claimant been represented by an attorney, the Board would have found bad faith and be made to pay Respondent's costs. But she was filing *pro se*. Final Determination, Michelle Shocked v. James Billington, (April 3, 2024). This is an example of more information being available to understand copyright (and the first sale doctrine) for *pro se* applicants.

<sup>73</sup> The first final determination was a Section 512(f) misrepresentation claim where respondent filed a knowingly false takedown notice to Google. At a settlement, the Respondent conceded that he did that, and promised not to do that again, and would inform Google. Final Determination, Michael Flores v. Michael Mitrakos, No. 22-CCB-0035, (Feb. 15, 2023), <https://dockets.ccb.gov/document/download/2124>.

<sup>74</sup> Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

made “visible online” in 2018. As just one universally famous example, Disney’s Tinker Bell from the 1950s Peter Pan movie (based on a 1904 book replete with fairy images that is now in the public domain) has long been depicted in silhouette form in every conceivable pose for decades, including the bun hairstyle, pointed wings, wispy bangs, long eyelashes, short pointed skirt, and other allegedly expressive elements depicted in Claimant’s allegedly protected and allegedly infringed work.<sup>75</sup>

This is thrilling!

The Pinwheel Copyright art image consists of approximately 23 separate silhouettes (e.g., crescents, stars, butterflies, mushroom, rabbit, grass, fairies), the vast majority of which do not appear anywhere in the allegedly infringing low-resolution “Petit-ArtSprk Product” image, and most of which plainly are not protectable under copyright law because they are basic artistic elements in the public domain. Therefore, Respondent has plainly not “Reproduce[d] the work” as alleged.<sup>76</sup>

Again, a public domain and non-protectable image argument, and also the argument that the objects are different, not appearing in the claimant’s version.

Even assuming, for the sake of argument, that two of the dozens of images on Respondent’s artwork at issue are similar to two of the fairy silhouettes in Claimant’s allegedly protected work, they are not “identical fairy silhouettes” as alleged. Respondent’s artwork was created by a third-party supplier based in China, drawing on the vast existing body of fairy silhouette artwork in the public domain.<sup>77</sup>

The works are based on works in the public domain and maybe from a third-party supplier based in China! An independent creation argument? Or maybe China is responsible?

Fairy silhouettes of all types and in all poses are unprotectable under the scènes à faire doctrine in the genre of fairy artwork, because they constitute expressions that are standard, stock, and common to the particular topic of fairy artwork and that necessarily follow from the common theme or setting of fairy artwork. Claimant may not claim

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<sup>75</sup> *Id.*

<sup>76</sup> Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251,, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

<sup>77</sup> Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

ownership of the entire genre of fairy silhouette artwork, as alleged. Even fairies with filigree wing patterns in all styles and poses have been known long before Claimant's earliest allegation in 2018 when the allegedly protected work was allegedly first "visible online." Fundamentally, Claimant's allegedly protected and allegedly infringed work so completely lacks creativity that it should not have copyright protection.<sup>78</sup>

And the *scènes à faire* doctrine argument. This is a genre: fairy art. And one person can't claim it as their own.



*Pinwheel Craft version*



*Petit-Artwork Spark's version*

<sup>78</sup> Final Determination, *Pinwheel Crafts v. Mary L. Pettit*, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

So, what happens? We don't know exactly what happened, but the respondent, Mary, seemed to have caved.<sup>79</sup> In this case, the CCB didn't seem to have to engage in a copyright infringement analysis.<sup>80</sup> Here is what we know:

**RE: 22-CCB-0251, Pinwheel Crafts LLC v. Pettit**

The parties have settled this matter and jointly wish the Board to dismiss the claims with prejudice. The parties jointly request that the Board issue the following settlement terms within a final determination:

**1. Counter-Notices Removal and Communication with Amazon:**

a. Mary Pettit agrees to promptly request the removal of all counter-notices and appeals against Pinwheel Crafts LLC and provide a copy of this request to Amazon via Brand Registry. All correspondence with Amazon regarding this matter shall be copied to [elaine@pinwheelcrafts.com](mailto:elaine@pinwheelcrafts.com).

b. Mary Pettit will confirm that the infringing ASINs are B09NXLDTVF, B08HLHQ448 and recognize that the existing silhouettes infringed upon Pinwheel Crafts LLC's copyright VA2319579.

**2. Copy of Signed Letter to Amazon:**

a. Mary Pettit agrees to promptly provide Pinwheel Crafts LLC with a copy of the signed letter to Amazon, confirming the removal of counter-notices and appeals and any related actions.

**3. Image Removal from Retailers:**

a. Mary Pettit agrees to immediately remove all images and listings related to the copyrighted material from all online retailers, including but not limited to Amazon, as well as any brick and mortar retailers, if applicable.

So, despite the arguments of non-protectable, public domain and scènes à faire, Mary was convinced that her works were infringing. One wishes for a larger analysis. But we see the arguments being made. The question, for me, was how did Mary Pettit get there after the strong response? And what role did the CCB play in getting to this outcome?

There was a second Final Determination that focused on the use of snippets from an Andrew Dice Clay comedy special as part of a documentary. What is important is that the Board did a traditional fair use analysis, and found fair use. Why this is important is that it is the first indication of how the Board would apply the body of copyright law in a fair use setting.<sup>81</sup> And it was very heartening to see.

<sup>79</sup> See 2023 Settlement, Pinwheel Crafts LLP v. Pettit, 22-CCB-0251, (Oct. 18, 2023) <https://dockets.ccb.gov/document/download/5528>.

<sup>80</sup> *Id.*

<sup>81</sup> Yes, it happens. On March 8, 2024, the Board found for the respondent Store on Sunset. Comedy Spotlight Productions had filed a copyright infringement claim related to a forty-six minute long comedy routine, "One Night with Dice.", a special performed by Andrew Dice Clay in 1986. The Comedy Store created a documentary, where 18 seconds is used from the performance, one five second clip and the other, 13 seconds. The Board found fair use. The Board found that while it was for a commercial movie, the movie was a documentary, and that it was commenting and criticizing and not using it for the original entertainment purpose. The clips were looking at specific examples of homophobic

*C. How Helpful is the CCB? Issues in Using the System*

So, all along, there has been a call for a system to be used that is inexpensive and accessible without lawyers. Have they succeeded? We won't know for a while. The statistics show that we may have a few problems to iron out. But for now, I don't think the resources for makers and creators to understand the system are going far enough. My worry for the quilters near to my heart and other artists trying to figure out the system is real. Let's look at two resources: the Claimant Information Section of the CCB website and the CCB Handbook.

*1. Claimant Information*

Claimant information has two sets of categories: "information before filing the claim" and "what happens next." My concern at the moment is how to know when you should file a claim—that is, when is the work you have been creating actually protectable? So, let's look at the "what" category. Here, the CCB suggests that you need to determine which category your work belongs, and gives a one sentence example for each.<sup>82</sup>

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material that caused Clay's downfall. The first factor went to the respondent; the second factor normally would go to the claimant as a creativity work, but because of its transformative nature, the Board found it neutral. The third factor, amount taken, weighed in favor of fair use. The fourth factor, effect upon the market, notes no impact on the market. Fair use prevails!!! And I say, thank goodness. This is standard fair use analysis for documentary films' use of copyrighted materials. It would have been horrid had it gone the other way. Final Determination, Comedy Spotlight Productions, Inc. Store on Sunset, No. 23-CCB-0035, (March 8, 2024), <https://dockets.ccb.gov/document/download/7431>.

<sup>82</sup> *Claimant Information*, COPYRIGHT CLAIMS BD., <https://ccb.gov/claimant/> (last visited Jul. 26, 2022).



### Types of Works

First, you will need to determine the copyright category of the work of authorship involved in your dispute. These categories include:

- Literary, musical, and dramatic works
  - Examples include fiction or nonfiction stories, poems, textbooks, and computer programs.
- Sound recordings and musical works (including any accompanying words)
  - Examples include recorded songs, spoken words, or instrumentals and notations on sheet music. The [handout Musical Works, Sound Recordings & Copyright](#) explains the difference between a musical work and a sound recording.
- Pictorial, graphic, and sculptural works
  - Examples include photographs, paintings, drawings, sculptures, jewelry, maps, charts, and models.
- Motion pictures and other audiovisual works
  - Examples include movies, television shows, videogames, webinars, and television or computer advertisements.
- Dramatic works
  - Examples include plays, musicals, and operas.
- Pantomimes and choreographic works
  - Examples include a related series of dance movements, but not a single dance move, social dance steps (such as ballroom dances, folk dances, line dances) or simple routines.
- Architectural works
  - Examples include includes building design, but not individual standard building features.

Would a quilter whose pattern has been copied (text, images and templates in a small booklet) know that it is a literary work, rather than a pictorial, graphic and sculptural work? What about someone who created a one-page comic? What happens if someone gets it wrong? Why do they need to choose a type of work? Would that be sorted by the required registration? This is just not enough information, in my opinion. It's the rhetoric of the Copyright Office. But it doesn't stand in the shoes of the user.

Then, in just a few sentences, they write: "Please note that copyright protects only original works of authorship. This protection does not extend to any idea, concept, system, or process embodied in a work, as opposed to the expression used to describe them. Copyright also does not protect names, titles, short phrases, or slogans."<sup>83</sup> That's it. No explanations. Nothing specific for musicians or artists. Certainly nothing for crafters or quilters. They do cite two circulars, "Works not protected by copyright" and "Copyright basics."<sup>84</sup> But again, someone must know they need to go there and then process the general information. The same is true of the page claimants are sent to for Section 512, which includes a chart, but is

<sup>83</sup> *Id.*

<sup>84</sup> U.S. Copyright Office, *Circular 1 Copyright Basics*, U.S. COPYRIGHT OFFICE (Sept. 2021), <https://www.copyright.gov/circs/circ01.pdf>.

not specific to their needs.<sup>85</sup> Perhaps more will be added later, but we have no way of knowing. The explanation of fair use is most egregious, as it merely sends them to the Fair Use Index without an explanation.<sup>86</sup> The Fair Use Index is a database of summaries of fair use cases.<sup>87</sup> And while a lovely resource at the Copyright Office, it does not explain or walk through fair use at all. Again, all of this could be temporary—maybe they are planning to expand the explanation portion of the website, but at the moment makers need more. These are not materials designed with the claimant in mind.

This is true for the registration information section as well. The most troubling portion is the “Identifying the Type of Claim.” Here they have one paragraph each that incorporates very little information.

**Identifying the Type of Claim**

The CCB is able to hear three types of copyright disputes:

**Copyright infringement claims.** Copyright infringement occurs when a copyrighted work is reproduced, distributed, publicly performed or displayed, or made into a derivative work (such as a translation of a book or its adaptation into a movie) without the permission of the copyright owner, if the use does not qualify for an exception, such as [fair use](#).

**Claims seeking a declaration of noninfringement.** A party accused of infringement (who has received for example, “cease and desist letter”) can file a claim seeking a ruling from the CCB that its actions do not infringe copyright. This could be useful if a party is worried about continuing a project under the threat of litigation and wants clarity about the validity of the copyright owner’s rights or the application of an exception.

**Claims regarding misrepresentations when filing a “takedown” notice or a counter-notice under the DMCA.** The Digital Millennium Copyright Act (DMCA) establishes a “notice and takedown” system for removing infringing content from the internet. Under this system, a copyright owner can send a “takedown” notice to an online service provider (such as a content-sharing website) describing material that someone has posted through the online service without the copyright owner’s permission. To avoid potential liability, online service providers follow specified procedures when they receive these notices, as well as when they receive counter-notices seeking the re-posting of the allegedly infringing material. The DMCA also provides that senders of either a notice or a counter-notice may be liable for damages if they knowingly make misrepresentations. Visit the [section 512 page](#) for additional information about the law and the “notice-and-takedown” procedure.

[Determining What Relief to Request](#)

So, maybe the handbook will be more helpful? Let’s take a look.

<sup>85</sup> U.S. Copyright Office, *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/512> (last visited Jul. 26, 2022).

<sup>86</sup> U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE (Jun. 2022), <https://www.copyright.gov/fair-use>.

<sup>87</sup> *Id.*

## 2. The Handbook

### Copyright Claims Board Handbook



The Copyright Claims Board Handbook is the practice manual for the CCB, a voluntary and virtual tribunal. The Handbook provides an in-depth and authoritative resource for filing, responding to and opting out of claims, seeking assistance with your claim, and more.

You can refer to the Handbook resources at any point throughout the process of filing or responding to a claim or a proceeding. If you have a particular question not addressed by the Handbook, you may also reference our [FAQs](#) or reach out to us at [asktheboard@copyright.gov](mailto:asktheboard@copyright.gov).

*Additional handbook resources will be posted here as they become available, and you can [subscribe for email updates](#).*

**Chapters**

1. Introduction
2. eCCB
3. Starting a Claim
  - a. Starting an Infringement Claim
  - b. Starting a Noninfringement Claim
  - c. Starting a Misrepresentation Claim
4. Smaller Claims
5. Representation
6. Compliance Review
7. Unsuitability
8. Service
9. Opting Out
10. Active Phase
11. Response
  - a. Infringement Response
  - b. Noninfringement Response
  - c. Misrepresentation Response
12. Counterclaims
13. Expedited Registration

Let's look at "Starting an Infringement Claim." Again, we are trying to see how much information the Copyright Office provides for claimants to sort out if they *actually have a claim*, including whether what they are upset about is protected by copyright. Here they go into a little more detail about Section 106 (one example for each of the rights). But there is *nothing* about what constitutes copyright, non-protectable items, the public domain, idea/expression, first sale, etc. And certainly nothing on ownership, licenses, fair use or contracts. It's like "you have all of these rights..." but it doesn't define *what counts under copyright to receive* the rights, or any limitations to those rights. That is presumed. That's what I was afraid of.

The claimant is given a drop-down menu to provide the list of wrongs, among other information. I have not seen anywhere where they disclaim what is not protected, or any underlying or derivative works, and certainly not that they are using a public domain work. Is this left up to the respondent to identify? Who carries the burden of proof that they have created a copyrightable work? Someone suggested that the registration process would sort it all out. But that's not what the registration system has done in the past. At what stage is the work evaluated?

### D. Monitoring the CCB: The Problem of Claim Noncompliance

Because the CCB has made its data publicly available, we see a lot of analysis of the claims and process right now. My favorite is a weekly data review by (our

own) Katie Fortney, available at <https://bibliobaloney.github.io/#about>.<sup>88</sup> We see from the data that most cases are infringement cases.

For example, on February 2, 2024, there were forty-one active cases, with thirty-nine infringement cases, one noninfringement, and one Digital Millennium Copyright Act (DMCA) misrepresentation. Of the forty-one cases, twenty-one were not represented by attorneys. Over half of the cases do not have someone to explain the CCB process. Of the current forty-one open claims, thirty-one of them are waiting for the claim to be amended, which means they didn't fill out the claim form properly. This is a serious problem.

Open Cases	
Cases that have not yet reached the active phase, but also have not yet been dismissed/closed. For an overview of the steps between a claim filing and becoming active, see <a href="#">this flowchart at the CCB website</a> .	
Current status	
Status	Cases
Waiting for Amended Claim	31
Waiting for Scheduling Order/Expiration of Opt Out Window	28
Waiting for Proof of Service	25
In Abeyance	15
Waiting for Initial Review	10
Waiting for Review of Amended Claim	7

And from this data, almost forty percent of the cases dismissed were for failure to amend the claim. There are other problems, for sure, and understanding how copyright works is clearly one of them.

*E. We All Can Evaluate Copyrightability and Potential Infringement When We Understand Copyright*

Throughout the Just Wanna Quilt project, we have had a lot of questions in the Facebook group. We are, in a way, like our own informal CCB! But what is different is that we have developed a user community that understands the law *and the art/craft* in which the controversies sit. Here are a few scenarios that seem like they could have ended up at the real CCB. What this section is arguing is: 1) resources are needed that meet the maker where they are; and 2) communities develop standards and understandings of what is protectable and what is not, and how does that translate to spaces like the CCB? Let's look at some examples.

*1. Home Depot and the Purloined Hexagons, and Public Shaming.*

A quilt designer posted about her experience with Home Depot and their design team. She posted:

<sup>88</sup> See generally Fortney & Hansen, *supra* note 42.

**Modern Handcraft**

January 26, 2019 · 🌐

I like to share this every year or so just to remind people how terrible of a company @homedepot is for ripping designers off. On the right is my geometric rainbow quilt and on the left is their modern paint color brochure. Call me crazy.... but it's a bit too similar for my taste. I mean - the missing hexagons / angle / color flow 🙄  
@concretecottage has a whole list of designers that have been copied by Home Depot on her stories today.  
Shame on you @homedepot!!!

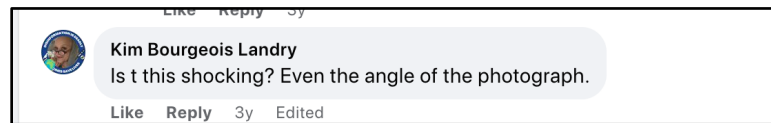
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What is interesting is that this was the extent to the conflict. She did not register her work with the U.S. Copyright Office, and did not pursue the grievance. When I reached out to her, the response was: “Hi there! I sadly didn’t do anything to resolve the issue since it’s such a large company - I figured it would be too much hassle. If I can’t afford to sue them, publicly getting the word out is even better. Actually I have no clue about suing them or anything past that -

<sup>89</sup> Modern Handcraft, *Just Wanna Quilt*, FACEBOOK (Jan. 26, 2019), <https://www.facebook.com/groups/justwannaquilt>.

because I didn't really actively try anything. I did get an email from a marketing person who I am sure is in charge of their Instagram. Pretty much stated that they love working with people etc. let me see if I can track that down as well." I think this is typical. Outrage. And yet, without any idea what to do about it or how to evaluate the situation. In our *Just Wanna Quilt* Facebook group, there was great discussion about this controversy. Kim Bourgeois Landry's comment was typical:



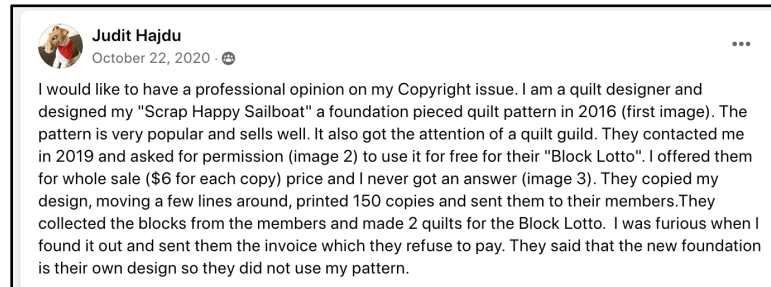
So, how would this play out at the CCB? Would Home Depot opt-out? Not necessarily. Many larger companies are not. Will artist and crafting communities see the CCB as a place of recourse, and what do we need to do to assist? What our quilter did was blast social media with the grievance, and many chimed in, told their own stories, and complained about big companies stealing. We see the public shaming in social media as a viable tool when there is nothing else. The court of public discourse: it may hold more sway. But does it impact Home Depot's behavior? Did they even know they were being shamed? Did they care? I think again about the photographers, getting three times their licensing fee. What would be the damage done for stealing a quilt design for a major advertising campaign? How would our panel at the CCB access this?

## 2. *The Property of Sailboats Shapes, or Public Domain Shapes Claimed by One and Offended by Others*

We see this a lot in quilting - someone takes very simple common blocks, puts them together, and then is offended when someone else does the same. The looking-only-forward effect. They don't stop and analyze where they gained their knowledge or that they have not produced anything that is copyrightable. Yet, they are outraged. This kind of claim seems to be ripe for CCB. The question will be: will the Board be aware that underlying works exist making the claim non-copyrightable, or alternatively, the offending work an independent creation? I think about to the silhouette fairy case. That wasn't the first time fairies had been made that way, but the claimant was able to convince the respondent that it was.

Here is another example. We had someone post this on the *Just Wanna Quilt* Facebook group, and I think the poster was surprised by the response. I, on the other hand, was very proud that our members applied their copyright knowledge, and got to the "right" answer.<sup>90</sup>

<sup>90</sup> Judit Hajdu, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt>.

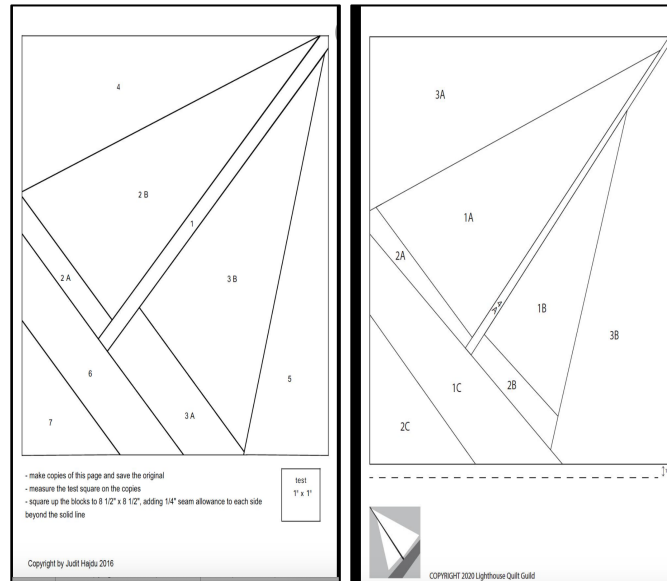


Our members weigh in: both those that have studied copyright, and many that have not.<sup>91</sup>

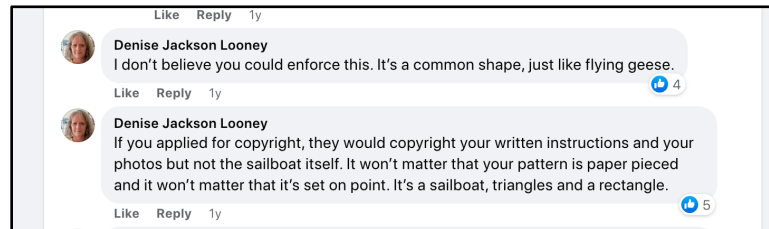


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<sup>91</sup> During COVID, we had a weekly copyright session, using a self-published book *Just Wanna Create*. We were supposed to meet for an hour on Saturday for a few weeks. We ended up meeting for two hours every Saturday for months.

*Original Work**Alleged Infringing Work*

The quilt world is made up of quilting blocks—standard blocks that everyone uses and agrees is in the public domain. The question here is when is something common, and when is it protectable. Here’s what Denise Jackson Looney wrote:<sup>92</sup>

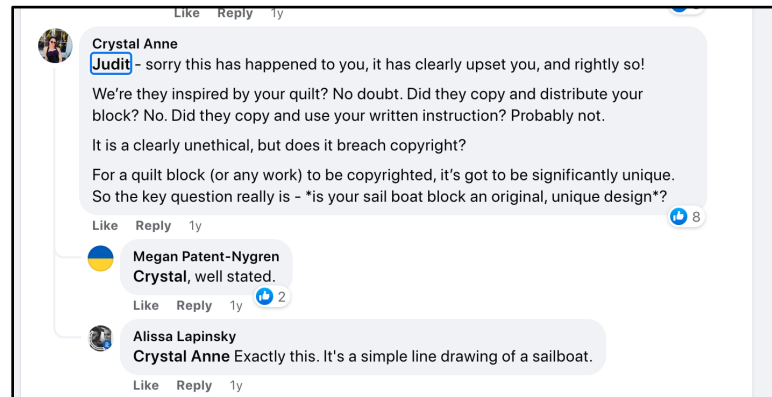


Here is another response by Crystal Anne:<sup>93</sup>

<sup>92</sup> Denise Jackson Looney, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt/>.

<sup>93</sup> Crystal Anne, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt/>.





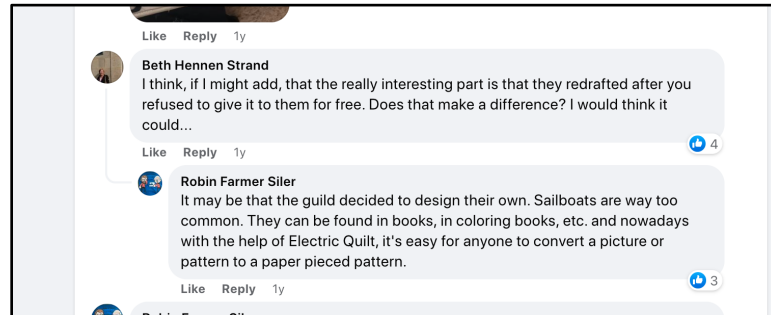
And more weighed in.<sup>94</sup>



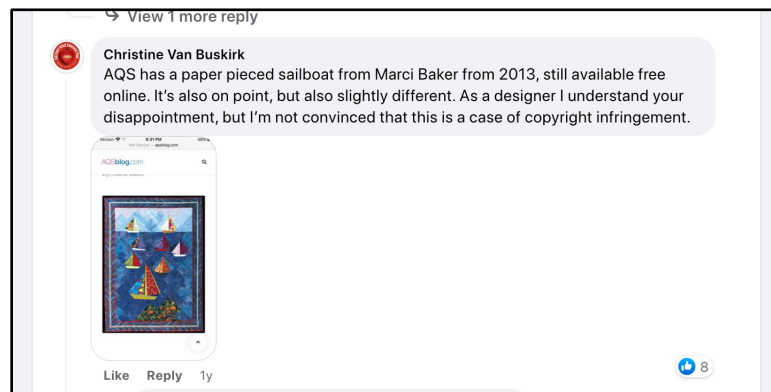
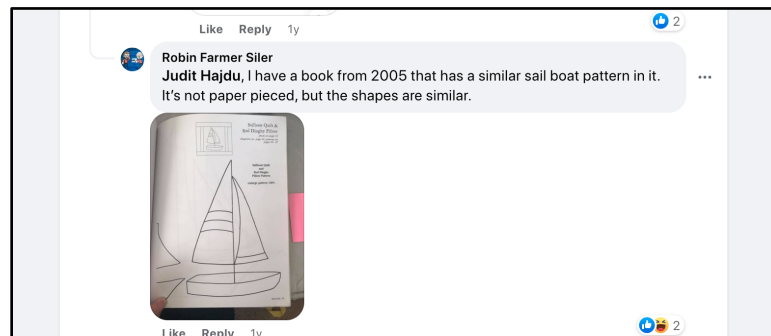
I was a proud mama with these conversations. They understand how copyright law works. But we've been discussing this for a number of years, including Copyright Camp, podcasts about copyright and quilting, and discussions like this everyday. They understand how copyright works.<sup>95</sup>

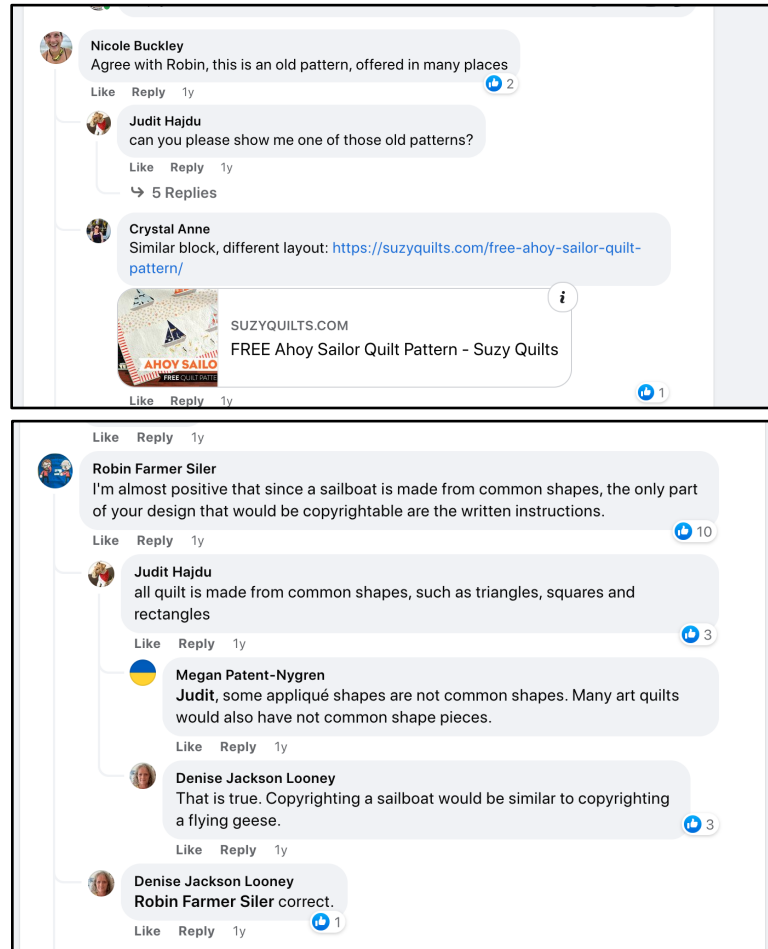
<sup>94</sup> Robin Farmer Siler, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt>.

<sup>95</sup> *Id.*



And then the conversation turned to seeing if they could find similar patterns of sail boats. They were doing their homework. Will the CCB? Who will do this part of the work? Would they assume the sailboat pattern was actually the claimants? Will it be another silhouette fairy case?





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There are no third party experts at hand as part of the CCB system, unless you count the legal team evaluating the initial claims coming in.<sup>97</sup> How will they know when a sailboat is protectable and not? They need their own quilting army, don't they? How do we communicate this level of conversation to claimants? I think this sailboat example is fairly simple. But we have already seen the *Boisson* court get it wrong with quilts.<sup>98</sup> How will they know that a more complicated pattern, like a Mariner's Compass or Double Wedding ring is something everyone knows and uses?

<sup>96</sup> *Id.*

<sup>97</sup> *About the Copyright Claims Board*, in CCB HANDBOOK 1, 8 (2024).

<sup>98</sup> *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

*F. Damages*

One other key element. The message the CCB is sending is “Don’t think this is a cash cow.” The damages can be up to \$15,000, but so far have been closer to \$3,000. The average damages award has been around \$2,000. The damages are based on data about licensing, whether the registration was timely (whereafter statutory damages could be applied), and the differences between actual damages and statutory damages. The message being sent is that filing with the CCB is not an automatic windfall of \$15,000. And, it costs money to file—at least \$100-200 (the claim itself and registration if not already registered), plus the cost of service of process. Will this act as a deterrent? I imagine it will for my quilters. But that also may help us understand the stakes, and also the small margins of profit. They just can’t afford to take the chance, even at this level. And maybe that’s okay.

*III. ENTER ANDY WARHOL*

As part of the conversation with the quilters, we often hit on the question of fair use. There’s a lot of talk about fair use, and how to use fair use within their work. This used to be a complicated conversation. But I think in some way, *Andy Warhol* simplifies it; at least for the makers that I know. Taking a photograph and using it in the same manner as the original will not be fair use. What about use as reference photographs? You have to be careful. Bisa Butler was careful, using only public domain images. *Andy Warhol* makes that ever more present. The other aspects of fair use still apply, of course, and that’s important for so many makers.<sup>99</sup> *Andy Warhol* provides greater teeth for using a photograph without permission. We have seen cases after *Andy Warhol*. So, what is a quilter (or other artist) to do? Be aware of one’s use of others’ photographs—for reference, of the building. So, it will be interesting to see if the CCB get these post-*Warhol* cases, and how that impacts use of source images. Will there be a licensing fee found, three times the original licensing fee?

*IV. CONCLUSION: COMMUNICATING COPYRIGHT TO MAKERS*

This is not an essay about quilting, and yet it is about quilting. I am in my studio, quilting. I want to make my own fairy silhouettes. I want to play with a public domain boat. Creativity starts with ideas, but also with objects—photographs, shapes, others’ works. The law can help us understand the boundaries sometimes—think Compendium III and case law. There is a nuance here. But also not. And we learn that from *Andy Warhol*.<sup>100</sup> Don’t compete with

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<sup>99</sup> Sid Gard and I are doing just that with our forthcoming book, *JUST WANNA COPYRIGHT FOR MAKERS*, (C&T Publishers, expected December 2024). This is the second in the series, the first *JUST WANNA TRADEMARK FOR MAKERS*, (C&T Publishers, 2023), and a contracts book in the same series due out in 2025.

<sup>100</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

the original for the same reason in the same market. Just not cool. The photographers at the CCB feel that way.

My hope for the CCB is that the decisions and process help us as makers sort out just what copyright is and isn't. Can it be a non-precedent setting guidance? And what additional resources would be needed to help make the boundaries of copyright clearer to the general public who are engaged in making, borrowing, and stealing creative works? Maybe I'm pinning too much on the CCB, but a quilter can dream.

December 2023. I'm in Chicago again, and this time at the Museum of Contemporary Art, to see the art quilts of Faith Ringgold. These predate Bisa Butler's quilts by decades. They are paintings on fabric, often framed by quilt blocks. They are art. They are famous. They are so copyrighted. I stand in awe. They incorporate images, phrases and writings, and even other renditions of other (famous) paintings. Turns out there are quite a few lawsuits involving quilts. But that is for another day. Right now, I am in awe of seeing up close these masterpieces I've only seen in books. And she is incorporating images of people, famous old paintings, words, and so much more. And it makes me think of where we began, with the Bisa Butler show at the Art Institute.

Bisa Butler's amazing quilts seem like a long way away now—in this paper and in viewing them, and of course, in my nightly attempts at quilting. But she starts with a concept, technique, and images, and in this case, known public domain images. She builds art from fabric. There is no doubt that her work is a derivative of the original photographs. And they are beautiful. She was aware of copyright—she chose specifically public domain photographs. She understood copyright in her practice. But I am left, at the end of the day, with the question of how you explain all of these nuances to makers, to artists, to creators. What if she wanted to use images of copyrightable characters, of the Batmobile? What then? Would *Andy Warhol* legally preclude that? Would anyone care? No idea. And if a quilter takes the image of a famous character, person, or the Batmobile and makes that image into a quilt, will it matter? Likely not. Unless of course, it is one of the photographers that file claims at the CCB, or the quilter's quilt becomes commercially problematic. But again, that is for another day.<sup>101</sup>

Teaching artists how to understand their work in relationship to others is key. What are the rules of creation? How do they understand what the law allows and what it does not? In one of my first interviews for the *Just Wanna Quilt* project, a husband/wife quilting team (that made their income from their creative work) explained to me that they saw infringing activities on a spectrum: an economic spectrum, not degree of similarity.<sup>102</sup> They presumed that part. On one end was the innocent infringer, who didn't realize their errors. On the other was someone

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<sup>101</sup> Again, this is the subject of Sid Gard and Elizabeth Townsend Gard's piece for *University of Houston Law Review on Borrowed Fame*, forthcoming 2024.

<sup>102</sup> *Id.*

that had usurped a licensing deal with a major company, losing income. You measure both the substantial similarity and the economic loss. But the couple also didn't really spend time doing the work themselves on what they might be infringing, where they got their ideas, and whose feelings they might be hurting. I saw this a lot; I still do. Idea/Expression, infringement, potential economic loss, and hurt feelings are all tied together; however, they are also a two (or multiple) lane highway where oftentimes creators are just looking at who might have harmed them, and not where their ideas or expression originated.

So, what about the CCB? Will it help us understand the boundaries of creating? Not quite yet. The Board is upholding our principles on first sale and fair use. And we see that professional photographers can now impose a three times license fee for unauthorized use of their photographs on commercial websites. But we are still too early to know if makers and others will use it to sort out boundary issues.

So, time to head back to the quilt studio and ponder some more. Perhaps I'll try my hand using the techniques described in a video by Bisa Butler.<sup>103</sup> Or perhaps I'll make travel plans to see another quilt exhibit. I hear there's a really cool Stitchpunk Quilt exhibit at the New England Quilt Museum.<sup>104</sup> That might pose interesting copyright questions. I think I might make a version of a pixelated chicken from the video game *Stardew Valley*. (An original pixelated character that someone made a cross-stitch pattern of and is selling it on Etsy (I bought it) and now I'm making into a quilt.) Oh, there is so much more to explore in the quilting studio related to copyright.

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<sup>103</sup> Bisa Butler, *Process*, Scholastic, <https://www.youtube.com/watch?v=rqalw7jUlqk>.

<sup>104</sup> StitchPunk, New England Quilt Museum, <https://www.neqm.org/stichpunk-details>.

**PART III**

**OUT IN THE WORLD:  
ADMINISTRATIVE AND OTHER DEVELOPMENTS**

## COPYRIGHT OUT IN THE WORLD

We are bringing back our look around the world at recent cases, legislative, and administrative developments. We will be highlighting different areas of the world, and also trying to keep abreast of U.S. developments. From the first issue of the first Volume published in June 1953, cataloging the goings-on around the world was central to the mission. In fact, articles did not come into play until a few years later. Bijou Mgbodikwe<sup>105</sup> has graciously agreed to oversee this most important aspect of the Journal of the Copyright Society. In this issue, we look at developments in the U.S., Canada, and Mexico.

### *I. UNITED STATES OF AMERICA*

As of July 15, 2024

*Reported by* BIJOU MGBODIKWE

Note: for the U.S., we have not included recent cases, as that is a long list. We are focusing in this issue on legislative and administrative developments.

#### *A. Legislative and Administrative Developments*

##### *1. Legislative*

#### **U.S. Congress. House.**

H. R. 791. A bill entitled the “American Music Fairness Act of 2023.” Introduced on February 2, 2023; and referred to the Committee on the Judiciary. (118th Congress. 1<sup>st</sup> Sess.)

The bill would create a new public performance right for sound recording copyright owners for broadcast audio transmissions. Under the bill, terrestrial radio stations would now have to obtain a license to publicly perform sound recordings with the amount of the royalty they would have to pay to be determined by the Copyright Royalty Board (CRB) every five years. Radio stations that fall below certain revenue thresholds may be exempt from the CRB-established royalty rate and would instead pay a flat fee.

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<sup>105</sup> Bijou Mgbodikwe is senior policy counsel at the Entertainment Software Association, a trade association representing the U.S. video game industry, where she focuses on artificial intelligence policy, intellectual property policy, First Amendment, content moderation, and platform liability. She has also worked in the U.S. government in the U.S. Patent and Trademark Office and the International Trade Administration on international trade and intellectual property issues.



H.R. 1631. A bill entitled the “Protecting and Enhancing Public Access to Codes Act or Pro Codes Act.” Introduced on March 17, 2023. (118<sup>th</sup> Congress. 1<sup>st</sup> Sess.)

This bill provides copyright protection for privately-developed technical standards that are incorporated into a law or regulation. However, eligibility for protection attaches only if the applicable standards development organization makes the standard available on a free publicly accessible online source. The bill failed a vote under a fast-track procedure in the House but it may be voted on again this legislative session.

H.R.7228. A bill entitled the “Bolstering Intellectual Rights against Digital Infringement Enhancement Act or BIRDIE Act.” Introduced on February 5, 2024. (118<sup>th</sup> Congress. 2<sup>nd</sup> Sess.)

The bill would extend federal copyright protection to the design of golf courses by amending the definition of “architectural work” in Section 101 of the Copyright Act (17 U.S.C. 101) to include “the design of a course on which golf is played.”

#### *B. Administrative*

##### **U.S. Copyright Office.**

37 C.F.R., Part 210. Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act. Final rule. *Federal Register*, vol. 89 no. 131 (July 9, 2024), pp. 56586-56617.

The Copyright Office issued a final rule, effective August 8, 2024, on the application of the Copyright Act’s derivative works exception to termination rights to the blanket license established by the Music Modernization Act. The final rule also clarifies payee royalty distribution administered by the Mechanical Licensing Collective (MLC). While the rule becomes effective in August, compliance by the MLC is not required until the first distribution of royalties based on the first payee snapshot taken after October 7, 2024.

The Office commenced this proceeding after the MLC adopted a termination dispute policy that conflicted with prior Office guidance. The Office concluded clarifying the issues “would provide much needed business certainty to music publishers and songwriters” and “would enable the MLC to appropriately operationalize the distribution of post-termination royalties in accordance with existing law.”

37 C.F.R., Parts 201 and 202. Group Registration of Two-Dimensional Artwork. Notice of proposed rulemaking. *Federal Register*, vol. 89, no. 32 (Feb.15, 2024) pp. 11789-11798.

“The Copyright Office is proposing the creation of a new group registration option for two-dimensional artwork. According to the Office, this option will allow applicants to register up to ten works published within a thirty-day time period by submitting a single online application with a digital deposit copy of each work.” Each work must be a single two-dimensional pictorial or graphic work, so three-dimensional works and works containing multiple images will not be eligible for this option. A successful registration will cover each artwork as a separate work of authorship. The rulemaking comes in response to the Office’s recognition of challenges facing individual visual artists in registering two-dimensional artwork one work at a time, which may lead some artists not to apply for registration.

Periodic Review of the Designations of the Mechanical Licensing Collective and Digital Licensee Coordinator. Notice of Inquiry. *Federal Register*, vol. 89, no. 20 (Jan. 30, 2024) pp. 5940-5945.

The Copyright Office issued a notice of inquiry in January, as required by the Music Modernization Act (MMA), requesting public input on whether the Office’s “existing designations of the mechanical licensing collective and digital licensee coordinator should be continued.” In 2018, the MMA created a statutory blanket mechanical license for the reproduction and distribution of nondramatic musical works by digital music providers, including permanent downloads, limited downloads, and interactive streams. This new blanket license replaced the song-by-song “notice of intention” process for such uses. The MMA requires the Office to review these designations every five years, with the first review to begin in January 2024.

37 C.F.R., Parts 201 and 202. Group Registration of Updates to a News Website. Notice of proposed rulemaking. *Federal Register*, vol. 89, no. 2 (January 3, 2024) pp. 311-318.

In January, the Copyright Office proposed the creation of a new group registration option for frequently updated news websites. Because internet content is frequently updated, especially news websites, obtaining copyright registration for these types of works presents a challenge. The Office believes a group registration option would allow news sites to register their updates as a collective work with a deposit of “identifying material representing sufficient portions of the works, rather than the complete contents of the website.” On July 22, the Office adopted the final rule, which is largely identical to that proposed in January. The rule is effective immediately.

#### **Library of Congress. Copyright Royalty Board.**

Determination of Rates and Terms for Digital Performance of Sound Recordings by New Subscription Services and Making of Ephemeral

Copies to Facilitate Those Performances (NSS V). Notice of proceeding. *Federal Register*, vol. 89, no. 4 (Jan. 4, 2024) pp. 810-812.

On January 5, the Copyright Royalty Board announced the commencement of a quinquennial proceeding (known as NSS V) “to determine the rates and terms for the digital performance of sound recordings” by new subscription services and the making of ephemeral recordings to facilitate those performances for the period beginning on January 1, 2026, and ending December 31, 2030.” Under the Copyright Act, the Copyright Royalty Board is required to conduct this proceeding every five years.

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web VI). Notice of proceeding. *Federal Register*, vol. 89, no. 4 (Jan. 4, 2024) pp. 812-814.

On January 5, the Copyright Royalty Board announced the commencement of a quinquennial proceeding (known as Web VI) to determine the rates and terms for two statutory licenses permitting the digital performance of sound recordings over the internet by webcasters and the making of ephemeral recordings to facilitate those performances for the period beginning on January 1, 2026, and ending December 31, 2030. Under the Copyright Act, the Copyright Royalty Board is required to conduct this proceeding every five years.

#### **U.S. Department of Commerce. Patent and Trademark Office.**

On March 12, the Patent and Trademark Office and the Copyright Office (“Offices”) published the results of their joint study on the intellectual property law and policy implications of non-fungible tokens (NFTs) as requested by the then-Chair of the Senate Committee on the Judiciary Subcommittee on Intellectual Property, Patrick Leahy and Ranking Member Thom Tillis.

The Offices solicited public comments, held three public roundtables, and looked at existing case law. In their report, the Offices concluded that NFT technology is rapidly evolving and that any new laws specific to NFTs would be premature especially as the legal issues implicated are not novel ones. On consumer confusion about ownership of NFTs, the two agencies stated that those issues would be better addressed through education or consumer protection measures rather than through changes to copyright and trademark laws. Finally, the Offices said there would be no changes (based on either NFT or blockchain technology) to their respective agency registration or recordation practices.

#### **U.S. DEPARTMENT OF HOMELAND SECURITY. CUSTOMS AND BORDER PROTECTION**

19 C.F.R., Parts 113, 133, 148, 151 and 177. Enforcement of Copyrights and the Digital Millennium Copyright Act. Final rules. *Federal Register*, vol. 89, no. 121 (June 24, 2024) pp. 52364-52379.

On June 24, Customs and Border Protection (CBP) issued final amendments to CBP regulations pertaining to importations of merchandise that violate or are suspected of violating copyright law, including the Digital Millennium Copyright Act (DMCA), in accordance with Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The final rule, which becomes effective on August 23, 2024, expands access for rights holders to greater pre- and post-seizure disclosures of importation information by CBP at the border. Owners of existing recorded copyrights may submit a letter requesting such disclosures to the Intellectual Property Enforcement Branch of Regulations and Rulings at CBP.

#### **U.S. FEDERAL TRADE COMMISSION**

16 C.F.R., Part 1. Petition for Rulemaking of PIRG and iFixit. Notice of proposed rule. *Federal Register*, vol. 89, no. 2 (Jan. 3, 2024) p. 286.

On January 3, the Federal Trade Commission published a request for public comment on a petition it received from the U.S. Public Interest Research Group Education Fund (“US PIRG”) and iFixit. US PIRG’s petition requests that the FTC initiate a rulemaking to protect consumers’ right to repair products they have purchased. US PIRG is a federation of independent, state-based, citizen-funded public interest research groups while iFixit is a global community of people who help others repair their devices. Both organizations regularly participate in the triennial Section 1201 rulemaking at the Copyright Office, seeking expanded exemptions for device repair from the anti-circumvention prohibition in 17 U.S.C. 1201 of the Digital Millennium Copyright Act.

## *II. CANADA*

As of July 15, 2024

*Reported by* MACKENZIE STEWART<sup>106</sup>

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<sup>106</sup> Mackenzie Stewart is an associate lawyer at the Toronto office for the firm Cassels, Brock & Blackwell LLP. She works primarily in IP Litigation and has a background in regulatory and policy matters relating to copyright and cultural heritage law. Prior to joining Cassels, Mackenzie clerked at the Supreme Court of Canada, and the Federal Court of Appeal, and was legal counsel at the Department of Canadian Heritage. She has acted as counsel on matters before the Federal Court of Canada and the Canadian Copyright Board, and has advised on the drafting of copyright related legislation and policy.

A. Cases:

*GE Renewable Energy Canada Inc. v. Canmec Industrial Inc.*,  
2024 FC 322

The Federal Court of Canada has confirmed that copyright protection in Canada is governed by the Canadian *Copyright Act*, R.S.C., 1985, c. C-42, even where the work is created outside of Canada, as long as it is part of a Canadian employment agreement. This decision confirms that, when enforcing Canadian copyright in works, courts will determine authorship and ownership of copyright in accordance with the Canadian *Copyright Act*, regardless of the country the works were created in or whether the works were created under agreements that explicitly designate a foreign law as the governing law. While foreign employment agreements may qualify as an “agreement to the contrary” when determining the first owner of copyright under Canadian law, a choice of law or assignment clause may not be enough for that purpose.

*1395804 Ontario Ltd. (Blacklock’s Reporter) v. Canada*  
*(Attorney General)*, 2024 FC 829

The Federal Court of Canada reiterates that sharing limited news articles between a small number of government employees obtained through an individual paid subscription for the purposes of media monitoring constitutes “fair dealing” for the purposes of s. 29 of the *Copyright Act*. The Court also found that use by multiple employees of the same password to obtain access to a subscription would not constitute “circumvention” of a “technological protection measure” under ss. 41.1(1) of the Act, as the password was acquired and used for the purpose for which it was created, to gain access to articles.

*French v. Royal Canadian Legion (Dominion Command)*, 2024  
FCA 63

The Canadian Federal Court of Appeal affirms a Federal Court decision that found that a person cannot assert moral rights over a “useful article” that would not have copyright protection by virtue of s. 64(2)(d) of the *Copyright Act*, R.S.C., 1985, c. C-42. In doing so, the Court implicitly affirms that a stuffed toy animal reproduced in quantities of over fifty would be considered a “useful article” under the Act.

B. Legislative and Policy Developments:

Broadcasting Regulatory Policy CRTC 2024-121

Following the adoption of the *Online Streaming Act*, S.C. 2023, c. 8, which made sweeping amendments to the *Broadcasting Act*, S.C. 1991, c. 11, the Canadian Radio-television and Telecommunications Commission (CRTC) has begun the process of developing regulatory requirements for online streaming services

operating in Canada. The first of these will require foreign online streaming services that make \$25 million or more in annual contributions revenues and that are not affiliated with a Canadian broadcaster to contribute 5% of those revenues to various funds that will support the creation of Canadian media and Indigenous programming. This requirement is anticipated to take effect in September 2024.

#### Online News Notice of Consultation [CRTC 2024-143](#)

After the passing of the *Online News Act*, [S.C. 2023, c. 23](#), in June 2023 and the *Online News Act Application and Exemption Regulations*, [SOR/2023-276](#), in December 2023, the CRTC has launched a public consultation process to determine whether Google LLC (Google) meets the criteria for an exemption under Section 11 of the *Act* and the *Regulations*. The *Online News Act* was implemented by the Canadian government with the intention of creating a bargaining framework between news businesses and “online intermediaries”, as a way to contribute to the funding of Canadian news content. In December 2023, the Department of Canadian Heritage announced an agreement under which Google would contribute \$100 million to Canadian news businesses. Google has since reached an agreement with the Canadian Journalism Collective to distribute the funds and has applied to Canadian Heritage for an exemption from the Act. If Google is eligible for an exemption, the CRTC must determine how long the exemption order should last, up to a maximum of five years, which provisions of the Act Google should be exempted from; and if any conditions should be attached to the exemption order. Any party may submit comments with the CRTC until July 29, 2024.

### III. MEXICO

July 15, 2024

Reported by BIIOU MGBOSIKWE

#### The Protection of Traditional Cultural Expressions (TCEs).

In February, former president Lopez Obrador proposed an amendment to Article 2 of the Mexican Constitution that would have established copyright protection for an indigenous community’s TCEs, thereby obligating the federal and local governments to create a legal framework for protecting and enforcing these new rights. Indigenous communities would be considered copyright owners so any third-party uses would require consultation with and financial compensation to members of those communities in order to obtain a license.

Unconstitutionality Actions against the issuance of the amendments to the Federal Copyright Law of July 1, 2020.

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In July 2020, amendments to the Federal Copyright Law and the Federal Criminal Code entered into force, officially implementing copyright obligations set forth in Chapter 20 of the Agreement between the United Mexican States, the United States of America and Canada (known as the USMCA).

Article 20.88 of the USMCA obligated Mexico to implement in its domestic legislation a mechanism that provides internet service providers (ISPs) with legal incentives through a safe harbor in order to take down copyright infringing content, to adopt a mechanism of system of “notice” to rights holders, “takedown” of content and “counter-notice” to the user similar to that in the U.S.’s Section 512 of the Digital Millennium Copyright Act (known as notice-and-takedown). Mexico was also obligated to implement civil, administrative and criminal procedures against the circumvention of technological protection measures (TPMs) that protect access to copyrighted works.

On August 19, 2020, a non-governmental organization known as Article 19 filed an *Amparo* lawsuit (a constitutional challenge) alleging the unconstitutionality of the USMCA-based amendments to Mexico’s copyright law. Article 19 claimed that the new notice-and-takedown mechanism permitted censorship of content on the internet and violated the freedom of speech. After several procedural twists and turns over 4 years, on June 3, 2024, the Mexican Supreme Court of Justice sustained the constitutionality of the complained of provisions including notice-and-takedown, staydown, and penalties for violating TPMs.