A COPYRIGHT IGNORED: MARK TWAIN, MARY ANN CORD, AND THE MEANING OF AUTHORSHIP

by TIMOTHY J. MCFARLIN*

ABSTRACT

Did Mark Twain and the *Atlantic* infringe a copyright belonging to Mary Ann Cord in the story of how enslavers tore her family apart and how she was ultimately reunited with her youngest son? If so, might that long-ignored infringement be remedied today?

In 1874, Cord told Twain the heartrending and astounding story of how her family had been ripped from her, and how she was liberated years later by her youngest, Henry, who had become a soldier for the Union. Twain proceeded to write Cord's story down from memory, organizing the events chronologically, editing it, and describing how she told it. Twain published this manuscript in the *Atlantic Monthly* as "A True Story, Repeated Word for Word as I Heard It," for money, under his name alone.

Analyzing the questions above — Was this infringement? Could it still be remedied? — this project unfolds in two parts. This first part, "A Copyright Ignored," focuses on the thorny threshold issue of copyrightability, arguing that Cord was indeed an author who had a common-law copyright in the words she spoke to Twain.

The second part, "A Copyright Restored," published in the *Wisconsin Law Review*, tackles the issues of infringement and remedy, arguing that Twain and the *Atlantic* likely did violate Cord's rights and, further, that a claim by her descendants may still exist today. In this way, her case may

*Associate Professor, Samford University – Cumberland School of Law, © 2023. Thank you to my friends and colleagues at the IP Scholars' Roundtables at the Texas A&M University and the University of New Hampshire Franklin Pierce Schools of Law; the IP Mosaic Roundtable Conference; the IP Scholars Conference, Benjamin N. Cardozo School of Law, Yeshiva University; the University of Houston Law Center Intellectual Property Student Organization; the 2022 AALS Annual Meeting, "Bring the Noise: IP in Tumultuous Times" panel; my "Trouble Begins" lecture at Quarry Farm, hosted by Elmira College's Center for Mark Twain Studies; and the Cumberland faculty, particularly Dr. J. Mark Baggett, for their invaluable comments on this project. Further thanks to Dustin Marlan, Andres Sawicki, Kara Swanson, and Alfred Yen for their comments on drafts, as well as to the Cumberland Law Library, particularly Ed Craig, for help with my research. Dedicated to my mother, Kathy F. McFarlin, 1943–2017, who took me up the river as a boy to visit Hannibal and learn about Twain, and to my father, Lyle H. McFarlin, 1939–2022, a great storyteller in his own right. Thank you, Mom and Dad, for everything.

set a vital precedent for righting other longstanding wrongs, particularly those against the Black community.

Cord's case could set precedent in other ways, as well. The same key which unlocks her rights can help open us to a deeper understanding of authorship in copyright law. The answer to whether Cord — who it's said could neither read nor write and who never claimed to be an author — qualifies as one should tell us about more than just copyright's past.

Contrary to the views of many courts and scholars, I argue here that "authorship is as it does." It's not merely a self-conscious enterprise. It need not be limited to people like Twain, Austen, and Hemingway. It's for everyone, and the law should recognize that.

A note to readers regarding challenging language embedded in the historical record:

This Article quotes challenging language from the historical record that I would not have included if it were not necessary for the analysis. There is one particular word I do not quote — it is not necessary for the analysis — but it is included in the full "A True Story," to which I do include a link. For a thoughtful, personal, and powerful discussion of this difficult language as well as of Twain's portrayal of Cord in "A True Story" by a student who was studying the piece, see Alyssa Alexander's essay entitled "A True Story, Repeated Word for Word as I Lived It."[1]

TABLE OF CONTENTS

[1] 11 MARK TWAIN ANN., 113-17 (2013), https://www.jstor.org/stable/10.5325/marktwaij.11.1.0113.

I. INTRODUCTION

Picture, if you will, Mark Twain reclining on the porch of a stately, well-to-do New York home on a warm summer evening in 1874. There he regales a small group of family and household workers with an amazing story of an adventure he'd had when he captained a steamboat on the mighty Mississippi, one he'd never written down but could tell in vivid detail.

Imagine that one of those workers, struck by Twain's story, writes it down from memory soon thereafter. She organizes the events chronologically — Twain had started in the middle of the story and worked backward then forward from there — and frames the narrative as one told her by a former steamboat captain named "Uncle Jacob."

The worker submits the manuscript to the *Atlantic Monthly* with the title "A True Story, Repeated Word for Word as I Heard It." The *Atlantic* publishes it, paying her handsomely. Readers praise her for bringing out the voice and vernacular of the Mississippi steamboat culture. She later sends Twain a signed copy of the piece, inscribed with her "kindest regards," noting "the bit of personal history which he recounted to her."

Was this a violation of Twain's rights?

Pause here to mull over your initial reaction. If it's "yes," or "perhaps," then read on and consider whether there's a relevant difference between this hypothetical scenario and what Twain did in fact do with Mary Ann Cord's story, as summarized in the abstract above and detailed below.[2] If you think "no," still read on. You might be convinced otherwise.

Next consider three initial points. First, copyright can, under certain circumstances, protect the spoken word.[3] This is an oft-overlooked aspect of the law. While federal-law copyright attaches only to words fixed in a tangible medium — like pen and paper — an orally expressed work of authorship can be protected under state-law copyright, often known as "common-law copyright."[4]

Common-law copyright is a court-recognized — in effect court-created — body of law whose contours have developed case by case from the

---

[2] Mark Twain, *A True Story, Repeated Word for Word as I Heard It*, ATLANTIC (Nov. 1874); *see* infra Part II.

[3] *See infra* Part III.

[4] *Id.*

courts of England to the courts of each state in the U.S. today.[5] It is grounded in judges' recognition that an author should have the right to control the publication of her expression and have a corresponding remedy against someone who publishes it without her permission.[6] Federal copyright, by contrast, stems from the U.S. Copyright Act, a statute passed by U.S. Congress and interpreted by the U.S. federal courts.[7] Historically, federal copyright applied only to published works, but today it applies to all expression, published or unpublished, that has been fixed in a tangible medium either by the author or with her permission.[8] That state law may protect *un*fixed expression — like the words that came from Cord's mouth before Twain wrote them down — is a practical though challenging concept.[9]

Practical in that a copyist escaping liability simply because an author had yet to fix her expression would, I think, strike many as troublesome. In other words, if you tell me a detailed, original story before you write it down, should I be free to write and publish it word for word, without your permission, with credit and compensation to me alone?

Challenging in that issues of proof abound — what if the alleged copyist denies the charge and claims that the expression was original to him?

---

[5] Zvi Rosen, *Common Law Copyright*, 85 U. CIN. L. REV. 1055, 1057-58 (2018); HOWARD B. ABRAMS & TYLER OCHOA, 1 THE LAW OF COPYRIGHT § 8:12 ("Historically, the common law recognized the right of an author to control the first publication of an unpublished work.").

[6] *See id.* Though some commentators have argued that common-law copyright is essentially a myth — *see, e.g.*, Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L.J. 106 (2003); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983) — the concept has, regardless, taken root in U.S. copyright law in the form of protecting unpublished and, potentially, unfixed works of authorship. *See* Rosen, *supra* note 5 at 1057-58; 1 ABRAMS & OCHOA, *supra* note 5, at § 8:12; *see also* 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6:30 (2022) ("States, however, long protected unpublished works at common law before such protection was preempted by Section 301 of the 1976 Act. Even before the 1976 Act, however, state common-law copyright ceased at publication.").

[7] *See id*. The Act, in turn, falls under the authority granted Congress by the U.S. Constitution, article I, section 8, clause 8.

[8] *See id*.; 17 U.S.C. § 301(b) (preempting state law protection over fixed expression but expressly rejecting federal preemption over unfixed works); *id*. § 101 (fixation must be "by or under the authority of the author").

[9] *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (2022) (discussing the potential for state-law copyright to protect unfixed works and noting the relative lack of authority on the issue: one state, California, has passed a statute confirming such protection; another state, New Jersey, has decided against it as a matter of common law; and the rest of the states have either not addressed it or have discussed it without deciding); *see also infra* note 40 (citing numerous scholars discussing copyright's potential to protect unfixed works).

Courts are now placed in a position of "he said, she said" without written evidence to support the oralist's claim. It's further complicated by a legitimate concern for whether courts can effectively or efficiently distinguish between everyday conversation and works of authorship. We don't want copyright's nose poking into every chitchat.

But here such challenges are largely absent — Twain acknowledged the copying in the title he chose, "A True Story, Repeated Word for Word as I Heard It," in his letters to the *Atlantic*'s editor, and in his private notebook, as detailed below.[10] And, as also detailed below, Twain himself regarded Cord's story as a "literary work," not simple conversation.[11] This well-documented evidence of copying — as well as the esteem in which Twain held the substance of Cord's speech — make this an excellent case in which to further consider copyright's potential to protect the spoken word under certain, limited circumstances.

It's vital here to understand this potential, and missing it is likely why the possibility of Cord's copyright appears to have thus far been ignored. People seem to have presumed that because Cord had not written her story, Twain was free to write and publish it without her consent.[12] But the law is more interesting and nuanced than that. Exploring and applying the nuances here, I ultimately conclude that Cord likely did have a copyright in her story under the common law of New York, the state in which she lived, worked, and told her story to Twain.[13] And as further detailed in this project's second part, "A Copyright Restored," because copyright infringement is a so-called "strict-liability" offense, using Cord's expression without her permission would violate the law even if Twain and the *Atlantic* did not think her expression protected.[14]

---

10 *See infra* Part II.

11 *See infra* note 47 and accompanying text.

12 *See* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS, 66-69 (2001) ("Who is the author of the piece? Copyright law affected only expressions fixed in print. So legally, Cord had no legal claim to authorship."). Further, Professor Vaidhyanathan's discussion of Twain and Cord distinguishes between piracy (total copying for non-artistic, for-profit purposes, which is almost always deemed copyright infringement) and plagiarism (ethically questionable copying, typically without attribution, though generally not legally actionable), suggesting that Twain's use of Cord's story was at most plagiarism. *Id.* at 69. Certainly there is a difference between piracy and plagiarism. *See* Richard A. Posner, *On Plagiarism*, ATLANTIC (Apr. 2002); *see also* RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM (2007). But there's also much space in between them. *Id*. In my view, and as detailed in "A Copyright Restored," *infra* note 14, Twain's use of Cord's story falls within that space. And a large part of that space involves acts the law deems infringing.

13 *See infra* Part III.

14 *See* Timothy J. McFarlin, *A Copyright Restored: Mark Twain, Mary Ann Cord, and How to Right a Longstanding Wrong*, 2023 WIS. L. REV. 45. Now, had Twain

A second initial point: while my focus is on the law, I acknowledge the challenging historical and cultural issues raised by this analysis. Making twenty-first century judgments on Twain and the *Atlantic* for their nineteenth-century conduct is a fraught enterprise. But I do think we can explore the possibility that Twain and the *Atlantic* ignored Cord's rights, likely at least in part because she was a Black[15] household worker who

---

and the *Atlantic* simply published the facts of Cord's life — even without her permission — they would not have infringed any copyright belonging to her. *Id*. This is because copyright does not properly protect facts. Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991). But it does protect "subjective descriptions" of those facts, "whose power lies in [the author's] individualized expression." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985). Consider an example of the unprotected facts of Cord's story:

> I stopped and didn't move. I stared at the soldier. The pan in my hand trembled. I suddenly realized he was my son. The pan fell. I took his left hand and pushed back his sleeve. Then I pushed back his hair.

and an example of how Cord subjectively described those facts:

> I jist stopped right dah, an' never budged! jist gazed, an' gazed, so; an' de pan begin to tremble, an' all of a sudden I knowed! De pan drop' on de flo' an' I grab his lef' han' an' shove back his sleeve,—jist so, as I's doin' to you,—an' den I goes for his forehead an' push de hair back . . . .

See infra note 87 and accompanying text. Because Twain admittedly copied the latter version — what he called the "clear, compact & coherent" way that Cord described what happened to her, *see infra* notes 47, 100, and accompanying text — he copied something potentially protected by copyright, as further analyzed in Part III *infra*.

Beyond copyright, the question of whether the private facts of Cord's life could otherwise be protected — specifically by the related common-law rights of privacy and publicity — is addressed in a separate essay. *See* Alyssa DiRusso and Timothy J. McFarlin, *Identity Appropriation and Wealth Transfer: Twain, Cord, and the Post-Mortem Right of Publicity*, 48 Am. Coll. Trust & Estate Counsel L.J. 41 (2022).

[15] Regarding the capitalization of "Black," see, e.g., Brian Garner, *LawProse Lesson 373: On Capitalizing "Black" but not "white,"* https://lawprose.org/lawprose-lesson-373-on-capitalizing-black-but-not-white/, in which he explains well that

> [m]ost white people in North America can and do identify themselves as Irish, Scottish, English, French, German, Scandinavian, Italian, etc. The only people who think of a generic "white identity" tend to be white supremacists, who routinely capitalize the word white. [Many] Black people, however, cannot identify themselves as descending from the people of Gambia, Ivory Coast, Senegal, Sierra Leone, etc. Part of the centuries-long slave trade involved forcibly stripping Black people of their original cultures — their traditions, their customs, their languages, and their beliefs. When African people were violently uprooted from their ethnically diverse continent, their heritage was purposely and systematically obliterated. So capitalizing Black merely recognizes that their descendants in the Americas have a shared experience — a certain commonality that transcends any particular African culture and includes all that has happened for many generations.

apparently did not read or write,[16] while at the same time acknowledging that much good came from "A True Story." It aroused an empathy in Twain's audience for the pain and pride of those who endured the evils of slavery.[17] It continues to do so today, both in its own right and through its influence on Twain's most famous work, *The Adventures of Huckleberry Finn*.[18] This is always a tension in copyright: violations can lead to beautiful art, or as the saying goes, "Good artists copy. Great artists steal."[19]

Further, while I raise both here and in "A Copyright Restored" how issues of race and gender apply in Cord's case, I am mindful of my limitations in understanding and fully exploring those issues. I humbly hope that I am at least treating them respectfully and bringing them to the attention and further discussion of other scholars with an expertise I do not possess and experiences I haven't lived, such as the authors cited in this piece. *See, e.g., infra* notes 235 and 264.

16 The scholarship on Twain and Cord refers to Cord as illiterate, *e.g.*, Sherwood Cummings, *The Commanding Presence of Formerly Enslaved Mary Ann Cord in Mark Twain's Work*, 34 MARK TWAIN J. 22, 22 (1996), but this appears to be a presumption without affirmative evidence, as best I can tell, such as one of her descendants saying that she was in fact so. Further, the census records of the time, which may have noted whether Cord was considered literate, appear to no longer exist. *See New York, U.S., State Census 1875*, ANCESTRY.COM, https://www.ancestry.com/search/collections/7250/ (noting the unavailability of the 1875 Census records for Chemung County, where Cord resided); *see also New York State Census Records*, NEW YORK STATE LIBRARY, https://www.nysl.nysed.gov/genealogy/nyscens.htm (showing same).

Moreover, given the formal and informal prohibitions on education in the antebellum South, with literacy often expressly barred, there is a solid a basis for the presumption that Cord could not read or write. Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 102 (1991) ("Through the middle of the nineteenth century, anti-literacy laws effectively denied any education to most Black people in the United States. Even states without laws prohibiting the education of non-white children did not recognize any obligation to educate those children in free public schools."); Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools As A Matter of Justice*, 11 MICH. J. RACE & L. 419, 475 (2006) ("Penalties for violating the anti-literacy laws included whippings, imprisonment, and fines. Masters threatened slaves who wanted to read with the loss of limbs or fingers.").

17 *See, e.g.*, Deborah A. Lee, *Love and Debt: A True Story of Mary Ann Cord, John T. Lewis, and Mark Twain at Quarry Farm*, 54 MARK TWAIN J. 97, 106-07 (2016).

18 SHELLEY FISHER FISHKIN, WAS HUCK BLACK? MARK TWAIN AND AFRICAN-AMERICAN VOICES 7-9 (1993) ("Throughout his career as a lecturer and as a writer, Twain aspired to have the effect upon his listeners that speakers like Frederick Douglass and Mary Ann Cord had upon him . . . . My goal is to foreground the role previously neglected African-American voices played in shaping Mark Twain's art in *Huckleberry Finn*.").

19 The saying has been recently popularized by Steve Jobs, *see* Clark D. Asay, *Patent Schisms*, 104 IOWA L. REV. 45, 72 (2018), but it apparently goes back in one form or another to Pablo Picasso, T.S. Eliot, Igor Stravinsky, Lionel Trilling, Wil-

Must we treat great-but-infringing art as the fruit of a poisonous tree, to be spat instead of savored?[20] I think not, but neither does it mean we should ignore the violation. In other words, we can still honor Twain and "A True Story," and indeed I believe we honor them more deeply, by exploring their complexities.

One such complexity is Twain's strongly pro-copyright mindset, one that's challenging to reconcile with his apparent failure to consider the possibility of Cord's copyright. For example, nearly five years before he heard and copied Cord's story, Twain rebuked a newspaper hoping to publish one of his lectures: "I said my lecture was my property, & no man had a right to take it from me & print it, any more than he would have a right to take away any other property of mine."[21] However, even though Twain believed that the law *should* protect his spoken lectures, he may not have realized, at least at the time, that it likely *did*.[22] That lack of realization

liam Faulkner, and maybe more. *See* Debra L. Quentel, *"Bad Artists Copy. Good Artists Steal.": The Ugly Conflict Between Copyright Law and Appropriationism,* 4 UCLA ENT. L. REV. 39, 80 (1996).

[20] *See* Mark A. Lemley, *The Fruit of the Poisonous Tree in IP Law*, 103 IOWA L. REV. 245 (2017).

[21] Letter from Mark Twain to his wife, Olivia L. Langdon (Oct. 31 or Nov. 1 1869), *in* 3 MARK TWAIN'S LETTERS, 1869 (Victor Fischer and Michael B. Frank, eds.) (1992); FRED W. LORCH, THE TROUBLE BEGINS AT EIGHT: MARK TWAIN'S LECTURE TOURS 106-07 (1966).

[22] This could have been a significant factor in why he did what he did with Cord's words. For instance, in the same letter to his wife quoted above, he further wrote that "although the law protects rigidly the property a shoemaker contrives with his hands, it will not protect the property I create with my brain." *Id*. Twain may have distinguished between a pre-written lecture performed orally versus purely oral expression. Part III discusses their potential different treatment under the law. But Twain was often known to improvise. *See* Mary Griffin, *Review, Mark Twain on the Lecture Circuit*, *by Paul Fatout*, https://twain.lib.virginia.edu/07twain/griffin.html. Any improvised parts of his lectures would, like Cord's words, be considered purely oral and therefore be subject to either the same protection or lack thereof under the law.

Further illuminating what Twain thought about the protectability of the purely spoken word is an 1872 letter to his wife. *See* 5 MARK TWAIN'S LETTERS, 1872-1873 (Lin Salamo and Harriet Elinor Smith, eds.) (1997), at 18-21. There Twain referenced how he had written down the words of a Black child he met while traveling — words which Professor Fisher Fishkin persuasively argues formed the basis for a sketch he published as "Sociable Jimmy" in the *New York Times* in November 1874, the same month he published Cord's words in the *Atlantic*. FISHER FISHKIN, WAS HUCK BLACK?, *supra* note 18, at 14-31; *see also* Anthony Depalma, *A Scholar Finds Huck Finn's Voice in Twain's Writing About a Black Youth*, N.Y. TIMES (July 7, 1992). Of particular note is the reason Twain gave his wife for why he would wait to publish the story. *Id*. at 29. The child had told Twain much gossip about the family who employed him, such that Twain was worried that publishing it too soon would have that family "after me." *Id*. This apparent concern over a libel claim by the child's employers — but no reference one

coupled with his frustration that others had begun profiting off his books without permission — Twain had filed his first copyright infringement lawsuit just a year before he heard Cord's story[23] — may have inspired something of an "all's fair" attitude in his ambitious thirty-eight-year-old mind

way or the other to a potential copyright claim by the child's family — seems to further suggest Twain's "up for grabs" mentality of others' spoken words, or at least *some* people's spoken words.

Whose words were and weren't up for grabs? A potentially illuminating example can be found in Twain's 1881 publication of "A Curious Experience." Mark Twain, *A Curious Experience*, THE CENTURY MAG. (1881), https://americanliterature.com/author/mark-twain/short-story/a-curious-experience. Twain begins by stating that it is a story that a Union major "told me, as nearly as I can recall it" about events that occurred during his command of Fort Trumbull in 1862-63. *Id*. Twain ends by noting that he showed his manuscript to the major, who responded that Twain "got the main facts of the history right, and have set them down just about as they occurred." *Id*. Twain's statement that the story was taken down as he heard it was apparently genuine, as it was with Cord's story, given that Twain later disavowed any suggestion that the story had sprung from his own brain. *See* 1 DAVID FREARS, MARK TWAIN DAY BY DAY: AN ANNOTATED CHRONOLOGY OF THE LIFE OF SAMUEL LANGHORNE CLEMENS, Sec. 39 (2005), https://daybyday.marktwainstudies.com/ ("[T]here was not the shadow of a suggestion, from the beginning to the end of 'A Curious Experience,'" wrote Twain, "that the story was an *invention.*"). But unlike with Cord's story, or the story of "Sociable Jimmy," Twain made it a point in "A Curious Experience" to include the fact that he submitted his manuscript to the storyteller for approval prior to publication. Was this, at least in part, because the teller was an adult white man, as opposed to a Black child or Black woman?

[23] *See* Herbert Charles Verschleisser Feinstein, Mark Twain's Lawsuits (Ph.D. Dissertation, UC Berkeley, 1968) (on file with author). Throughout his life Twain had an intense interest in — and often disdain for — the law, including copyright law, likely arising originally from his father's work as a frontier lawyer and judge. *See generally* Earl F. Briden, *Law*, *in* THE MARK TWAIN ENCYCLOPEDIA, 445-48 (J.R. LeMaster and James D. Wilson, eds. 1993) ("As Hamlin Hill aptly remarks, he was a man who sued as instinctively as he wrote . . . ."); J. Mark Baggett, *Copyright*, *in* TWAIN ENCYCLOPEDIA, *supra*, at 183-84; J. Mark Baggett, *Mark Twain's Legal Burlesques and the Democratization of American Legalese*, 19 MARK TWAIN ANN. 95 (2021); THE QUOTABLE MARK TWAIN: HIS ESSENTIAL APHORISMS, WITTICISMS, & CONCISE OPINIONS (R. Kent Rasmussen ed., 1997) ("U.S. copyright laws are far & away the most idiotic that exist anywhere on the face of the earth," "Only one thing is impossible to God: to find any sense in any copyright law on the planet," and "Perhaps no important American or English statutes are uncompromisingly and hopelessly idiotic except the copyright statutes of these two countries."); *Twain's Plan to Beat the Copyright Law*, N.Y. TIMES (Dec. 12, 1906) ("Mark Twain looks upon the copyright law as pure robbery. He believes that it is not designed in the interest of the public, but is simply a mechanism whereby after the author has enjoyed the fruits of his labor for forty-two years his property can be taken from him and handed over to a lot of publishers who had nothing to do with it. He considers it a law for the robbery of an author's children in the interest of the publishers."). Regarding Twain's lobbying to extend the length of statutory copyright, see *infra* note 38.

with regard to the spoken word. Now, that would not excuse Twain's actions from a legal perspective — again, infringement is a strict-liability offense — or even from a purely moral perspective, but it may help us better understand why things happened the way they did.

A related complexity is that prior to the publication of "A True Story," people like Cord had often been compensated for, and had copyrights recognized in, stories of their enslavement. These stories were (and still are) commonly referred to as "slave narratives."[24] Many wrote their narratives themselves, though not all.[25] A prominent example was Solomon Northup, whose story was famously adapted in recent years into the Oscar-winning film *Twelve Years a Slave*.[26] Northup orally dictated his narrative to his publisher in 1853, and he received, credit, compensation, and copyright.[27] Another example was Sojourner Truth; she orally dictated her best-selling narrative in 1850.[28] It was republished under her name several times, including in 1876, shortly after Twain and the *Atlantic* first published Cord's story.[29] Twain was deeply influenced by this genre, so much so that he later extensively relied on an orally dictated narrative as an influence on his novel *A Connecticut Yankee in King Arthur's Court*.[30]

It's quite plausible, then, for Twain to have connected Cord with a publisher for her narrative. (He needn't have looked far — the *Atlantic*

---

[24] *See* Henry Louis Gates, Jr., *How Many Slave Narratives Were There?*, THE ROOT (Feb. 24, 2014), https://www.theroot.com/how-many-slave-narratives-were-there-1790874721; TIYA MILES, ALL THAT SHE CARRIED 287-89 (2021) (explaining her use of the term "slave narratives").

[25] *See infra* Part III.

[26] SOLOMON NORTHUP, TWELVE YEARS A SLAVE (1853); *see also* DAVID FISKE, CLIFFORD W. BROWN, & RACHEL SELIGMAN, THE COMPLETE STORY OF SOLOMON NORTHUP, THE AUTHOR OF *TWELVE YEARS A SLAVE* (2013); *infra* Part III.

[27] *Id*.

[28] SOJOURNER TRUTH, A NARRATIVE OF SOJOURNER TRUTH, A NORTHERN SLAVE, EMANCIPATED FROM BODILY SERVITUDE BY THE STATE OF NEW YORK (1828); *see also* ERLENE STETSON & LINDA DAVID, GLORYING IN TRIBULATION?: THE LIFE WORK OF SOJOURNER TRUTH (1994); Jessica Janecki and Lauren Reno, *Sojourner Truth's Narrative*, Duke University Libraries (Feb. 14, 2008), https://blogs.library.duke.edu/rubenstein/2018/02/14/sojourner-truths-narrative/; *infra* Part III.

[29] *Id*.

[30] *See* FISHER FISHKIN, *supra* note 18, at 7-9, 107; ALAN GRIBBEN, MARK TWAIN'S LITERARY RESOURCES: A RECONSTRUCTION OF HIS LIBRARY AND READING, VOL. TWO 39-40, 210, 378, 535, 1049-50 (2022) (cataloging and discussing evidence of Twain's reading within the genre, which certainly included Charles Ball's orally dictated narrative and may also have included Solomon Northup's orally dictated narrative); *see also infra* notes 194-96 and accompanying text.

itself had published one less than a decade earlier.)[31] Cord's story of enslavement and reunion could then have been written down — perhaps by Twain himself — and ultimately credited to her, as Northup's and Truth's were to them, or at least credited to Cord and Twain together.[32]

So this isn't about applying present-day morality to long-past acts. Copyright, attribution, and compensation for people in the stories of their enslavement were not just possible but common back then. Though Twain and the *Atlantic* apparently did not consider Cord's potential rights, they should have. And if they should have known better in their time, it helps ease the difficulty of judging them fairly in our time.

Third initial point: the heart of this project is authorship. All other issues flow from it. If we don't consider Cord an author under the law, the copyright analysis ends there. But if we do, that means she had legal rights, the implications of which we must acknowledge.[33] And this again is

---

[31] William Parker, *The Freedman's Story, Part I*, ATLANTIC (Feb. 1866), available at https://www.the*Atlantic*.com/magazine/archive/1866/02/the-freedmans-story/308737/; William Parker, *The Freedman's Story, Part II*, ATLANTIC (Mar. 1866), https://www.the*Atlantic*.com/magazine/archive/1866/03/the-freedmans-story-continued/308738/. *See infra* notes 198-201 and accompanying text for further details on Parker's authorship.

[32] *See supra* notes 26-28 and *infra* Part III.

[33] *See, e.g.*, *Copyright Basics, U.S. Copyright Office Circular* 1 (2021), https://www.copyright.gov/circs/circ01.pdf ("The copyright in a work initially belongs to the author(s) who created that work."). Common-law copyright is a species of personal property. Zvi Rosen, *Common Law Copyright*, 85 U. CIN. L. REV. 1055, 1118 (2018) ("The common-law copyright . . . is indistinguishable from any other personal property.") (citing Palmer v. De Witt, 47 N.Y. 532, 538 (1872)). Cord apparently could own such personal property in her own right at that time in New York, as the state had passed the Married Women's Property Act in 1848, which included the provision that "[t]he real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted," Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1410-11 (1982), and passed the pro-women's ownership Act Concerning the Rights and Liabilities of Husband and Wife in 1860, Reva B. Siegal, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2137 (1994).

Black people, moreover, had legally owned property in New York for many years prior to the events at issue here, contrary to laws in other states near that time. *See* Susan Bennett, "*The Possibility of A Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 259-60 (2000) (describing Black property ownership in nineteenth century New York); Roy W. Copeland, *The Rise and Fall of Black Real Property Ownership: A Review of Black Land Ownership from the Rough Beginnings to the Great Gains; Dispossession via the Use of Legal Tactics and the Push for Black Land Retention*, 9 NAT'L BLACK L.J. 51 (1984) (describing other states' legal prohibitions on Black property ownership in the nineteenth century).

not just a matter of history. Given the perpetual nature of common-law copyright, any right that Cord had in her story may still exist today.

In short, the theory goes that if Twain did not obtain Cord's permission to write her story down, federal law has likely never applied to it.[34] So federal copyright's durational limitation would not have attached.[35] Further, the prevailing view of common-law copyright is that it only ends upon authorized publication.[36] So an unauthorized publication would not have divested Cord of her common-law copyright; it could therefore have passed down to her descendants all the way to today, presuming at least one of them survives.[37] Put another way, while the statute of limitations would likely bar any claim of monetary damages dating far back in time, it would not necessarily prevent a forward-looking assertion of rights by Cord's descendants.[38]

---

[34] *See supra* note 8 and accompanying text.

[35] *Id.* Federal copyright's duration cannot be perpetual, per the "limited times" language of the U.S. Constitution. *See* U.S. CONST. art. I, § 8, cl. 8. For further detailed analysis, see McFarlin, *A Copyright Restored*, *supra* note 14, at 73-79.

[36] *See id.*.

[37] Charles Weber, *When Does a Professor Lose His Common-Law Rights in His Lecture?*, 4 AM. BUS. L. BULL. 58. 66 n.12 (1960) ("Like most property [common-law copyright] can be transferred by sale, gift, will, or intestacy."); *see also* McFarlin, *A Copyright Restored, supra* note 14. If no descendant survives, there is also the possibility that the copyright would now belong to the State of New York, via a legal doctrine called "escheat." *See* McFarlin, *A Copyright Restored*, *supra* note 14, at 74-79 and 88-89. If so, a state official, such as the New York Attorney General, might now have standing to assert a claim. *Id*.

[38] *Cf.* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 683 (2014) (suit by claimed author's heir) ("She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered."). For further detailed analysis of the potential inheritability of Cord's copyright, see McFarlin, *A Copyright Restored, supra* note 14, at 88-89. Twain himself believed his copyrights should last forever, passing to his heirs in perpetuity, a policy which he was ultimately unable to convince lawmakers to adopt for his or anyone else's writings, much to his bemused dismay. *See, e.g.*, Verschleisser Feinstein, *supra* note 23; VAIDHYANATHAN, *supra* note 12, 50-80. Twain testified at length to both U.S. Congress and British Parliament on his views; for example, in 1900, Twain expounded:

> When I appeared before that committee of the House of Lords the chairman asked me what limit I would propose. I said, "Perpetuity." I could see some resentment in his manner, and he said the idea was illogical, for the reason that it has long ago been decided that there can be no such thing as property in ideas. I said there was property in ideas before Queen Anne's time; they had perpetual copyright. He said, "What is a book? A book is just built from base to roof on ideas, and there can be no property in it." I said I wished he could mention any kind of property on this planet that had a pecuniary value which was not derived from an idea or ideas.

This raises difficult issues of how to treat "A True Story" today. Do we need her descendants' consent to publish it? Are they due compensation? Should we now credit the work to both Twain and Cord? I tackle these questions in detail in this project's second part, "A Copyright Restored."[39]

But, again, all of that is moot if Cord was not an author, so the first focus must be on that issue. In analyzing it here, I examine the state of copyright law in her time but also look beyond it. The practical reason for this expansive examination is the relative lack of authority, both then and now, on authorship in the spoken word.[40] It's not entirely clear how a court in 1874 would have decided Cord's claim. So a court faced with that claim today would likely consult all relevant sources — both historical and contemporary — to decide whether Cord was an author. In this way, I

Steve Courtney, *Mark Twain's Copyright Fight*, Inventor's Eye (2017), https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/mark-twains-copyright-fight. That a perpetual copyright — the kind that would apply to an oral story like Cord's — might now be asserted *against* Twain's work is perhaps a fitting irony, one which he, the self-mocking satirist, might very well appreciate.

[39] McFarlin, *A Copyright Restored*, *supra* note 14, at 89-99.

[40] *See generally* David Brennan & Andrew Christie, *Spoken Words and Copyright Subsistence in Anglo-American Law*, 4 I.P. Q. 3 (2000); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1092 (2003) (citing Brennan & Christie, *supra*). For other illuminating discussions of the unsettled issue of copyright in the spoken word, see, e.g., Hector L. MacQueen, *'My Tongue is Maine Ain': Copyright, the Spoken Word, and Privacy*, 68 The Mod. L. Rev. 349 (2005); Jeremy Phillips, *Copyright in Spoken Words - Some Potential Problems*, 7 Euro. I.P. Rev. 231 (1989); Burton D. Williams, *The Protectibility of Spontaneous Oral Conversations Via Common Law Copyright*, 13 IDEA 263 (1969-70); Frank J. Nawalanic, Comment, *Common Law Copyright, and Conversation*, 20 Clev. St. L. Rev. 188 (1971); Paul M. Morley, *Common Law Copyright in Spontaneous Oral Conversation*, 11 Wm. & Mary L. Rev. 248 (1969); Note, *Copyright: Right to Common Law Copyright in Conversations of a Descendent*, 67 Colum. L. Rev. 366 (1967); Andrea S. Hirsch, Comment, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 Am. U. L. Rev. 1071 (1982); Vicki L. Ruhga, Comment, *Ownership of Interviews: A Theory for Protection of Quotations*, 67 Neb. L. Rev. 675 (1988); Joseph B. Thor, *The Interview and the Problem of Common Law Copyright in Oral Statements*, 17 Bull. Copyright Soc'y U.S.A. 88 (1969); Ashley T. Barnett, *"Profiting at My Expense": An Analysis of the Commercialization of Professors' Lecture Notes*, 9 J. Intell. Prop. L. 137, 153–55 (2001); Elizabeth Adeney, *Authorship and Fixation in Copyright Law: A Comparative Comment*, 35 Melbourne U. L. Rev. 677 (2011); Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to Be Archived to Justify the Fixation Requirement*, 8 Loy. L. & Tech. Ann. 109, 140 (2009); Megan Carpenter and Steven Hetcher, *Function over Form: Bringing the Fixation Reqirement into the Modern Era*, 82 Fordham L. Rev. 2221, 2249-50 (2014); Marketa Trimble, *U.S. State Copyright Laws: Challenge and Potential*, 20 Stan. Tech. L. Rev. 66, 121-242 (2017). For reference to copyright treatises' discussion of the issue, see *infra* note 140.

believe that both practical and academic considerations align, making Cord's case a fitting one in which to explore some central aspects of authorship that span her time and ours.[41]

For instance, there's a long-running thread in the law equating authorship with intent.[42] But what kind of intent — how self-conscious must it be? There's no evidence that Cord considered herself an author or intended her story to be treated as a work of authorship protected by law.[43] Does that mean she's not deserving of copyright?[44] And does it matter that we're dealing with common-law authorship here, rooted in part at least in notions of privacy,[45] as opposed to federal copyright, which is tied to the utilitarian "Progress of Science" language in the U.S. Constitution?[46] I grapple with these questions here, ultimately arguing that authorship is as it does: you should not have to consider yourself an "author" to be one under the law.

Cord's case further challenges us to consider how an audience can shape our understanding of authorship. Ruminating in a personal notebook more than twenty years after he heard Cord's story, Twain described it as "[a] curiously strong piece of literary work to come unpremeditated from lips untrained in the literary art. The untrained tongue is usually wandering, wordy & vague, but this is clear, compact & coherent . . . ."[47] The power that Cord's story still held over her audience — namely, Twain — years later is stunning.

I've argued elsewhere that we should generally be reluctant to use audience reaction to judge who is and isn't an author — the costs will

---

41 I aim to do this respectfully, hoping that — regardless of how the reader ends up on Cord's claim — the discussion both brings further awareness to her contribution to what became "A True Story" and sharpens our conception of copyright.

42 *See* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 204 (2001); *see also* Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1263 (2016) ("[M]ost people would not refer to someone as an author who did not intentionally adopt that stance for herself.").

43 *See infra* Parts II and III.

44 At least under one prominent theory of authorship, the answer would seem to be no. *See* Buccafusco, *supra* note 42, at 1264 ("If people do not intend their creations to be treated as works of authorship, they obviously are not creating them because of the incentives that the law provides to works of authorship. Granting such people copyrights generates social costs without any concomitant incentive benefit."). As specified in Part III, *infra*, I argue for the opposite conclusion.

45 *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207 (1890) (discussing and utilizing the privacy aspect of common-law copyright — the right not to have one's words published — to argue for a more general right of privacy in the common law).

46 U.S. CONST. art. I, § 8, cl. 8.

47 FISHER FISHKIN, *supra* note 18, at 8-9, 151. See *infra* note 100 and accompanying text for the entire quote.

often outweigh the benefits.[48] But here I think is a powerful example of how an audience might help guide us to the right result, particularly as we try to navigate the murky waters of copyright in the spoken word.

Cord's case further connects with recent scholarship on how causation has factored into determinations of authorship over the years.[49] The idea is that authorship may best be understood as the act of causing the creation of protectable expression. Applying that lens to this case is intriguing: but for Cord, Twain never publishes the story; but for Twain, Cord's story may never have been published. While the latter causality provides an attractive argument for Twain's claim to copyright in Cord's words, I argue here that the former should prevail, the core reason being that Twain should have sought her express consent before causing their publication.[50] Copyright encompasses not only the right to profit from one's expression but also the right to decide whether it be kept private.[51]

In ways such as these, then, a deep consideration of whether Cord was an author may correspondingly deepen our understanding of copyright.

Having discussed these vital initial points — (1) copyright has the potential to protect the spoken word, (2) Cord's case for that protection presents many complexities, but ones that ultimately don't prevent a sound present-day analysis, and (3) that analysis calls for a broad consideration of legal sources from yesterday and today — let's delve further into the details.

Part II of this Article recounts how Twain came to hear and copy Cord's story in a way that closely parallels the hypothetical posed at this Article's start. The recounting is based on judicially admissible sources from that time, largely consisting of letters between Twain and the *Atlantic*'s editor William Dean Howells, supplemented by research from generations of Twain scholars. Part III then analyzes the question of Cord's authorship, exploring issues of intent, audience reaction, and causation.

If, as I argue, Cord did have a copyright, it should broaden and democratize our understanding of authorship's meaning under the law.

---

[48] McFarlin, *Shouting the People: Authorship and Audience in Copyright*, 93 TUL. L. REV. 443, 491-92 (2019); *see also infra* Part III.B.ii.

[49] *See* Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 25 (2017) ("*Cummins* thus articulates the logic first put forth in *Walter v. Lane*, namely that the author is the individual *but for* whose actions the work — in its protectable form — would not be in existence at all."); *see also infra* Part III.

[50] For evidence showing that Twain likely did not seek that consent, see his correspondence as quoted in Part II *infra* and the analysis of that correspondence in this project's second part. McFarlin, *A Copyright Restored, supra* note 14, at 53-58.

[51] *See infra* notes 223-25 and accompanying text.

II. A TRUE STORY: MARK TWAIN AND MARY ANN CORD

The events that brought Twain and Cord together in Elmira, New York, in 1874 are truly remarkable. In telling them, it bears stating the obvious that we cannot know for sure what happened so many years ago. But in a civil matter like copyright infringement, the burden of proof is not absolute, it's not even "beyond a reasonable doubt," it's "by a preponderance of the evidence," i.e., more likely than not.[52] And the most vital details — the ones that I believe would allow a court today to make sound more-likely-than-not judgments here on the issues of authorship and infringement — come from Twain's and the *Atlantic*'s editor's own pens, such that they are not just a matter of history but would likely be admissible in court today.[53]

The details most relevant to the legal analysis are interspersed throughout this project. But to provide the reader a foundational understanding of what happened between Twain and Cord, I think it useful to provide in one place a general historical telling of their story, focused mainly on the primary documentary sources but also supplemented by scholars' extensive research into these events.

To begin, the extraordinary details of Samuel Clemens's early life — from his boyhood in Missouri, to the start of his writing career in California where he first used the pen-name Mark Twain, to his rise to national prominence that led him to settle in Hartford, Connecticut, and spend his summers in nearby Elmira, New York — have been amply told and retold elsewhere.[54] It is important to specify here, however, that in the fall of 1874, Twain was only thirty-eight and that while he did already have a national reputation, it was largely as a humorist.[55] The wild success of

---

[52] Herwitz v. Nat'l Broad. Co., 210 F. Supp. 231, 234 (S.D.N.Y. 1962); Establissement Kadaq Vaduz v. Piha, 1995 WL 598980, at *1 (S.D.N.Y. Oct. 11, 1995) ("To establish by a preponderance of the evidence means very simply to prove that something is more likely than not so. In other words, a preponderance of evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . the belief that what is sought to be proved is more likely true than not true.") (quoting Duke Laboratories v. U.S., 222 F. Supp. 400, 406 (2d Cir. 1963)).

[53] *See generally* 5A Robert A. Barker & Vincent C. Alexander, New York Practice Series: Evidence in New York State and Federal Courts §§ 8:14, 8:79, 8:87, 8:89 (2022) (discussing the admissibility of party admissions and statements against proprietary interest by those deceased) and 8:74 (discussing the admissibility of documents more than 30 years old).

[54] *See, e.g.*, Albert Bigelow Paine, Mark Twain, A Biography, 1835-1910, Complete (1912); Ron Powers, Mark Twain: A Life (2008).

[55] *See* Cummings, *supra* note 16, at 22; *Preface to "A True Story, Repeated Word for Word as I Heard It*," *in* Atlantic, Civil War Issue (2012) ("For Twain, a humorist from the West, breaking into *The Atlantic* was an accomplishment he had aspired to for some time. As the author Ron Powers wrote in his biography of

Tom Sawyer and *Huck Finn*, his two most legendary works, lauded not just for their bathos but pathos too, remained a few years in his future.[56]

Mary Ann Cord's life is certainly not as well known, but it too was extraordinary. Much of what we do know comes from what Twain wrote down and published, but much else has come from Twain scholars' further research and their interviews with her descendants.[57] She was born in approximately 1798, in the state of Maryland, into an enslaved family.[58] She was then sold or otherwise moved to Virginia as a young girl, where she eventually married and had seven children.[59] They were sold and separated from each other in 1852.[60] Cord was moved onto a plantation in New Bern, North Carolina, where she continued to be enslaved.[61] Near the end of the Civil War, Union troops captured and occupied this planta-

---

Twain, without the friendship and help of the magazine's editor, William Dean Howells, 'Twain might have flared for a while, a regional curiosity among many, and then faded, forgotten.' Ten years after this tale of slavery, Twain would create a literary icon in the escaped slave Jim in *The Adventures of Huckleberry Finn*.") (quoting POWERS, *supra* note 54).

56 *See id.* He had begun writing *Tom Sawyer* as early as 1872, but it was not published until 1876. *See Getting Tom to Market*, https://twain.lib.virginia.edu/tomsawye/tomcomp.html. Twain started writing *Huckleberry Finn* in 1876 but did not publish it until 1885. Walter Blair, *When Was Huckleberry Finn Written?*, 30 AM. LITERATURE 1, 1 (1958).

57 *See, e.g.*, Lee, *supra* note 17, at 97; Herbert A. Wisbey, Jr., *The True Story of Auntie Cord, in* MARK TWAIN IN ELMIRA, Robert D. Jerome and Herbert A. Wisbey, Jr., eds. (2013). Professor Wisbey's article, based on his personal interviews of Cord's descendants, was first published in the *Mark Twain Society Bulletin* in 1981. *Id.* It "was written in response to a query from actress Pauline Myers for information about the 'Aunt Rachel' of Mark Twain's well-known story, a character portrayed by Miss Myers in her prize-winning one-woman show." *Id.*

That show, "Mama," written and performed by Myers, portrayed "the suffering and struggles of six black women" from history. D.J.R. Bruckner, *The Stage: 'Mama,'* N.Y. TIMES (Nov. 4, 1986), https://www.nytimes.com/1986/11/04/theater/the-stage-mama.html. Two were Sojourner Truth and "Aunt Rachel." *Id.* As reviewed in the *New York Times*, "Aunt Rachel's story of the dismemberment of her family at a slave auction is appalling, and her joyful gratitude at finding one of her children many years later is, in Ms. Myers's rendition, a powerful tribute to the strength of women, mothers and humanity." *Id.* That Sojourner Truth was portrayed under her own name, while Mary Ann Cord was not, illustrates well the long-felt ramifications of how Twain used Cord's story.

58 Wisbey, *supra* note 57, at 276-80.

59 *Id*. Marriages between enslaved persons were recognized by the enslaved community and often at least informally by their enslavers but were not granted protection under the law. *See, e.g.*, Reginald Washington, *Sealing the Sacred Bonds of Holy Matrimony: the Freedman's Bureau Records*, 37 PROLOGUE MAG. 1 (2005), https://www.archives.gov/publications/prologue/2005/spring/freedman-marriage-recs.html.

60 Wisbey, *supra* note 57, at 276-80.

61 *Id*.

tion.[62] While she was cooking breakfast one morning for the troops, Cord, stunned and overjoyed, recognized her youngest son Henry by his scars, and they were miraculously reunited.[63]

Henry had escaped from slavery in 1858, when he was about thirteen years old, and had made his home as a free man in Elmira, New York, where he took the last name of Washington and worked as a barber.[64] During the war he enlisted in the Union Army, in the service of which he eventually found and liberated his mother.[65] After the war, she joined him in Elmira, where she married Primus Cord, a widower and homeowner who had lived there for many years.[66] She took a job as a cook at Quarry Farm, the home of Twain's sister-in-law Susan and her husband Theodore Crane, which is how she came to meet Twain, who spent summers there with his wife Olivia and their young daughters.[67] During the day, Twain would typically go to the cupola beyond the house and write.[68]

According to Twain's early biographer Albert Bigelow Paine, Cord first told Susan Crane the story of her enslavement and liberation, and Crane had "more than once tried to persuade her" to tell it to Twain as well, but Cord was "reluctant."[69] On one evening, however, in the summer of 1874,

> when the family sat on the front veranda in the moonlight, looking down on the picture city [of downtown Elmira], as was their habit, Auntie Cord came around to say good night, and Clemens engaged her in conversation. He led up to her story, and almost before she knew it she was seated at his feet telling the strange tale in almost the exact words in which it was set down by him . . . .[70]

---

62 *Id.*; Twain, *A True Story*, *supra* note 2.

63 *Id.*

64 Wisbey, *supra* note 57, at 277.

65 *Id.*

66 *Id.* at 278.

67 *Id.* at 279; Quarry Farm, Center for Mark Twain Studies, https://marktwainstudies.com/about/quarry-farm/ ("Many years between 1871 and 1895, the Clemens [family] spent more days at Quarry Farm than they did at their primary residence in Hartford. All three of their daughters – Susy, Clara, and Jean – were born in Elmira.").

68 *Id.* The cupola still exists, since relocated to the campus of Elmira College. *See* Visiting the Mark Twain Study and Exhibit, https://marktwainstudies.com/visiting-the-mark-twain-study-and-exhibit/.

69 PAINE, *supra* note 54, at 515.

70 *Id.* Paine continued: "It gave Mark Twain a chance to exercise two of his chief gifts — transcription and portrayal. He was always greater at these things than at invention. Auntie Cord's story is a little masterpiece." *Id.* The exact evening may have been that of Sunday, June 28, 1874. 1 FREARS, *supra* note 22, Sec. 32 (noting a June 29 letter to Twain from Olivia, his wife, "[W]e are sitting much as we did last night . . . Allie sits just where you did when Aunty Cord was telling us of her son . . . ."). Paine also states that Twain wrote the story down "the next morning,"

The story of Twain's writing and publishing those words is best told in his correspondence from the time. Twain had recently struck up a friendship with William Dean Howells, the *Atlantic*'s editor, and Twain was anxious to publish something in its prestigious pages.[71] On September 2, 1874, Twain sent Howells a letter from Elmira in which he wrote:

> I enclose also a "True Story" which has no humor in it. You can pay as lightly as you choose for that, if you want it, for it is rather out of my line. I have not altered the old colored woman's story except to begin it at the beginning, instead of the middle, as she did — & ~~worked~~^ traveled^ both ways. I told this yarn to Hay & some company & they liked it. So I thought I'd write it.[72]

---

see Paine, *supra* note 54, at 515, which is apparently quicker than the timing suggested by Twain's correspondence, *see infra* note 72 and accompanying text, in which he indicated he retold Cord's story to his friends before deciding to write it down.

Regarding what to make of Paine's biography in this context, it's worth noting that it has generally been both lauded for its unique basis in primary sources — primarily due to his close friendship with Twain late in Twain's life — and viewed skeptically due to that same friendship, causing some to view him as Twain's hagiographer. *See, e.g.*, Terry Oggel, *Mark Twain's "Particular Friend," Albert Bigelow Paine*, 56 MARK TWAIN J. 204 (2018); Raymond, C. Elizabeth, *The Life of Mark Twain: The Early Years, 1835-1871*, THE ANNALS OF IOWA 78 (2019), 399-401; Max McCoy, *Biographer Obscura: The Secret Life of Albert Bigelow Paine*, 56 MARK TWAIN J. 249 (2018).

As a matter of evidence law, even though Paine's writings are not party-admissions like those of Twain and Howell, they still might be admissible in an action by Cord's descendants as "statements in an ancient document." *See* Fed. R. Ev. 803(16). Regarding the weight to be accorded such evidence, I would say that Paine's credibility regarding the genesis of "A True Story" appears relatively strong. Though Paine admitted to striving more for the "impression of truth" than for a meticulous fidelity to every detail of his subject's life, *see* Oggel, *supra*, at 204-05, the central aspects of Paine's recounting of the events here are confirmed by Twain's own writings. *See infra* notes 72-81, 95, 100-01, and accompanying text. And as to the intriguing additional aspect he introduces — that Cord had previously told the story to Twain's sister-in-law and had to be coaxed into telling it to Twain — Paine appears to have had little motive for fabrication, particularly as it does not seem designed to burnish his friend's reputation.

[71] WILLIAM DEAN HOWELLS, MY MARK TWAIN: REMINISCENCES AND CRITICISM, 5-10 (1910); POWERS, *supra* note 54, at 2-6; PAINE, *supra* note 54, at 513-14.

[72] Letter from Mark Twain to William Dean Howells (Sept. 2, 1874), *in* 1 MARK TWAIN – HOWELLS LETTERS: THE CORRESPONDENCE OF SAMUEL L. CLEMENS AND WILLIAM D. HOWELLS, 1869-1910, 22-23 (Henry Nash Smith & William M. Gibson, eds.) (1960) (alterations in the original). Twain's retelling of Cord's story "to Hay & some company" likely happened in New York City in late June or early July. 6 MARK TWAIN'S LETTERS, 1874-1875, 219 n.3 (Michael B. Frank & Harriet Elinor Smith eds. 2002).

The Hay mentioned is John Hay, a former personal secretary to Abraham Lincoln; in later years, Secretary of State to Theodore Roosevelt; and since the late 1860s, a friend of Twain's. Thomas J. Reigstad, *Fame Came at a Considerable Cost:*

On September 4, in a letter to a family friend, he enclosed a photograph of the Quarry Farm household on the porch.[73] In describing the people pictured, he wrote "Next . . . is Auntie Cord (a fragment of whose history I have just sent to a magazine). She is the cook; was in slavery more than forty years."[74]

Then, on September 8, Howells replied to Twain:

> I've kept the True Story which I think extremely good and touching with the best and reallest kind of black talk in it. Perhaps it couldn't be better than it is; but if you feel like giving it a little more circumstantiation (you didn't know there was such a word as that, did you?) on getting the proof, why, don't mind making the printers some over-running.[75]

On September 17, Howells wrote Twain again about the piece: "This little story delights me more and more: I wish you had about forty of 'em! Please send the proof back suddenly. You can reject any of the proposed corrections."[76]

Having returned to his home in Hartford, Twain replied to Howells on September 20:

> All right, my boy, send proof sheets *here.* I amend dialect stuff by talking & *talking* it till it sounds right — & I had difficulty with this negro talk because a negro sometimes (rarely) says "goin'" & sometimes "gwyne." & they make just such discrepancies in other words — & when you come to reproduce them on paper they look as if the variation resulted from the writer's carelessness. But I want to work at the proofs & get the dialect as nearly right as possible.[77]

The Relationship of Mark Twain and John Hay, THE BUFFALO NEWS (July 8, 2016) (reviewing Mark Zwonitzer, THE STATESMAN AND THE STORYTELLER: JOHN HAY, MARK TWAIN, AND THE RISE OF AMERICAN IMPERIALISM (2016)). At the time Hay was a writer, editor, and lecturer, living in New York City. HOWARD I. KUSHNER & ANNE HUMMEL SHERRILL, JOHN MILTON HAY: THE UNION OF POETRY AND POLITICS (1977).

73 Letter from Mark Twain to John Brown (Sept. 4, 1874), *in* 6 MARK TWAIN'S LETTERS, 1874-1875, at 54, 221-24 (Michael B. Frank & Harriet Elinor Smith eds. 2002). Dr. John Brown was a Scottish physician and writer whom Twain's family had befriended during their travels abroad. *Id*.

74 *Id*.

75 Letter from William Dean Howells to Mark Twain (Sept. 8, 1874), *in* Smith & Gibson, *supra* note 72, at 24-25.

76 Letter from William Dean Howells to Mark Twain (Sept. 17, 1874), *in* Smith & Gibson, *supra* note 72, at 25. The corrections proposed by the *Atlantic* appear, based on a detailed review of the manuscript by Professor Nagarawa, to have consisted only of "technical, and mostly trivial revisions: dashes replaced with commas, a few capital letters reduced to lower case, spellings of black dialect retouched (such as removing the apostrophe from "somethin'") and so on." Makoto Nagarawa, *"A True Story" and its Manuscript: Mark Twain's Image of the American Black*, 29•30 POETICA 143, 144 (1989).

77 Letter from Mark Twain to William Dean Howells (Sept. 20, 1874), *in* Smith & Gibson, *supra* note 72, at 25-26.

These amendments Twain references — his effort to "get the dialect as nearly right as possible" — appear from a surviving manuscript to have consisted of numerous but relatively minor changes to the phrasing.[78] Examples are "good God" crossed out and changed to "good gracious" and "O bless de chile, it mos' break my heart, he so good" changed to "O bless de chile, he always so good."[79] The most significant changes, it appears, were Twain altering the phrase "I ain't jes houn'-dog mash to be trod on by common trash" from his first draft to "I wa'nt bawn in the de mash to be fool' by trash!" and "If anybody come meddlin' wid you, you jist come an tell me" to "'If anybody come meddlin' wid you, you jist make 'em walk chalk."[80]

---

[78] Mark Twain, *A True Story, Repeated Word for Word as I Heard It* (undated, unpublished manuscript) (on file with the University of Virginia), https://twain.lib.virginia.edu/huckfinn/truest1.html. While others who have analyzed Twain's manuscript have attributed his edits to his "own authorial skills," *see, e.g.*, PETER MESSENT, THE SHORT WORKS OF MARK TWAIN: A CRITICAL STUDY 62 (2001), and Nagarawa, *supra* note 76, at 145 and 151, it is in my view as or more probable that Twain was, as he himself wrote, working to improve the text's fidelity to what Cord actually said. In other words, instead of assuming that the original draft was what Cord said, and that all later edits were creative decisions by Twain, it is also plausible — probable, even, given Twain's repeated statements that he was using Cord's words, not his — that the final piece was closer to what Cord precisely said than his first draft. For instance, he could have heard her use the saying "I wa'nt bawn in the de mash to be fool' by trash" again around the house at Quarry Farm. Professor Fisher Fishkin has also suggested this potential interpretation. *See* FISHER FISHKIN, *supra* note 18, at 32-33 ("[W]as he improving on Mary Ann Cord's original story, or merely revising his record of it to read more accurately?").

More provocatively, Professor Messent has also suggested — based on his review of an unpublished interview by Professor Emory Evans of Cord's great-grandson Leon Condoll — that "Henry was evidently the son of Mary Ann Cord by the owner of the plantation on which she had worked" and that her separation from Henry did not occur at the auction block. MESSENT, *supra*, at 231 n.12. This would further suggest that Cord did not tell Twain the full truth about these events. While this doesn't matter from a copyright perspective — it's not the facts (or purported facts) of her life that copyright would protect, only the way she expressed them, regardless of their truth, *see supra* note 14 — the possibility certainly complicates and deepens the human element.

[79] Twain, *A True Story*, unpublished manuscript, *supra* note 78, at 9 and 11-12.

[80] *Id.* at 7, 8, 14, and 24. The phrase "walk chalk" apparently meant walking "a line of rectitude and sobriety, not deviating a hair's breadth, or he must obey the rules closely." Karen Hill, *What Does the Phrase "to Walk the Chalk" Mean and Where Did it Come From?* (July 7, 2020), ZIPPY FACTS, https://zippyfacts.com/what-does-the-phrase-to-walk-the-chalk-mean-and-where-did-it-come-from/.
"The significance is alleged to have been of nautical origin, a straight chalk line drawn along the deck, or a narrow lane between two lines, to test the sobriety of a sailor; if he could not walk the length of the line placing each foot directly on it, or

Twain subsequently received the proof sheets from Howells, and probably while he was finalizing the piece he wrote the following letter on September 25 to William Seaver, a friend and editor at *Harper's Monthly*:

> Remember that darkey yarn I told you & Hay? Well, it has gone to the "Atlantic" & so you boys can't gobble it, you see. But come to think, it would have been much better to let Hay do it in verse.[81]

Sometime in September or October, Twain submitted a final version to Howells, and the *Atlantic* published it in its November 1874 issue, titled "A True Story, Repeated Word for Word as I Heard It."[82] In it, Twain disguised Cord as "Aunt Rachel," but in referring to the narrator as "Misto C—" he hinted that he was writing about himself, sans pen name.[83]

Twain set the scene of the family gathered on the Quarry Farm porch, sharing laughter with Aunt Rachel, when the narrator asked her:

> "Aunt Rachel, how is it that you've lived sixty years and never had any trouble?"
>
> She stopped quaking. She paused, and there was a moment of silence. She turned her face over her shoulder toward me, and said, without even a smile in her voice: —
>
> "Misto C—, is you in 'arnest?"
>
> It surprised me a good deal; and it sobered my manner and my speech, too. I said: —
>
> "Why, I thought — that is, I meant — why, you *can't* have had any trouble. I've never heard you sigh, and never seen your eye when there wasn't a laugh in it."
>
> She faced fairly around, now, and was full of earnestness.
>
> "Has I had any trouble? Misto C—, I's gwyne to tell you, den I leave it to you."[84]

---

if he was unable to keep within the two lines of the lane, he was adjudged to be too drunk for duty and was clapped into the brig." *Id.*

81 Letter from Mark Twain to William Seaver (Sept. 4, 1874), *in* Frank & Smith, *supra* note 73, at 245-46. Regarding Twain's first reference, in a letter to William Dean Howells, to his retelling of Cord's story, see *supra* note 72. Professors Frank and Smith note that "Seaver and John Hay probably heard the germ of 'A True Story' in New York in late June or early July . . . . Clemens admired Hay's verse portraits of the Western life and character, and Hay in turn lauded Clemens's proficiency at dialect and his memory and imagination." (internal quotations omitted).

82 Frank & Smith, *supra* note 21, at 234 n. 1; Twain, *A True Story*, *supra* note 2, at 591-94.

83 Choosing "Aunt Rachel" was likely a nod toward Rachel, wife of Jacob, from the Book of Genesis. *See* JAMES D. WILSON, A READER'S GUIDE TO TWAIN'S SHORT STORIES 270 (1987). Professor Messent cautions that not all readers would have identified "Misto C—" as Twain. MESSENT, *supra* note 78, at 231 n.10.

84 *A True Story*, *supra* note 2, at 591. Note that Twain undercounted Cord's age, sixty instead of seventy-six, probably because she looked younger than she was. Wisbey, *supra* note 57, at 276.

Perhaps the two most powerful portions of the story that followed were, first, Cord's description of her separation from her family and, second, her reunion with her youngest, Henry.[85] Describing their separation:

> "Dey put chains on us an' put us on a stan' as high as dis po'ch, — twenty foot high, — an' all de people stood aroun', crowds an' crowds. An' dey'd come up dah an' look at us all roun', an' squeeze our arm, an' make us git up an' walk, an' den say, 'Dis one don't 'mount to much.' An' dey sole my ole man, an' took him away, an' dey begin to sell my chil'en an' take dem away, an' I begin to cry; an' de man say, 'Shet up yo' dam blubberin',' an' hit me on de mouf wid his han'. An' when de las' one was gone but my little Henry, I grab' him clost up to my breas' so, an' I ris up an' says, 'You shan't take him away,' I says; I'll kill de man dat tetches him!' I says. But my little Henry whisper an' say, 'I gwyne to run away', an' den I work an' buy yo' freedom.' Oh, bless de chile, he always so good! But dey got him — dey got him, de men did; but I took and tear de clo'es mos' off of 'em, an' beat 'em over de head wid my chain; an' dey give it to me, too, but I did n't mine dat.[86]

And describing her and Henry's reunion, thirteen years later:

> Well, 'bout seven, I was up an' on han', gittin' de officers' breakfast. I was a-stoopin' down by de stove, — jist so, same as if yo' foot was de stove, — an' I'd opened de stove do wid my right han', — so, pushin' it back, jist as I pushes yo' foot, — an' I'd jist got de pan o' hot biscuits in my han' an' was 'bout to raise up, when I see a black face come aroun' under mine, an' de eyes a-lookin' up into mine, jist as I's a-lookin' up clost under yo' face now; an' I jist stopped right dah, an' never budged! jist gazed, an' gazed, so; an' de pan begin to tremble, an' all of a sudden I knowed! De pan drop' on de flo' an' I grab his lef' han' an' shove back his sleeve, — jist so, as I's doin' to you, — an' den I goes for his forehead an' push de hair back, so, an' 'Boy!' I says, 'if you an't my Henry, what is you doin' wid dis welt on yo' wris' an' dat sk-yar on yo' forehead? De Lord God ob heaven be praise', I got my own ag'in![87]

Cord's full story formed the basis for nearly 87% of "A True Story."[88] Twain's own words, which functioned to set the scene and prompt "Aunt Rachel" to tell the story, made up just over 13%.[89]

---

[85] *A True Story*, *supra* note 2, at 591-92.

[86] *Id*.

[87] *Id.* at 592-94.

[88] Cord's story covers 1861 of the 2145 total words in "A True Story," per Microsoft Word's counting function. Twain's own words cover 284. This of course presumes that Twain, both in his private correspondence and in his personal notebook, was telling the truth about copying Cord's story as near as possible to how she told it. As argued here and in "A Copyright Restored," while it's possible that Twain was lying even in his private notes, I think it unlikely.

[89] *Id*.

Twain received $20 per page for his submission, the highest rate the *Atlantic* had yet paid a writer.[90] With "A True Story" spanning the equivalent of three full pages of the magazine, Twain's pay amounted to $60, worth approximately $1,562 today.[91]

The piece was well received in contemporary reviews, and Howells later showered it with praise: "The rugged truth of the sketch leaves all other stories of slave life infinitely far behind, and reveals a gift in the author for the simple, dramatic report of reality which we have seen equaled in no other American writer."[92]

"The success of Mark Twain's 'A True Story,'" note Professors Smith and Gibson, "led Howells to ask him again and again for further contributions to the *Atlantic*," leading to the successful seven-part series "Old Times on the Mississippi," published between January and August 1875, which recounted Twain's time in that river's steamboat culture.[93]

That same year, Twain published a collection of his short stories, titled *Sketches New and Old*, in which he included "A True Story."[94] He gave a signed copy of *Sketches* to Cord with the inscription:

> The author of this book offers it to Aunty Cord with his kindest regards and refers her to page 202 for a well-meant but libelous portrait of herself and also the bit of personal history which she recounted to him once at Quarry Farm.
>
> Samuel L. Clemens Mark Twain Hartford, Nov. 18, 1875[95]

While no outward reaction by Cord appears to have been documented, she kept the inscribed copy, and it was handed down through generations of her family.[96] In 1986, at the age of ninety-eight, Cord's

---

[90] Judith Yaross Lee,*"True Story, A," in* TWAIN ENCYCLOPEDIA, *supra* note 23, at 751-52.

[91] CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1874?amount=60 (last visited January 27, 2023).

[92] HOWELLS, MY MARK TWAIN, *supra* note 71, at 124.

[93] Smith & Gibson, *supra* note 72, at 31; John W. Young, *Mark Twain, William Dean Howells, and "Old Times on the Mississippi"* (1997), http://www.twainweb.net/filelist/howe1.html. Twain later republished and expanded upon these essays in book form as *Life on the Mississippi*. MARK TWAIN, LIFE ON THE MISSISSIPPI (1883), https://docsouth.unc.edu/southlit/twainlife/twain.html; *see also* Book Review, *Mark Twain's Life on the Mississippi*, ATLANTIC (Sept. 1883), https://www.theatlantic.com/magazine/archive/1883/09/mark-twains-life-on-the-mississippi/633158/ (noting that "[o]f the first fifteen chapters of Mr. Clemens's book, twelve are reprinted from *The Atlantic*").

[94] *See* Wilson, *supra* note 83, at 272.

[95] In 1877, Twain once more republished "A True Story," that time as a pocketbook combination titled *A True Story and The Recent Carnival of Crime*, the latter being a new, fictional essay. MARK TWAIN, A TRUE STORY AND THE RECENT CARNIVAL OF CRIME (1877).

[96] *See* Molly Sinclair, *Mother and Son's Amazing Reunion*, WASH. POST (Feb. 27, 1986), https://www.washingtonpost.com/archive/local/1986/02/27/ mother-and-sons-

great-grandson donated it to the University of Maryland in whose archives it remains.[97]

Cord herself continued to live and work for Twain's sister-in-law's family at Quarry Farm well beyond that summer of 1874, until, according to her descendants' oral history, Cord fell into a well that was being dug on Quarry Farm and "never got over it."[98] She died in 1888 in her son Henry's home and was laid to rest in Elmira's Woodlawn Cemetery.[99]

Cord and her story would, however, live on in Twain's mind, returning more than once to him in later years. First, in a private notebook dated 1895, Twain wrote of her story as:

> [a] curiously strong piece of literary work to come unpremeditated from lips untrained in the literary art. The untrained tongue is usually wandering, wordy & vague, but this is clear, compact & coherent — yes, & vivid also, & perfectly simple & unconscious.[100]

Then, in 1906, in a manuscript not published until after his death, Twain wrote of Cord:

> She was cheerful, inexhaustibly cheerful, her heart was in her laugh & her laugh could shake the hills. Under emotion she had the best gift of strong & simple speech that I have known in any woman except my mother. She told me a striking tale out of her personal experience, once, & I will copy it here — & not in my words but her own. I wrote them down before they were cold. (Insert "A True Story.")[101]

Howells, too, continued to marvel at the piece late in his life, in 1907, as he reminisced over his time editing the *Atlantic*: "Later came Mark Twain, originally of Missouri, but then provisionally of Hartford, and now ultimately of the Solar System, not to say the Universe. He came first with

---

amazing-reunion/5548ec00-0ad1-4a61-abe5-f1fa70d4852f; *see also University of Maryland, College Park*, WOMEN AND LEADERSHIP ARCHIVES, http://lucweb.luc.edu/orgs/gannon/archives/completelist.cfm (last visited Jan. 27, 2023) (listing Cord's great-grandson Leon Washington Condol's papers as part of the University of Maryland's collection) ("A rare copy of Sketches Old and New (1875), autographed by the author, in which Auntie Cord's story appears, was handed down through the Condol family and is included in this collection."). Professor Wisbey notes — apparently from an obituary for Mr. Condol's mother, the daughter of Henry Washington, Cord's son — that Cord's granddaughter "treasured" this signed copy. Wisbey, *supra* note 57, at 280.

97 *Id*.

98 Wisbey, *supra* note 57, at 279-80. The story of her fall into the well, as well as much of the other history reported by Professor Wisbey, came from an interview, circa 1981, that he conducted with William Condol, another of Cord's great-grandsons. *Id*.

99 *Id*.

100 FISHER FISHKIN, *supra* note 18, at 166.

101 *Id.* at 31.

"A True Story," one of those noble pieces of humanity with which the South has atoned chiefly if not solely through him . . . ."[102]

With the return to our solar system of Halley's Comet, last seen at his birth, Twain died in 1910.[103] He was laid to rest in the same cemetery as Cord.[104]

"A True Story" has remained in publication over the many years since.[105] Twain's *Sketches New and Old* collection, which includes it, has been republished numerous times.[106] Its original form can be easily found on the *Atlantic*'s website,[107] and it's part of a selection of materials that the *Atlantic* sends, via web links, to its new subscribers.[108] It is also featured prominently in the *Atlantic*'s recent rollout of its "Writers Project," highlighting Twain and his works among those of twenty-five select writers in its archives.[109] Cord is mentioned in one place on the *Atlantic*'s website as the inspiration for the story but not elsewhere, and nowhere is she credited as an author of her words.[110]

---

[102] William Dean Howells, *Recollections of an Atlantic Editorship*, ATLANTIC (Nov. 1907), https://www.the*Atlantic*.com/magazine/archive/1907/11/recollections-of-an-*Atlantic*-editorship/304475/.

[103] *See* POWERS, *supra* note 54, at 9, 617, 626.

[104] Wisbey, *supra* note 57, at 280.

[105] *See, e.g.*, THE MARK TWAIN COLLECTION: FEATURING CLASSIC STORIES FROM THE PAGES OF *The Atlantic* (2013). It is even available as its own audiobook, under the title *The True Story*. *See* THE TRUE STORY, https://www.audible.com/pd/The-True-Story-Audiobook/B00MJCG8QM.

[106] *See, e.g.*, the many editions listed in the ISBN (International Standard Book Number) search for "Sketches New and Old Twain." https://isbnsearch.org/search?s=sketches–ew+and+old+twain.

[107] Twain, *A True Story, supra* note 2, https://www.theAtlantic.com/magazine/archive/1874/11/a-true-story-repeated-word-for-word-as-i-heard-it/306511/.

[108] E-mail from Jeffrey Goldberg, Editor-in-Chief, ATLANTIC (Feb. 6, 2022, 08:04 AM CST) (on file with author).

[109] *The Atlantic Writers Project*, ATLANTIC, https://www.theatlantic.com/the-writers-project/#Twain.

[110] Twain, *A True Story*, *supra* note 2. Her absence was further illustrated by an *Atlantic* feature commemorating Twain's birthday, which included the following description of "A True Story" omitting Cord and misattributing the context to his early days in Missouri:

> Twain was born and raised in Missouri, a slave-holding state. An early influence on him was a slave named Uncle Daniel who told ghost stories to gatherings of local children. Twain's first contribution to *The Atlantic*, featuring a monologue delivered by a former slave, reflects those early experiences.

On His Birthday, Remembering Mark Twain's Gifts to the Atlantic, ATLANTIC (Nov. 30, 2011), https://www.theatlantic.com/national/archive/2011/11/on-his-birthday-remembering-mark-twains-gifts-to-i-the-atlantic-i/249272/. The history of Cord and Twain was, however, included with the *Atlantic*'s 2012 Civil War commemorative issue's republication of "A True Story," which is presently available

Though she has not received this authorial credit, history has recognized the facts detailed above and acknowledged Cord as her story's source.[111] Such recognition is not universal, however. In its description of "A True Story," the University of North Carolina's *Documenting the American South* online collection still includes the following note:

> Twain's title is all we have in the way of a preface, so it is not clear who originally told this story. Indeed, given Twain's frequent quips about honesty and deceit — "all men are liars, partial or hiders of facts, half tellers of truths" — we cannot rule out the possibility that the story is a product of his own imagination.[112]

The fact that, even today, a source like *Documenting the American South* can miss Cord's role in "A True Story" — a role amply documented above, most powerfully in Twain's own notes where he would have little reason to lie — shows well why legal recognition as an author matters.

If it can be shown that Cord was, more likely than not, an author in the eyes of copyright law — and if the *Atlantic* and Twain Foundation would ultimately acknowledge it, whether voluntarily or under court order — this remaining conjecture could perhaps be dispelled. And Cord's expression could be reclaimed, with the authority of law, as her own.

III. CORD'S CASE FOR COPYRIGHT

To decide if Mary Ann Cord had a copyright, we must first understand how the law has protected purely oral expression, i.e., that which has not (yet) been written down or otherwise fixed in a tangible medium.[113] Examining (i) the law in Cord and Twain's time, (ii) the significant subsequent case of *Estate of Hemingway v. Random House*,[114] and (iii) the pub-

online at https://www.the*Atlantic*.com/magazine/archive/2012/02/a-true-story-word-for-word-as-i-heard-it/308792.

111 *See, e.g.*, Judith Yaross Lee, *supra* note 90, at 751-52; Ken Burns, et al., *The Life That Shaped Mark Twain's Anti-Slavery Views*, AFT (2002), https://www.aft.org/periodical/american-educator/fall-2002/life-shaped-mark-twains-anti-slavery-views. The closest to recognizing Cord as an "author" of her words has been scholar Deborah Lee referring to her as a "co-author." Lee, *supra* note 17, at 107.

112 Patrick E. Horn, *Summary of "A True Story,"* Documenting the American South, University of North Carolina. On a related note, we may recall Twain's commentary on himself, expressed through the character Huck Finn, "He told the truth, mainly. There were things which he stretched, but mainly he told the truth." MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).

113 A number of cases deal with expression that has been written and then copied upon hearing it delivered orally. *See, e.g.*, Ferris v. Frohman, 223 U.S. 424 (1912); Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999). The law protects this type of expression as well, but the basis for doing so is not fully the same.

114 244 N.E.2d 250 (N.Y. 1968).

lishing industry practice for orally dictated slave narratives, I argue that the law regarding copyright and the spoken word favors Cord.

But just because copyright could protect Cord's words doesn't mean that it did. The ultimate issue is whether, in telling her story, Cord was engaging in authorship. And considerations such as intent, audience reaction, and causation are also relevant in deciding that issue. In particular, did Cord need to consider herself an author for copyright law to treat her as one? I argue that authorship is not so limited — authorship is, in essence, as authorship does — such that Cord did have a copyright in her story.

A. Does it Matter That Cord Never Wrote Her Story Down?

Because Cord apparently never put her story in writing, the law considers it unfixed.[115] But that doesn't necessarily mean it's unprotected. In the United States, state law — and only state law — may protect unfixed expression.[116] Here, it's likely that New York is the state whose law would govern: it's where Cord lived, worked, and told her story to Twain, and it's where Twain wrote it down.[117] This is in a sense fortutious: New York has the most developed case law on copyright in the spoken word.[118] Accordingly, given the paucity of reported cases on the issue elsewhere,[119] it's likely that New York decisions would be looked to as the most persuasive precedent regardless.

A basic hurdle, though, is time. The events at issue here — Cord's telling of her story and Twain's publication of it — occurred in the late nineteenth century.[120] No court in New York or anywhere else in the U.S. appears to have addressed a claim to copyright in unfixed expression until

---

115 *See* 17 U.S.C. § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated . . . .").

116 *See* 17 U.S.C. § 301.

117 *See* Frederick Chusid & Co. v. Marshall Leeman & Co., 326 F. Supp. 1043, 1059 (S.D.N.Y. 1971) (applying New York common law to a case involving parties centered in New York, even where "the wrongful acts of defendants took place in at least four states other than New York"); *see also* Mention v. Gessell, 714 F.2d 87, 89 (9th Cir. 1983) ("Since this is an action for common law copyright infringement . . . the copyright owner's domicile controls for choice of law determinations.").

118 *See* Ronald B. Standler, *Common Law Copyright in the U.S.A.*, 23 (2013), http://www.rbs2.com/clc.pdf.

119 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.5 (2d ed. 1997) ("[C]ourts have had little opportunity to flesh out common law copyright's bare bones on such important points as standards for protection, proof of infringement and remedies for infringement."); Standler, *supra* note 118.

120 *See supra* Part II.

the twentieth century.[121] Two British cases from that era, however, as well as a prominent U.S. treatise on intellectual property, did address the issue. A logical beginning, then, is to examine that precedent.

1. Spoken-Word Copyright in Twain and Cord's Time

The first and most basic point is that it was settled law in Twain and Cord's time that an attendee at a lecture or other live performance could not take verbatim notes and publish them without the speaker's consent.[122] While this might seem decisive for Cord, most all the cases on this point appear to have dealt with speakers who had previously written something down.[123] Whether an unfixed work was protected by copyright was, conversely, was barely addressed back then, and not yet at all in the U.S.

Two British cases of the era — *Abernethy v. Hutchinson* from 1824 and *Nicols v. Pittman* in 1884 — did address the issue but were conflicted in their views.[124] They both ruled in favor of the lecturer despite there being no prior writing, but *Abernethy* declined to do so on the basis of copyright.

Abernethy involved a surgeon's lectures in a hospital theater that a magazine published without his consent, apparently obtaining a verbatim transcription from a student's surreptitious notes.[125] The court declined to decide the surgeon's copyright claim in his favor without being able to see his notes, which the surgeon claimed he had but failed to produce.[126] Instead, the court ruled in his favor on an alternate theory: that by attending the students had implicitly agreed not to transcribe and sell his lecture for profit.[127]

Nicols also involved a lecture transcribed by an audience member and published for profit, but this time the defendant claimed that his notetaking was done openly in the first row.[128] Ruling for the lecturer, the court remarked:

---

121 *See generally* Brennan & Christie, *supra* note 40.
122 *Id.*
123 *Id.*
124 *See id.*; Abernethy v. Hutchinson, 3 L.J. Ch. 209 (1824); Nicols v. Pittman, 26 Ch. Div. 374 (1884).
125 Brennan & Christie, *supra* note 40, at 10-11; Charles Weber, *When Does a Professor Lose His Common Law Rights in His Lecture?*, AM. BUS. L. ASS'N BULL. 58, 71-72, https://www.bus.umich.edu/KresgeLibrary/resources/abla/abld_4.1.58-81.pdf.
126 *Abernethy*, 3 L J. Ch. 209; Brennan & Christie, *supra* note 40, at 10-11; Weber, *supra* note 37, at 71-72.
127 *Id.*
128 *Nicols*, 26 Ch. Div. 374; Brennan & Christie, *supra* note40, at 10-11; Weber, *supra* note 37, at 71-72.

> [W]hether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but are not at liberty, having taken those notes, to use them afterwards for the purpose of publishing the lecture for profit.[129]

The court, however, did not make clear whether the ruling was based on copyright or, like in *Abernethy*, an implied contract theory.[130] So, though equivocal on whether copyright or contract was the right, both cases found a wrong: unauthorized copying and publication for profit, even if what was copied was purely oral.[131]

Beyond the cases, the leading and perhaps first treatise of the era to focus on copyright — *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* by Eaton S. Drone, published in 1879 — adopted the position that common-law copyright can protect the spoken word.[132] Specifically,

---

129 *Id*.

130 *Id*.

131 *Abernethy*, 3 L J. Ch. 209; *Nicols*, 26 Ch. Div. 374; Brennan & Christie, *supra* note 40, at 10-11; Weber, *supra* note 37, at 71-72.

132 EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES: EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 98-99 (Boston, Little Brown 1879). As support, Drone cited Lord William Blackstone's arguments in the case of *Tonson v. Collins*, 1 W. Bl. 322 (1761), which though not a spoken-word case, involved a debate over the root and rationale for common-law copyright. *See* Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29, 67-68 (2012) (discussing the context of *Tonson*). As quoted by Drone, Blackstone stated: "A literary composition as it lies in the author's mind, before it is substantiated by reducing it into writing, has the essential requisites to make it the subject of property. While it thus lies dormant in the mind, it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public." Drone, *supra*, at 1 n.1; *see also* 1 NIMMER & NIMMER, *supra* note 9, § 2.02 (citing Drone regarding the issue of protection of unfixed works and ultimately arguing in favor of Drone's conclusion: "It therefore seems preferable to view the underlying rationale for common law copyright (i.e., the recognition that a property status should attach to the fruits of intellectual labor) as applicable, regardless of whether that labor assumes tangible form.").

Courts from the late nineteenth century in New York and elsewhere regularly cited Drone with approval. *See, e.g.*, Tompkins v. Halleck, 133 Mass. 32, 43 (1882); The Mikado Case, 25 F. 183, 187 (C.C.S.D.N.Y. 1885) (calling Drone "a commentator of authority"); Tabor v. Hoffman, 118 N.Y. 30, 34–35, 23 N.E. 12 (1889); McCann v. Randall, 147 Mass. 81, 83, 17 N.E. 75, 78–79 (1888); Werckmeister v. Springer Lithographing Co., 63 F. 808, 811 (C.C.S.D.N.Y. 1894); Daly v. Walrath, 57 N.Y.S. 1125, 1126 (App. Div. 1899); *see also* Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 18 (2017) (describing Drone as "the leading copyright treatise of the time"). Professor Litman has further discussed the influence of Drone on the courts of the time, as well as its waning influence on the

> [L]iterary property . . . may be as perfect in a production expressed in spoken as in one communicated by written or printed words. A poem when read, a lecture when delieved, a song when sung, a drama when acted, may have all the attributes of property, though not a word has been written or printed. The true test is not whether the thing is corporeal or incorporeal, not whether it is attached to a material substance, but whether it is capable of identification such that exclusive ownership may be asserted. The identity of an intellectual production is secured by the langauge in which it is expressed; and this is true whether the language be spoken or written.[133]

Having staked this position — that spoken words, if capable of identification such that exclusive ownership may be asserted, can be protected by common-law copyright — Drone's treatise then addressed the same evidentiary concerns that troubled the court in *Abernethy*:

> When a composition has not been reduced to writing, it may be more difficult to prove the authorship, and thereby to establish a title to ownership. But the manuscript is but a means of proof. And when the title to the ownership is not disputed, or can be satisfactorily established without the existence of a writing, as it may be in many cases, it is immaterial whether the composition has been reduced to writing, or has been communicated only in spoken words.[134]

Here, as detailed above, Twain copied Cord's spoken words, from memory, to the best of his considerable ability.[135] Twain's own statements, made by him in letters and his notebooks, establish it without apparent dispute.[136]

So, Drone's influential treatise — one that was regularly cited in the courts of the era — speaks in favor of Cord's claim.[137] This confirms it was recognized back then that common-law copyright could apply to the

development of federal statutory copyright. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1386 (2010) ("[T]he broad Drone view of natural rights copyright fell out of fashion, to be replaced, first, by a utilitarian public-interest account and later by a utilitarian broad property rights account.").

133 DRONE, *supra* note 132, at 98-99.

134 *Id.* This principle — that a lack of fixation is an evidentiary issue, not an issue of copyrightability — is closely echoed in one of today's leading copyright treatises. 1 GOLDSTEIN, *supra* note 119, § 17.5.1 ("Where these evidentiary problems do not arise, state courts can be expected to grant common law copyright protection without reservation. For example, where a member of an audience audiotapes or videotapes a protectible performance without permission, the unauthorized audiotape or videotape will constitute irrefutable and lasting evidence not only of the plaintiff's authorship, but also of the defendant's infringement, thus removing any evidential hurdles to relief on a common law copyright theory.").

135 *See supra* Part II. John Hay, no stranger to taking dictation — for President Lincoln, no less — marveled at the power of Twain's memory. *See supra* note 72.

136 *See supra* Part II.

137 *See supra* notes 132-33 and accompanying text.

spoken word. In essence, if Cord had brought a claim against Twain back then, there was authority in her favor.[138] Likewise, a court today, looking back, could soundly decide the issue in Cord's favor without rewriting history.

Any court now, though, would likely also be greatly influenced by the New York Court of Appeals's 1968 decision in *Estate of Hemingway v. Random House*, the first U.S. case to address the issue directly and in detail.[139] It is to this day considered the quintessential discussion of the subject.[140]

2. *Spoken-Word Copyright and* Estate of Hemingway v. Random House

Ernest Hemingway — who once wrote that all modern American literature comes from one book by Mark Twain called *Huckleberry Finn* — died in 1961.[141] His widow sued Random House in 1966 to block the publication of *Papa Hemingway: A Personal Memoir*.[142] The writer of

---

[138] *See also infra* Part III.A.iii for a discussion of the publishing practices regarding narratives of enslavement.

[139] 244 N.E.2d 250 (N.Y. 1968). The case of *Jenkins v. News Syndicate Co*., 219 N.Y.S. 196, 198 (Sup. Ct. 1926), came before *Hemingway* and was cited in it, and it involved a claim based at least in part on spoken words, but there it was also alleged that the plaintiff subsequently wrote those words down before the defendant published them. *Jenkins* also never used the term "copyright" — using "common-law property" instead — and it may also be read as more of an implied contract case. *See id.* (stating that the plaintiff spoke "under circumstances which implied that it would not be used without compensation"). *Columbia Broadcast System v. Documentaries Unlimited*, 248 N.Y.S. 2d 809 (1964) also preceded *Hemingway*. It too involved words that were purely spoken — a radio broadcaster's improvisations on the news sheets handed to him — and recorded without consent, and it did refer to common-law copyright, but its rationale focused more on theories of unfair competition and the right of publicity, stating "the significant element, however, is that his voice and style of talking, which in his profession is the foundation and source of employment and income, were appropriated by defendant without his consent. A broadcaster's voice and style of talking is, to all intents and purpose, his personality, a form of art expression and his distinctive and valuable property." *Id.* So, *Hemingway* appears to be the first case to unambiguously address the issue of common-law copyright in spoken words.

[140] Today's preeminent copyright treatises emphasize it. *See, e.g*., 1 GOLDSTEIN, *supra* note 119, at §17.5.1; 1 NIMMER & NIMMER, *supra* note 9, at § 2.02; 3 PATRY ON COPYRIGHT, *supra* note 6, at §§ 5:19, 10:42. The *American Law Reports* resource also emphasizes the case in its discussion of the issue. Thomas J. Griffin, *Annotation, Common-Law Copyright in the Spoken Word*, 32 A.L.R. 3d 618 (1970).

[141] ERNEST HEMINGWAY, GREEN HILLS OF AFRICA 22 (1935); *Est. of Hemingway*, 23 N.Y.2d at 344.

[142] *Est. of Hemingway*, 244 N.E.2d at 252. Mary Welsh Hemingway, his widow, sued Random House on her own behalf and on behalf of his estate. *Id.*

that book was A.E. Hotchner, a friend and protégé of Hemingway.[143] The book quoted from conversations between the mentor and pupil, which Hotchner described as "not necessarily verbatim but . . . renditions based upon notes which he kept and recorded during the years of his friendship with Hemingway and his natural talent for remembering such conversations."[144]

The estate claimed that Hemingway's contributions to these conversations were "subject to a common law copyright, that is, the right of first publication of such material, which right belongs solely to his estate."[145] Indeed, the estate argued that "[w]hat for Hemingway was oral one day would be or could become his written manuscript the next day."[146] Thus, the estate claimed, what Hemingway said to Hotchner "was as much the subject of common-law copyright as what he might himself have committed to paper."[147]

The trial court disagreed. It denied the estate's motion for a preliminary injunction and, later, granted summary judgment to Random House,[148] finding that "[c]onversations . . . are inevitably the product of interaction between the parties; they are not individual intellectual productions," so "it would seem that the only rational rule is that any party is free to publish his own version — whether verbatim or not. There is no need to reach the question whether one party's written version could ever infringe upon any other's. It is only necessary to hold that no party may ever prevent any other from publishing the oral expressions involved."[149]

In essence, then, the trial court decided that Hemingway and Hotchner's conversations were collaborative, making them at most joint authors who each had the right to publish each other's words.[150] So Hemingway's estate could not stop Hotchner from using the conversations in his book.[151]

---

143 *Id.* at 252-55. Hotchner was already at that time a lawyer — having graduated from the University of Washington in St. Louis School of Law — and a budding author in his own right. Bruce Weber, *A.E. Hotchner, Writer and Friend of the Famous, Dies at 102*, N.Y. TIMES (Feb. 15, 2020). He went on to live a long and interesting life, publishing many more books and befriending the actor Paul Newman, leading to their cofounding the massively successful charitable endeavor Newman's Own. *Id.*

144 Est. of Hemingway v. Random House, Inc., 268 N.Y.S.2d 531, 536 (N.Y. Sup. Ct. 1966).

145 *Id.*

146 *Est. of Hemingway*, 244 N.E.2d at 253-54.

147 *Id.* at 254.

148 *Est. of Hemingway*, 268 N.Y.S.2d. at 536; Est. of Hemingway v. Random House, Inc., 279 N.Y.S.2d 51, 59-60 (N.Y. Sup. Ct. 1967).

149 *Est. of Hemingway*, 279 N.Y.S.2d at 59-60.

150 *Id.*

151 *Id.*

Taking the matter up on appeal, New York's highest court unanimously affirmed the result — a loss for Hemingway's estate — but for a different reason.[152] The court decided that Hemingway had consented to Hotchner's use of his contributions to their conversations, based on "a continuing practice, during Hemingway's lifetime, for Hotchner to write articles about Hemingway, consisting largely of quotations from the latter's conversation — and of all of this Hemingway approved."[153]

I address this issue of consent in detail in "A Copyright Restored," as it also would be a potential defense to any infringement claim by Cord's heirs,[154] but for now what's most vital is that Judge Fuld, writing for the unanimous court, did not rest his pen there. He could not resist discussing the merits of spoken-word copyright in general, and in so doing he created likely the most useful — if not binding — precedent to guide our analysis of Cord's claim to copyright.[155]

Fuld first quoted with approval Professor Melville Nimmer's position that "the underlying rationale for common law copyright (i.e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form."[156] Noting the challenges, generally, with applying this principle to the purely spoken word, Judge Fuld distinguished the degree of difficulty this poses with a public address versus a private conversation.[157]

"Written or not," Fuld went on, "public addresses . . . have distinct, identifiable boundaries and they are, in most cases, only occasional products. Whatever difficulties attend the formulation of suitable rules for the enforcement of rights in such works . . . they are relatively manageable."[158] However, "conversational speech," presents "unique problems" including, primarily, the "right of the press to report on what people have Done, or on what has Happened to them or on what they have Said in public."[159] But this right "does not necessarily imply an unbounded freedom to publish whatever they may have Said in private conversation."[160]

---

152 *Est. of Hemingway*, 244 N.E.2d at 254-59.

153 *Id*.

154 *See* McFarlin, *A Copyright Restored*, *supra* note 14, at 53-63.

155 *Est. of Hemingway*, 244 N.E.2d at 254-57. Beyond the timing issue, the case's discussion on the copyrightability of the spoken word would likely not be binding on a court today because it is dicta, i.e., the case was decided instead on the ground of consent. *Id*.

156 *Id.* at 254.

157 *Id.* at 254-55. Judge Fuld also mentioned letters and plays, but given the written nature of both, they are not as relevant to the issue at hand in Cord's case. *Id.*

158 *Id.*

159 *Id*.

160 *Id*.

"[W]e should be wary," cautioned Judge Fuld, "about excluding all possibility of protecting a speaker's right to decide when his words, uttered in private dialogue, may or may not be published at large." He suggested, then, that "there may be limited and special situations in which an interlocutor brings forth oral statements from another party which both understand to be the unique intellectual protect of the principal speaker, a product which would qualify for . . . copyright if such statements were in writing."[161]

What might those limited and special situations be? Judge Fuld and his colleagues on the Court of Appeals offered some thoughts:

> [I]t would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication. In the conventional . . . copyright situation, this indication is afforded by the creation of the manuscript itself. It would have to be evidenced in some other way if protection were ever to be accorded to some forms of conversational dialogue.
>
> Such an indication is, of course, possible in the case of speech. It might, for example, be found in prefatory words or inferred from the circumstances in which the dialogue takes place.[162]

So, several aspects emerge as relevant to Cord's claim of copyright. First, although the appeal was ultimately decided on the issue of consent, the court's willingness to recognize copyright in the spoken word, at least in some situations, favors Cord's claim. It further confirms that a court today would not be bound to reject a claim, perhaps by Cord's descendants, simply because it is founded on purely oral expression.[163]

Next, then, are the different situations that weigh for or against copyright. The court's initial and primary distinction is between public address and private conversation.[164] This distinction is, I think, a useful vehicle to consider how the nature of Cord's communication with Twain might impact her claim to copyright. In essence, I see Cord's story as a hybrid of the two types, what we might call a private address.

Why a private address? First, it was not public. Though Twain's family was there, not just Twain, it was not open to a general audience.[165] But it was also not fully a conversation; it was more monologue than dialogue.[166] Twain's words in that moment prompted Cord's story, but that's

---

161 *Est. of Hemingway*, 244 N.E.2d at 255.
162 *Id.* at 256.
163 *See* McFarlin, *A Copyright Restored*, *supra* note 14, at 73-79 and 88-89, regarding the potential for a claim today.
164 *See supra* notes 157-60 and accompanying text.
165 *See supra* Part II.
166 *See id.*

all; the ratio of their spoken words, as recorded by Twain, was 98 to 2.[167] This satisfies, I think, Judge Fuld's concern for marking the utterance off from the ordinary stream of speech.[168] The evidence further suggests that Cord had told the story before to those close to her.[169] One of them, per Twain's early biographer, was her employer Susan Crane, who told Twain about it.[170] Twain then successfully prompted (without expressly asking) Cord to tell the story.[171] So this was not a spontaneous utterance in the stream of a common give-and-take conversation. It was an original description of her life experiences, one Cord had told before and would tell again.[172]

So we move then to Judge Fuld's second concern — did Cord indicate that she wished "to exercise control" over her story's publication?[173] While arguably confusing copyrightability with the issue of consent to publication,[174] I think it does speak to the ultimate issue on Cord's claim to copyright, one that echoes throughout copyright law: what kind of intent, if any, must one have to be deemed an "author" and therefore the owner of a copyright? There is nothing to suggest that Cord considered whether to publish her story or not.[175] She apparently could not read or write, and there's no evidence that she knew of a publishing market for stories like

---

167 Everything else was written by Twain after the fact, as opposed to his recording of his own speech. *See* Nagarawa, *supra* note 76, at 144-45, 51.

168 *Est. of Hemingway*, 244 N.E.2d at 256. It also, in my view, distinguishes Cord's case from the more general issue of copyright in conversations, which has been the main focus of the scholarly conversation of copyright in the spoken word. *See supra* note 40.

169 *See supra* notes 69-70 and accompanying text. While this did not come from Twain's own pen, his biographer's statement may still be admissible as a "statement in an ancient document." *See* Fed. R. Evid. 303(16); *see also* 5A BARKER & ALEXANDER, *supra* note 53, at § 8:74.

170 *See supra* note 69 and accompanying text.

171 *Id*.

172 *Id.* Cord's likely retelling of the story is evidenced by the story's repetition down the generations of her family. *See* Wisbey, *supra* note 57, at 277. Another way of looking at it is that it would've been strange if she, after that summer evening in 1874, never told her story again over her remaining fourteen years.

173 *Est. of Hemingway*, 244 N.E.2d at 256.

174 Consider this: if a random, third-party eavesdropper had overheard Hemingway's words to Hotchner and then wrote and published them, I think the court would have found the eavesdropper liable, even if Hemingway had not indicated in his words that he wished to control their publication. This, to me, suggests that the better understanding of this aspect of Judge Fuld's opinion is that it applies to consent, not copyrightability. Given the history of his relationship with Hotchner, Hemingway would've had to make express that he didn't want Hotchner to publish something that was said. But a similar requirement to stop an eavesdropper would be unlikely. See McFarlin, *A Copyright Restored*, *supra* note 14, at 53-63, for a further analysis of the consent issue in *Estate of Hemingway* and in Cord's case.

175 *See supra* Part II.

hers.[176] But a market did exist. A relatively brief description of it is useful, then, before analyzing the issue of intent and authorship.

3. Publishing Industry Treatment of Spoken-Word Enslavement Narratives

Cord was not alone. Examples abound of orally dictated stories of enslavement. But unlike Cord's story, most if not all were published with credit to the storyteller.[177] And though much less common than men's, women's narratives were published and credited as well.[178] Perhaps the most famous of these, *A Narrative of Sojourner Truth, A Northern Slave,*

---

[176] *See supra* note 16.

[177] *See* Gates, *supra* note 24. Per Professor Gates:

> [T]hanks to my friend William L. Andrews and his colleagues at Doc South, an online archive hosted by the University of North Carolina at Chapel Hill, we can put an exact number out there: *204*. That's right! From the height of the slave trade to the end of the Civil War in 1865, 102 known book-length slave narratives were written, with another 102 written by former slaves after the war.

Id. (emphasis in original). Many wrote their own. *Id.* But a great many others dictated their narratives or otherwise intensely collaborated with editors. *See* SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES xvii–xxix (John W. Blassingame ed.) (1977). Among the most famous examples were William and Ellen Craft, Henry "Box" Brown, and Solomon Northup, the latter of whom, in the months following his rescue, worked closely with David Wilson, an attorney from Whitehall, New York. *Id.* Others, as listed on the Doc South archive referenced by Professor Gates, include NAT TURNER, THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, VA. (1831), https://docsouth.unc.edu/neh/turner/menu.html (dictated in his jail cell); WILLIAM WEBB, HISTORY OF WILLIAM WEBB (1873), https://docsouth.unc.edu/neh/webb/webb.html (dictated to his wife); BETHANY VENEY THE NARRATIVE OF BETHANY VENEY, A SLAVE WOMAN, *in* ENCYCLOPEDIA VIRGINIA (1889), https://encyclopediavirginia.org/entries/narrative-of-bethany-veney-a-slave-woman-the-1889 (dictated to a woman identified only by her initials); MEMOIR OF OLD ELIZABETH: A COLORED WOMAN (1863), https://docsouth.unc.edu/neh/eliza1/eliza1.html; and THE HISTORY OF MARY PRINCE: A WEST INDIAN SLAVE (1831), https://docsouth.unc.edu/neh/prince/prince.html.

And slave narratives were not limited to book form. As Professor Goddu observes, "[a] focus on the slave narrative as book not only considerably underestimates the number of slave narratives produced but also the range and context of their circulation." Teresa A. Goddu, *The Slave Narrative as Material Text*, *in* THE OXFORD HANDBOOK OF THE AFRICAN AMERICAN SLAVE NARRATIVE (John Ernest ed., 2014). Such narratives were published in, among other contexts, periodical journals like the *Southern Quarterly Review*. *Id.* As noted above, the *Atlantic* itself featured at least one slave narrative prior to publishing "A True Story." *See supra* note 31.

[178] *Id.* Harriet Jacobs's *Incidents in the Life of a Slave Girl* was another quite-famous female narrative. *See generally* HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (1861); JEAN FAGAN YELLIN, HARRIET JACOBS: A LIFE (2003).

Emancipated from Bodily Servitude by the State of New York, in 1828, was first published in 1850 and republished several times, including in 1876.[179] Truth dictated her narrative to Olive Gilbert, whom she met through famed abolitionist William Lloyd Garrison in Massachusetts.

Gilbert, as described by historians Erlene Stetson and Linda David, shared with "other middleclass white women . . . a desire to bring the voices of black women before an audience as part of their dedication to abolitionism."[180] Truth's final manuscript was, according to Stetson and David, "recorded, shaped, and filled with scribal interpolations by Olive Gilbert," though, they note, "[i]n a self-effacing act of generosity or shyness, Gilbert did not put her own name into *Narrative* in any capacity, not as scribe, compiler, editor, and certainly not as author."[181]

Other dictated works, however, did refer to the person who recorded the narrative, while still giving primary credit to the oralist.[182] This was the case with Solomon Northup's 1853 book *Twelve Years a Slave*, which Northup dictated to David Wilson.[183] Wilson, a "lawyer, state legislator, local historian, occasional poet, and former school superintendent" whom Northup met while living in New York, was credited as editor, not author, of the book.[184] Further, beyond just getting authorship credit on the cover, Northup apparently was also the recognized owner of the copyright in the book, reportedly selling it to the publisher Derby & Miller for $3,000, worth approximately $109,538 today.[185]

---

179 TRUTH, *supra* note 28; ERLENE STETSON AND LINDA DAVID, GLORYING IN TRIBULATION: THE LIFE WORK OF SOJOURNER TRUTH (1994); Jessica Janecki & Lauren Reno, *Sojourner Truth's Narrative* (Feb. 14, 2008), https://blogs.library.duke.edu/rubenstein/2018/02/14/sojourner-truths-narrative/. That Truth's narrative was republished in 1876 helps show that a market existed for a female slave narrative, published in her own name, near the time of "A True Story."

180 STETSON & DAVID, *supra* note 28.

181 *Id.*

182 BLASSINGAME, *supra* note 177, at xviii–xix.

183 *Id.*; NORTHUP, *supra* note 26.

184 BLASSINGAME, *supra* note 177, at xviii–xix; FISKE ET AL., *supra* note 26. Northup likely met Wilson through another lawyer who helped the effort to free Northup. David Fiske, *David Wilson, American Lawyer and Author*, Britannica, https://www.britannica.com/biography/David-Wilson.

185 SUE EAKIN, SOLOMON NORTHUP'S TWELVE YEARS A SLAVE: AND PLANTATION LIFE IN THE ANTEBELLUM SOUTH (2007) (quoting the *Sandy Hill Herald*, Mar. 22, 1853: "We are informed that an extensive publishing house in this state has offered Northup, the kidnapped slave, recently returned to this village, $3000 for the copyright of his book."). Sandy Hill was a town in New York where Northup had once been a resident. *Id.* For the present value of $3,000 in 1853 in today's dollars — $115,635 — see CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1853?amount=3000 (last visited Jan. 27, 2023).

Josiah Henson also orally dictated his story of enslavement in *The Life of Josiah Henson, Formerly a Slave, Now an Inhabitant of Canada, as Narrated by Himself*, first published in 1849.[186] Samuel Atkins Eliot, a Massachusetts politician and abolitionist, received and recorded Henson's dictation.[187] The book's preface included a note that "Henson had dictated the story and then listened to the text read aloud, so that he could correct any errors."[188] Henson's copyright, like Northup's, was apparently acknowledged, and he too exercised his right to transfer ownership of it.[189]

Further, an 1876 edition of Henson's book[190] included a preface by Harriet Beecher Stowe, explaining that Henson's book was a key inspiration for her world-changing novel *Uncle Tom's Cabin*,[191] a fact she had previously revealed in her 1853 follow-up volume *A Key to Uncle Tom's Cabin: Presenting the Original Facts and Documents upon Which the Story Is Founded, Together with Corroborative Statements Verifying the Truth of the Work*.[192] Twain, along with much of the world, was very familiar with

---

186 JOSIAH HENSON, THE LIFE OF JOSIAH HENSON, FORMERLY A SLAVE, NOW AN INHABITANT OF CANADA, AS NARRATED BY HIMSELF (1849); BLASSINGAME, *supra* note 177, at xviii–xix; Erin Bartels, *Summary, Josiah Henson, 1789-1883, Truth Stranger Than Fiction. Father Henson's Story of His Own Life*, https://docsouth.unc.edu/neh/henson58/summary.html.

187 *Id*.

188 *Id*.

189 In an 1876 edition of his autobiography, Henson stated:

> Another of my new friends is Mr. John Lobb (the managing editor of the *Christian Age*). He has an extensive acquaintance with most of the evangelical ministers in London. He has arranged all my engagements, assisted me in addressing, at their request, very large audiences in public buildings, chapels, and places of worship. Indeed, he has on every public occasion rendered me material assistance as my *Chairman*. Under such obligations, I felt it to be a pleasant duty to make some acceptable acknowledgment, which I trust it will prove to be. I have therefore assigned the sole copyright of this work to Mr. JOHN LOBB.

JOSIAH HENSON, "UNCLE TOM'S STORY OF HIS LIFE." AN AUTOBIOGRAPHY OF THE REV. JOSIAH HENSON (MRS. HARRIET BEECHER STOWE'S "UNCLE TOM") (1876).

190 *Id.* Again, similar to Sojourner Truth's 1876 republication, *see supra* note 179 and accompanying text, this evidences the market for such narratives in Twain and Cord's time.

191 *Id.*; HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852); Jared Brock, *The Story of Josiah Henson, The Real Inspiration for Uncle Tom's Cabin*, SMITHSONIAN MAG. (May 16, 2018). U.S. Senator and Republican Party leader Charles Sumner declared, "Had there been no *Uncle Tom's Cabin*, there would have been no Lincoln in the White House." Brock, *supra*.

192 HARRIET BEECHER STOWE, A KEY TO UNCLE TOM'S CABIN: PRESENTING THE ORIGINAL FACTS AND DOCUMENTS UPON WHICH THE STORY IS FOUNDED, TO-

Uncle Tom's Cabin and was personal friends and neighbors in Hartford with Beecher Stowe.[193]

The Henson-Stowe example, then, hit very close to home for Twain. But an example that hit closer to home, in the figurative sense, was *Slavery in the United States: A Narrative of the Life and Adventures of Charles Ball*, first published in 1836 and reprinted in 1858.[194] Ball had orally dictated his story to Isaac Fisher, a Pennsylvania lawyer and amateur geologist.[195] While federal copyright was registered in the name of Fisher, and Fisher is referred to in the preface as "the author," Ball did get credit for the book — Twain himself referred to it in his own notes as "Autobiography of Charles Ball" while he was writing *A Connecticut Yankee in King Arthur's Court*.[196] Twain's copy of Ball's book was borrowed from Susan Crane, creating the intriguing possibility that Twain first read it in her house, the same place he heard and wrote down Cord's story.[197]

GETHER WITH CORROBORATIVE STATEMENTS VERIFYING THE TRUTH OF THE WORK (1853).

193 *See* Elizabeth Normen, *Where Mr. Twain and Mrs. Stowe Built Their Dream Houses*, 9 CONNECTICUT 3 (Summer 2011), https://connecticuthistory.org/where-mr-twain-and-mrs-stowe-built-their-dream-houses/; Kristen Masters, *Mark Twain, Harriet Beecher Stowe, and the Byron Scandal*, BOOKS TELL YOU WHY.COM, https://blog.bookstellyouwhy.com/mark-twain-harriet-beecher-stowe-and-the-byron-scandal; GIBBEN, *supra* note 30, at 707-08.

194 SLAVERY IN THE UNITED STATES: A NARRATIVE OF THE LIFE AND ADVENTURES OF CHARLES BALL (1827); Michael Roy, *The Vanishing Slave: Publishing the Narrative of Charles Ball, from* Slavery in the United States *(1836) to* Fifty Years in Chains *(1858)*, 111 THE PAPERS OF THE BIBLIOGRAPHICAL SOC'Y OF AM. 513, 513-14, and 535-36 (2017); GRIBBEN, *supra* note 30, at 39-40. After being separated and sold from his mother at age twelve, Charles Ball escaped slavery, fought in the Revolutionary War on the side of the colonists, was captured and sold into slavery again, and escaped again. Tim Grove, *Fighting the Power*, CHESAPEAKE BAY MAG. (Jan. 22, 2021), https://chesapeakebaymagazine.com/fighting-the-power/; *The History of American Slavery, When Cotton Became King*, SLATE (Aug. 24, 2015), https://slate.com/podcasts/history-of-american-slavery/2015/08/history-of-american-slavery-episode-6-cotton-charles-ball.

195 BALL, *supra* note 194, at i; Roy, *supra* note 194, at 534 n.61. In the preface to the book, Fisher, who wrote down Ball's words, states "that many of the anecdotes in the book illustrative of southern society were not obtained from Ball, but from other and creditable sources; he avers, however, that all the facts which relate personally to the fugitive, were received from his own lips." BALL, *supra* note 194, at ii.

196 *Id.* Regarding Twain's reference to it, see *The Works of Mark Twain, A Connecticut Yankee in King Arthur's Court* 645 (Bernard L. Stein ed., 1979) (noting the reference to "Autobiography of Charles Ball" in Twain's manuscript). There seems to be no record of whether Ball received compensation for his story. Roy, *supra* note 194, at 525-26.

197 In sum, the evidence shows that Twain first read Ball's book sometime earlier than 1889, but it's not clear how much earlier. *See* GRIBBEN, *supra* note 30 at 39-

The *Atlantic* itself, furthermore, had published a slave narrative in 1866, with the formerly enslaved William Parker credited as author.[198] Though it was initially written by Parker, not dictated, Parker's manuscript was edited by James Gilmore under the pseudonym "E.K."[199] Further, Parker, who apparently was just learning to read and write, may also have had other help in completing it.[200] Gilmore included the prefatory note, "The manuscript of the following pages has been handed to me with the request that I would revise it for publication, or weave its facts into a story which should show the fitness of the Southern black for the exercise of the right of suffrage."[201]

Given this context, it's certainly plausible for Cord's story to have been published under her own name, perhaps in the pages of the *Atlantic* or in book-length form, particularly given its amazing climax: her reunion with and liberation by her son, who had escaped slavery and become a soldier for the Union.[202] The chances of commercial success would almost certainly have been higher with Twain's name (or at least writing skill) attached to it as a co-author or editor, but even a writer of lesser skill or repute could likely have helped make Cord's narrative attractive to a publisher and audience, considering the non-famous scribes who helped other successful narratives.[203]

So, to what extent does this market for an orally dictated narrative, published under her own name, impact Cord's claim to copyright? On the one hand, the market's existence shows a usual custom of recognizing the storyteller, not the amanuensis, as the credited author. And scholarship has shown how such industry custom is influential in adjudicating copyright claims.[204] On the other hand, might we hold this market's existence

40; James D. Williams, *The Use of History in Mark Twain's Connecticut Yankee*, 80 PMLA 102, 109-10 (1965).

198 *See supra* note 31 and accompanying text; Dana M. Gibson, "*Am I Your Slave?" William Parker and "The Freedman's Story,"* 21-23, 45 (2009) (Honors Thesis, The Pennsylvania State University), https://honors.libraries.psu.edu/files/final_submissions/281.

199 *Id*.

200 Gibson, *supra* note 198, at 21-23.

201 *Id.* at 43.

202 *See infra* Part II.

203 *See infra* notes 177-96 and accompanying text (describing Olive Gilbert, David Wilson, Samuel Akins Eliot, and Isaac Fisher).

204 *See generally* Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1978-79 (2007) (cautioning against the use of custom but recognizing its pervasiveness in intellectual property cases, such as copyright, and acknowledging as an exception to her concerns that where "custom is standing in only for evidence of a positive proposition, such as 'this is what is generally done,'" it may serve a useful role in intellectual property). *Id.* at 1978–79; Timothy J. McFarlin, *Father(s?) of Rock & Roll: Why the Johnnie Johnson v.*

against Cord's claim to copyright? Should she have known to seek someone out to write her story before telling it to Twain, or should she have told Twain, "My story is private, don't publish it"? This strikes at the central issue: does it matter, for purposes of copyright, how Cord viewed herself vis-à-vis her story?

B. Cord Intentionally Caused a Profound Reaction in Twain, Making Her an Author Regardless of Whether She Considered Herself One

We've seen that courts, including in New York, have opined that the spoken word can qualify for copyright under certain circumstances.[205] We've further seen that the publishing industry in Twain and Cord's time often recognized credit, compensation, and copyright for those, like Cord, who had only expressed their narratives orally.[206] But Judge Fuld in *Estate of Hemingway* only seemed willing to recognize spoken-word copyright in someone who indicated the wish "to exercise control" over her story's publication.[207] The storytellers like Sojourner Truth, who did publish under her name, ultimately did this.[208] Cord, however, did not make such an indication.[209] Given the circumstances, she likely did not think of herself as an author in the legal sense or, correspondingly, as a copyright owner.

The central question, then, is does that matter — does an author have to view herself as one? This question, to me, is not only the key to deciding Cord's claim to copyright, it's the one that sheds the most light on both our past and present perceptions of authorship in copyright. Ultimately, I argue here that she did not have to view herself as an author. Because Cord intentionally caused a profound mental effect in her audience — namely, Mark Twain — that fact, alone, should qualify her as an author.

1. Intent and Authorship

"[I]t would seem," Professor David Nimmer has written, "that intent is a necessary element of the act of authorship."[210] To illustrate, Nimmer contrasts the following two situations: (1) a child throws a broken Barbie doll in the garbage, where it sits amidst banana peels and other household debris, and (2) an artist buys a Barbie, smashes it with a hammer, poses it

---

Chuck Berry Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship, 17 VAND. J. ENT. & TECH. L. 575, 671 (2015) (discussing the use of industry custom in authorship decisions).

205 *See supra* Part III.A.i. and ii.

206 *See supra* Part III.A.iii.

207 *See supra* Part III.A.ii.

208 *See supra* Part III.A.iii.

209 *See supra* Part II.

210 *See* Nimmer, *Copyright in the Dead Sea Scrolls*, *supra* note 42, at 204.

amidst banana peels and other household debris, and displays the product at an art gallery.[211] The artist is an author; the little girl is not.[212] Professor Buccafusco has since theorized that this is because the artist has intended to create mental effects on an audience and the child did not.[213]

This, to me, is a sensible and useful definition of authorship — expressing oneself with the intent to create mental effects in an audience — thereby reserving copyright for those who have intended to generate aesthetic expression, what we often simply call "art."[214] The child presumably did not place the doll in the trash to create art. The artist did. The girl did something functional — disposing of a doll she no longer wanted — and the law has long walled off copyright from the functional, reserving that for the sphere of patent.[215]

This seems, so far, to support Cord's claim. She intended that her story create mental effects in an audience — namely Twain and his family, as well as any previous audience to whom she had told the story, likely at least her own family and Susan Crane individually.[216] She chose certain words to best express to them how she felt at the pain and indignity of her enslavement, as well as her elation in reuniting with her son.[217]

Consider, in contrast, someone talking in their sleep. The words would not be directed to an audience. Or consider someone yelling random words to chase off a dangerous animal. The spoken word there serves a functional purpose — protection of self and perhaps property. Cord's words, instead, served an aesthetic, audience-targeted purpose, like any autobiographical tale, and therefore the aesthetic aspects of her story — the creative way in which she told it — should be protected by copyright.[218]

But Professor Buccafusco goes on to suggest that authorial intent also means something more: "[I]t makes little sense to extend authorial rights to people who do not intend that their creations be treated as writings of

---

211 *Id.* at 205-06.

212 *Id*.

213 Buccafusco, *supra* note 42, at 1262-64 ("For purposes of copyright law, then, a person may be considered an author when she has the categorial intention that her creation is capable of producing mental effects in an audience.").

214 *Id*.

215 *Id.*; *see also* Shubha Ghosh, *Patenting Games:* Baker v. Selden *Revisited*, 11 VAND. J. ENT. & TECH. L. 871, 892–93 (2009) (noting that the bedrock difference between copyright and patent "very broadly, rests on the difference between aesthetics and functionality").

216 *See supra* Part II.

217 *See id*.

218 Noting the aesthetic qualities and goals of autobiography, see, e.g., Majanne E. Gooze, *The Definitions of Self and Form in Feminist Autobiography Theory*, 21 WOMEN'S STUDIES 411 (1992); David Parker, *Towards an Aesthetics of Autobiography*, 23 AUTOBIOGRAPHY STUDIES 41 (2008).

authors."[219] This, to me, adds something extra and, if accepted, likely fatal to Cord's claim. I further see it as connecting to what Judge Fuld meant when he wrote of indicating a wish to exercise control over the publication of one's expression.[220]

I would not adopt this extra element for two reasons. The first reason is cabined specifically to purely spoken words and other unfixed creative expression. Buccafusco's reasoning stems from the U.S. Constitution's express purpose for granting copyright: "to promote the progress of science."[221] Accordingly, to him,

> [C]opyright law should limit the extension of rights to those people who are plausibly going to be affected by the incentives it creates. If people do not intend their creations to be treated as works of authorship, they obviously are not creating them because of the incentives that the law provides to works of authorship. Granting such people copyrights generates social costs without any concomitant incentive benefit.[222]

---

[219] Buccafusco, *supra* note 42, at 1263-64. Further, many scholars have argued that an incentivist understanding of authorship is an essential line drawn between humans and artificial intelligence. *See, e.g.*, Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1199 (1986); Vicenç Feliú, *Our Brains Beguil'd: Copyright Protection for AI Created Works*, 25 U.S.F. INTELL. PROP. & TECH. L.J. 105, 121 (2021) ("Under the current law, a work produced by even a completely autonomous AI system would be too far removed from a human creator to be considered protectable. This focus on the necessity of a human creator is grounded on the pragmatic approach of U.S. law centering on the incentives of economic rewards. The question of copyrightability for non-human-created works then must be answered in the negative under the current law."). That is, presuming that AI cannot be intrinsically motivated by the rights and potential riches of copyright, AI is not an author. While I agree that there are good policy reasons to decide that purely AI-authored works are uncopyrightable, I think there are better ones than a lack of a compensation motive.

Most basically, copyright as presently constituted is reserved for human authors, whether that's by the use of the term "author" in the U.S. Constitution and Copyright Act, the personhood and privacy rationales behind common-law copyright, or a dialogic understanding of authorship. *See* Carys Craig J. and Ian R. Kerr, *The Death of the AI Author*, 52 OTTAWA L. REV. 31, 58 (2019) ("To say authorship is human, that it is fundamentally connected with humanness, is not to invoke the romantic author, nor is it to impose a kind of chauvinism that privileges human-produced artifacts over those that are machine-made. Rather, it is to say that human communication is the very point of authorship as a social practice — indeed, as a condition of life. As such, we do not think we are being at all romantic when we say that authorship, in this sense, is properly the preserve of the human."); *see also infra* notes 224-25 and accompanying text. So, if we so choose, we can determine that machines are ineligible regardless of whether they are or aren't motivated by copyright.

[220] *See supra* note 162 and accompanying text.

[221] Buccafusco, *supra* note 42, at 1263-64 (referencing U.S. CONST. art. I, § 8, cl. 8).

[222] *Id.* at 264.

But common-law copyright — the type necessarily implicated by Cord's unfixed expression — is not founded on or bounded by such incentivist purpose.[223] Indeed, it has been recognized as broader than incentive-focused instrumentalism.[224] Courts and scholars generally see it as also, perhaps even primarily, protecting privacy and personhood, and in the case of the spoken word, specifically securing the right to not have one's expression published without consent.[225] As Twain himself described this way of thinking, "I said my lecture was my property, & no man had a right to take it from me & print it, any more than he would have a right to take away any other property of mine."[226]

---

[223] Professor Goldstein has noted that

> "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." Under this view, common law copyright, in its coverage of letters, conversations and other personal expressions, protects personal rather than economic values and clothes privacy with the attributes of property.

Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1004–05 (1970) (quoting Warren & Brandeis, *supra* note 45). Further, there has been no "progress of science" clause or its apparent equivalent in the New York Constitution, then or now. *See generally* N.Y. CONST. OF 1846 (controlling in Twain and Cord's time); N.Y. CONST. OF 1939 (today).

[224] *Id.* Observing this in the common law, and arguing for it in intellectual property law more generally, Professor Margaret Chon has written:

> [T]he overly-narrow view of IP as a set of commercial rights negates the intertwined history of common law privacy and statutory publication in copyright law, not to mention the various intersectional approaches of IP more broadly within torts-like human rights regimes. By contrast, much of what is protectible by copyright is not intended to be monetized, but rather to contribute to self-actualization and/or the nurturing of sociality to the end of human flourishing. Numerous IP scholars have critiqued the anachronistic view that all authors and inventors care about is remuneration. Even the U.S. Copyright Office recently departed from its usual focus on economic rights with a report emphasizing moral rights such as attribution.

Margaret Chon, *Intellectual Property Infringement and the Right to Say No*, 114 NW. U.L. REV. ONLINE 169, 174–75 (2019) (internal citations omitted); *see also* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. LJ. 517, 529 (1990) ("Thus, early American copyright theorists did not share the modern view that copyright is motivated solely by economic considerations. Instead, early Americans saw copyright as a matter of both economic policy and natural law."); Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1027 n.47, 1037–38 (2019).

[225] *Id.*; *see also* Est. of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (1968) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.").

[226] *See supra* note 21 and accompanying text.

I think Judge Fuld's proposal — that one must indicate a wish to exercise control over the publication of one's spoken word[227] — similarly runs contrary to this understanding of common-law copyright. One generally should not have to announce control over one's personhood or privacy to prevent another's encroachment on it. These rights do not require declaration, much less an awareness of them. As a related example: in states that require consent to have one's phone conversation recorded, there is no requirement that a speaker announce, "I intend to exercise my privacy in the words I am speaking. You may not record me." Consent may be given of course, but the default rule is against it.[228] Similarly, Cord should not have needed to proactively announce that she did not consent to Twain later writing and publishing her words. Expecting some such announcement from Hemingway likely made sense given his past dealings with Hotchner, but it should not be the rule for everyone, particularly Cord in her situation.

So, at minimum, I think we must read the incentivist aspect of Professor Buccafusco's theory of authorship to be a theory of *federal* law authorship, inapplicable to Cord's common-law right to prevent the publication of her words without her consent.

But the second reason I would not accept the "intent to have one's creations be treated as writings of authors" aspect is a reason that's applicable to both state and federal copyright. Prof. Buccafusco's view that copyright is a useless incentive to people who aren't aware of it is, to my mind, too limited. Granting rights equally to both those who are and those who aren't aware of the law generates trust in the system and brings into it additional creative people who will then more likely become educated on and motivated by that system. Conversely, denying rights to those who aren't aware of the law risks sowing distrust of and separation from that law.

Compare, for instance, the problems created by dying without a will, which can quickly lead to descendants' losing their property rights.[229] Professor Pepoff and others have noted that the lack of estate planning is

---

227 *See supra* note 162 and accompanying text.

228 *See, e.g.,* Holmes v. State, 182 A.3d 341, 348-49 (Md. App. 2018) ("[A] party to a telephone conversation does not take the risk that another party . . . will record and divulge the contents of the conversation.").

229 Reetu Pepoff, The Intersection of Racial Inequities and Estate Planning, 47 ACTEC L.J. 87, 88-89 (2021) (quoting Roy W. Copeland, *Heir Property in the African American Community: From Promised Lands to Problem Lands*, PRO. AGRIC. WORKERS J. 1, 2 (2015), https://tuspubs.tuskegee.edu/pawj/vol2/iss2/2 [https://perma.cc/9M6P-F9PU]); Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 STATE & LOCAL L. NEWS 6 (2016).

disproportionately high in the Black community.[230] That lack "may very well be intentional as it may be a result of an overall distrust of 'the system,'" Pepoff asserts, and she proceeds to quote scholar Roy Copeland's conclusion that "[t]he failure of African Americans to prepare wills is likely attributable to distrust of government, a belief that their children will ultimately inherit the land and reluctance to cause division within the family."[231] That belief is often wrong — court-ordered partition sales often dispossess the descendants who live on the land.[232] But the distrust persists and, against their interest, many do not engage with the law until it's too late.[233]

Similarly here, if we deny copyright to those who have done the same as others — intentionally caused mental effects in an audience — but who did it for reasons other than a desire to obtain copyright, we risk such unintended consequences. Word spreads. Reports of artists denied rights due to barriers like a lack of formal education[234] or access to counsel stand as good or greater a chance of pushing similarly situated people away from the law as it does to motivate them to get a lawyer, especially if they can't afford or otherwise access one.[235] It's easy for scholars to say, "If she wanted her rights, Cord should have got a lawyer," or perhaps, "All's fair in love and copyright,"[236] but I suggest there's a better way forward.

---

230 *Id*.

231 Pepoff, *supra* note 229, at 88-89.

232 *Id*.

233 *Id*.

234 In Cord's case, see *supra* note 16 for a discussion of how and why she would have been denied access to education while spending most of her life enslaved.

235 While historically underrecognized, problems such as these are achieving more notice and discussion in the intellectual property space, particularly in copyright. K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999); Angela R. Riley, "*Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009); Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213 (2010); Tonya M. Evans, *Reverse Engineering IP*, 17 MARQ. INTEL. PROP. L. REV. 61, 66-71 (2013); Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274 (2017); *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 Colum. J.L. & Arts 275 (2016); Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 661 (2019).

236 At least one prior article has used this exact phrase, though just as a title for a section on fair use. Andrea Barach, Anna Long, and Mark Swanson, *Healthcare*

If, instead, we bring creators like Cord into the fold of copyright, they are more likely to learn about the law and be motivated by it. The constitutional goal for federal copyright, as Professor Buccafusco notes, is "to promote the progress of science."[237] The best modern understanding of this phrase is, basically, "to promote the spread of knowledge."[238] So, as I understand it, Buccafusco contends that if we grant a federal copyright to those who are not at least partially motivated by it, we would on balance frustrate the spread of knowledge, because such people would have created anyway but they would now have the right to limit the spread of their work. In his words, "granting such people copyrights generates social costs without any concomitant incentive benefit."[239]

There is logic to this. But, as the saying goes, a page of history is worth a volume of logic.[240] We've learned as a society that excluding people from the law can frustrate the spread of knowledge. Examples include the estate-planning problem discussed above, as well as more widespread and insidious issues like people choosing not to vote in the face of legal barriers or due to their general distrust of the system.[241] Recognizing private property rights, however, can help foster civil participation.[242] As Professor Sunstein notes, "a right to own private property has an important and salutary effect on the citizens' relationship with the state and — equally important — on their understanding of that relationship. Because of this effect, it can be seen as a necessary precondition for the status of citizenship."[243]

If Cord had been recognized as an author and owner of a common-law copyright — in other words if Twain and the *Atlantic* had, instead of ignoring that possibility, secured Cord's express consent to the publication

---

Law and Intellectual Property Law: When Worlds Collide, HEALTH L., Feb. 2013, at 26, 34.

237 *See supra* note 46 and accompanying text.

238 Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article i, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 777–79 (2001).

239 Buccafusco, *supra* note 42, at 1264.

240 Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) ("To comprehend the scope of Congress' Copyright Clause power, 'a page of history is worth a volume of logic.'") (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)).

241 *See, e.g.*, Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1093–94 (2012); Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

242 Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 915 (1992).

243 *Id.*

of her story — she would then have owned a property right.[244] That right would have increased her stake in the legal system and, more generally, in our democratic republic.[245] It may, too, have helped her realize that what she was doing was legally recognized as authorship, thereby motivating her to generate and publish (either by dictation or by learning to write) additional works.[246]

Further, even if one discounts the potential for copyright to significantly motivate creators one way or the other, as a number of scholars do,[247] the law here likely says something about our values as a society more generally. As Professor Sunstein notes in his article "On the Expressive Function of Law," our "society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups."[248] By extension, a society might insist on an understanding of copyright which recognizes that a person like Cord — who for most of her life was

[244] Common-law copyright is a form of property under New York law. Rosen, *supra* note 42, at 1118 ("The common-law copyright . . . is indistinguishable from any other personal property.") (citing Palmer v. De Witt, 47 N.Y. 532, 538 (1872)).
[245] *See* Sunstein, *supra* note 242, at 915; *see also* Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2017) (discussing the wealth generated by copyright, including in particular for Black copyright holders).
[246] For example, Chuck Berry noted that once he found out about copyright, it encouraged him to write more songs. HAIL! HAIL! ROCK 'N' ROLL (Image Entertainment 2006) (1987). For other discussions of a broad definition of "Progress" that could encompass bringing more creative people within copyright, particularly those who have been historically excluded from its protection, see, e.g., Chien, Colleen V., *Redefining Progress and the Case for Diversity in Innovation and Inventing* (September 8, 2022), Santa Clara Univ. Legal Studies Research Paper No. 4213799, https://ssrn.com/abstract=4213799; JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE, 1, 4–5 (2022); Margaret Chon, *Postmodern 'Progress': Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 100–101 (1993); Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 WIS. L. REV. 123, 124 (2011).
[247] *See, e.g.*, WILLIAM PATRY, HOW TO FIX COPYRIGHT 77-80, 103-07 (2012) (citing Ruth Towse, *Creativity, Copyright and the Creative Industries*, 63 KYKLOS 461, 463 (2010)). *But see* Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera in the Napoleonic Age*, 1-3, 26-28 (Stanford Univ. and Nat'l Bureau of Econ. Research, Working Paper) (2019), http://ssrn.com/abstract=2505776 (suggesting that copyright laws adopted after Napoleon's military victories in Northern Italy encouraged the creation of a greater number of high-quality operas in that region).
[248] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027–28 (1996). Thank you to Professor Andres Sawicki for referring me to this piece.

prohibited from learning to read or write because of her skin color — can still be an author.[249]

Beyond these large but general concerns, more specific problems arise with applying a narrow incentivist approach, as well. One such problem here is that if, because someone was not motivated by copyright, we deny that the person is an "author" under federal copyright, we appear to provoke an absurd result. First, as noted above, state-law copyright is not expressly tethered to motivations — there is no instrumentalist "promote the progress of science" clause to guide or restrict it.[250] Second, current federal law specifies that state law protection ends upon the moment of fixation, at which time federal copyright kicks in.[251]

So, if federal authorship requires self-conscious intent, but state law does not, someone in Cord's shoes could go from an author under state law to a nonauthor under federal law the moment they write their words down. Again, this seems absurd — writing down one's expression is the prototypical act of authorship — and it suggests that authorship under federal law is not meant to have an incentivist limitation, unless common-law authorship necessarily also has the same incentivist limitation. As argued above, it does not and should not.[252]

Another way the problem manifests — one more likely to arise in the modern world — is in the context of collaborative creativity. When more than one person contributes creatively to a copyrightable work, federal law treats this situation one of two ways. The first is to deem them all authors and therefore coequal co-owners of the copyright.[253] The second is to deem one or some of the contributors as authors, but not all.[254] Part of the statutorily mandated approach to determining whether a contributor is an author is an examination of the contributors' intent.[255] Specifically, the leading circuits — the Second and Ninth — have required that, to have the necessary intent, a contributor must at minimum regard herself as an author of the work.[256] This requirement declares, in essence, that to be an author of a collaborative work, a contributor must view herself as one.[257]

---

[249] *See supra* note 16 and accompanying text.
[250] *See supra* notes 223-25 and accompanying text.
[251] 17 U.S.C. §§ 101 and 301; Frohman v. Ferris, 238 Ill. 430, 439–40, 87 N.E. 327, 329 (1909), *aff'd*, 223 U.S. 424 (1912) ("When the statutory right begins, the common-law right ends.").
[252] *See supra* notes 223-25 and accompanying text.
[253] 17 U.S.C. § 101 (definition of joint work); McFarlin, *Shouting the People*, *supra* note 48, at 452-54.
[254] McFarlin, *Shouting the People*, *supra* note 48, at 452-54.
[255] McFarlin, *Father(s?) of Rock & Roll*, *supra* note 204, at 161-65.
[256] *Id.*
[257] *Id.*

This requirement, again, denies rights to those who have created expression that looks like authorship, walks like authorship, and talks like authorship. But because it doesn't think of itself as authorship, it doesn't qualify. For example, Johnnie Johnson, the piano player who collaborated with rock and roll artist Chuck Berry on most of Berry's hit recordings, sued Berry, claiming he jointly authored songs on which Berry had taken sole credit.[258] Johnson testified at deposition that he contributed melodic and harmonic expression to complete the songs but also admitted that at the time he did not consider himself an author.[259] Though Johnson ultimately lost on the ground that he brought his claim too late, he likely would have suffered a similar fate on the merits due to his admission on the issue of intent.[260]

As argued above, this is a pernicious result. Johnson, like Cord, had no knowledge of copyright law, but that should not have barred either one from its protections.[261] Copyright, state or federal, should recognize that "authorship is as it does" not "authorship is how it views itself." If a person intentionally causes mental effects in an audience with her expression, that person is an author. If the expression is unfixed, then she is an author under state law.[262] If the expression is fixed, she is an author under federal law.[263] Any further requirement of self-regard or motivation risks discouraging the very spread of knowledge to which a utilitarian understanding of copyright aspires. Further, copyright must be integrated with and ultimately secondary to the principle of equal protection under the law.[264] An understanding of copyright that recognizes Cord's authorship,

---

258 *Id*.

259 *Id*.

260 McFarlin, *Father(s?) of Rock & Roll*, *supra* note 204, at 161-65.

261 *Id*.

262 Except in New Jersey, which appears to be the only state to have, at least for now, expressly rejected protection for unfixed expression. *See* Ruhga, *supra* note 40, at 679–80.

263 17 U.S.C. § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.").

264 *See* U.S. CONST. AMEND. 14 (equal protection under U.S. law); U.N. DEC. OF HUMAN RIGHTS ART. 7 (equal protection under principles of international law); Jessica Silbey, *Reading Intellectual Property Reform Through the Lens of Constitutional Equality*, 50 TULSA L. REV. 549, 559 (2015); Margaret Chon, *Intellectual Property Equality*, 9 SEATTLE J. SOC. JUST. 259, 260 (2010); Nelson v. Grisham, 942 F. Supp. 649, 656 (D. D.C. 1996), aff'd, 132 F.3d 1481 (D.C. Cir. 1997). For detailed discussions of inequality in copyright law along the lines of race and gender, see, e.g., *supra* note 235; Carys Craig & Anupriya Dhonchak, *Against Integrity: A Feminist Theory of Moral Rights, Creative Agency & Attribution in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND MORAL RIGHTS (Ysolde Gendreau ed., forthcoming 2023); Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 AM. U. J. OF GENDER, SOCIAL POLICY & THE LAW 175 (2015); John Tehranian, *Copyright's Male Gaze: Au-*

in my view, best accomplishes that integration and promotes a fair and equal spread of knowledge.

However, for those still hesitant to recognize Cord's spoken-word story as a work of authorship, let's consider the reaction of her audience: Mark Twain.

2. Audience and Authorship

Scholars have noted the deep and vital connection between authors and their audiences.[265] I have argued elsewhere, in the context of collaborative works, that we should be loath to use audience reaction to elevate one collaborator over another in judging the authorship of the work.[266] I also, however, have argued that (1) collaborators' reactions to each other's contributions can be a valuable source of evidence on the issue of authorship and (2) in an appropriate case, such as with a "specific, well-defined audience," an audience's reaction might serve as a useful "yardstick for expression's worthiness of copyright protection."[267]

Here, as further detailed in the second part of this project, "A Copyright Restored," I don't think that Twain and Cord truly engaged in a collaborative enterprise,[268] but I do think that, in evaluating a claim of authorship over the spoken word, Twain's reaction to Cord's speech can serve as a useful gauge in making the challenging judgment of when to protect the spoken word.

At its most basic, we might say the mere fact that Twain was so struck by Cord's speech that he wrote it down from memory and submitted it for publication proves its worthiness of copyright, similar to Justice Holmes' thought in *Bleistein* that the worth of the circus posters at issue was "sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights."[269] But this reasoning, as others have noted, is fairly circular,

---

thorship and Inequality in a Panoptic World, 41 HARV. J. OF LAW AND GENDER 343 (2008); Dan L Burk, *Feminism and Dualism in Intellectual Property Law*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 183 (2007); Malla Pollack, *Toward a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. OF WOMEN & THE LAW 603 (2006); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. OF GENDER, SOC. POL'Y & L. 551 (2006).

265 McFarlin, *Shouting the People*, *supra* note 48, at 446-48; Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1268 (2014).

266 McFarlin, *Shouting the People*, *supra* note 48, at 452-57.

267 *Id.* at 497.

268 *See* McFarlin, *A Copyright Restored*, *supra* note 14, at 63-64.

269 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

and many things of value are in a sense copied — ideas, for instance — that we choose not to protect with copyright.[270]

Here, however, we have more specific evidence of Twain's reaction that might help us decide whether Cord's words were a work of authorship as opposed to, in Judge Fuld's phrasing, merely part of the "ordinary stream of speech."[271] To Twain, reflecting on it nearly twenty years later, Cord's words were far from ordinary. He described them all together as a "curiously strong piece of literary work to come unpremeditated from lips untrained in the literary art. The untrained tongue is usually wandering, wordy & vague, but this is clear, compact & coherent — yes, & vivid also, & perfectly simple & unconscious.[272]

Several words, in particular, stand out: "unpremeditated," "unconscious," and "literary work." First, Twain appears to contemplate here that an extemporaneous — i.e., "unpremeditated" — speech can be a literary work. And literary works, we know, are the historical core of copyright.[273] Next, "unconscious" seems to apply most directly to the issue of intent and self-regard as an author, discussed in detail above,[274] evincing Twain's view that Cord told him her story without considering its value as property. So, Twain seems to think that someone can, without regarding herself an author, create a literary work. These reactions to Cord's words essentially function, in my view, as powerful expert testimony, as well as admissions, in favor of Cord's copyright claim.[275]

But why then did Twain ignore Cord when it came to credit and compensation for "A True Story"? Twain apparently believed that he was the sole author, at least under the eyes of the law.[276] This even though he was *her* audience on the steps of the porch at Quarry Farm. This leads us into a final applicable aspect of authorship in copyright: causation.

---

[270] Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1890 (1990); 17 U.S.C. § 102 ("In no case does copyright protection for an original work of authorship extend to any idea . . . .").

[271] *See supra* note 162 and accompanying text.

[272] *See supra* note 100 and accompanying text.

[273] *See, e.g.*, Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J. L. & TECH. 36, 63 (2011) ("The core focus of copyright is the extension of property rights to artistic and literary works including books, music, and works of art.").

[274] *See supra* Part III.B.i.

[275] *See Guide to New York Evidence*, https://nycourts.gov/JUDGES/evidence/, §§ 8.03 (party admission), 7.01 (opinion of expert witness).

[276] See *supra* Part I, specifically note 22 and the accompanying text, for an initial discussion of Twain's mindset.

3. Causation and Authorship

In his article "Causing Copyright," Professor Balganesh observes that "[c]opyright's construction of authorship has long embodied an important causal element."[277] In Balganesh's view, "an individual claimant should be treated as having caused the creation of the work — as a matter of authorship — if, but for that individual's actions, the particular work of expression in question would not have come into existence."[278] Here, but for Cord's articulation of her life experience, "A True Story" as it appeared in the *Atlantic* would not have come into existence. However, we can also say it is likely that but for Twain, Cord's story would not have been written down and published, at least at that point in time.

At bottom, here, it seems that the key question is how we view "existence." If Cord's story became a copyright-protected work of authorship when it left her lips and was overhead by Twain, then Cord was its sole cause. But if the copyright did not exist, or at least fully exist, until it was written down by Twain, then Twain is the one who, at least in part, caused its existence.

The 1900 British case of *Walter v. Lane* considers this issue.[279] In *Walter*, Lord Rosebury had delivered public speeches — which given their public nature were deemed published and therefore not protected by copyright — that a reporter had written down verbatim and his employer, the *London Times*, had published.[280] The *Times* then sued Lane for including the reports of the speeches in a book.[281]

The House of Lords, over a strong dissent, ultimately ruled in favor of the *Times*, finding that the reporter was an author because:

> A reporter's art represents more than mere transcribing or writing from dictation. To follow so as to take down the words of an ordinary speaker, and certainly of a rapid speaker, is an art requiring considerable training, and does not come within the knowledge of ordinary persons.[282]

There is, as Professor Balganesh points out, a but-for causal basis for this ruling — namely that but for the reporter writing down the speech, there would not exist a written, published account, thus the reporter is an author of those words.[283] Now, a key distinction exists here from *Walter*'s

---

277 Balganesh, *supra* note 49, at 11.
278 *Id.* at 56.
279 Walter v. Lane, [1900] AC 539 (HL) (appeal taken from Eng. and Wales).
280 *Id.* Statutory law in England also could protect public speeches, under the 1835 Lectures Copyright Act, if the author provided prior notice pursuant to the statute. *See* Brennan & Christie, *supra* note 40, at 14. Lord Rosebury failed to do so. *Id.*
281 *Walter*, [1900] AC 539.
282 *Id.*
283 Balganesh, *supra* note 49, at 16-17.

facts — Cord did not deliver her speech publicly, so she had not in that way potentially relinquished a claim to it — but *Walter*'s view of causation does favor Twain.

Walter has, however, been rejected in the United States,[284] most directly by the First Circuit in 1973 case of *Lipman v. Commonwealth of Massachusetts*.[285] There, a court reporter claimed a common-law copyright in the transcript she produced of an inquest hearing in the death of Mary Jo Kopechne at Chappaquiddick Island, one violated by the state clerk who sought to publish and sell the transcript.[286] In rejecting the reporter's copyright claim, the court noted his reliance on "*Walter v. Lane* . . . but no other authority" and held that "[w]ithout deprecating the mechanical skill necessary to become a stenotypist, we can recognize no ownership for that reason in a transcription of a judicial hearing. Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product."[287]

In other words, the transcriber caused something to come into existence, but not a work of authorship. If there is a work of authorship, it must have been caused by the speaker of the words.

Based on the evidence here, Twain presumably considered himself the author due to his action in (1) recognizing that what Cord had said was a literary work of value, (2) exercising his skill writing down the dialect — at least how he heard that dialect — of her speech, and (3) setting the scene with his own words.[288] This does seem a stronger claim than the court reporter's in *Lipman* or the newspaper reporter's in *Walter*. In each of those cases, it was the reporter's job to be there and take down what was said. Twain, by contrast, exercised at least some creativity in identifying the value of Cord's words, writing them down in dialect, and framing them in literary form. Does that make him the legal author of her words, not just his own?

Scholars and courts have considered whether someone, by recognizing the artistic value of unfixed phenomena (whether audio or visual), and by causing it to be fixed in a tangible medium, can thereby become an author of that phenomena under copyright law.[289] The consensus, though

---

284 Rebikoff, 25 MELB. U. L. REV. 340, 348 (noting how the British and Australian requirements for copyright, reflected in the *Walter v. Lane* decision, "can be contrasted with that in the United States where courts have held that there is a creative or aesthetic element to the originality required for subsistence of copyright"); 2 PATRY ON COPYRIGHT, *supra* note 6, at § 4:88.

285 Lipman v. Commonwealth of Mass., 475 F.2d 565, 568 (1st Cir. 1973).

286 *Id.*

287 *Id.*

288 *See supra* Part II.

289 *See, e.g.*, Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) ("Satava may prevent others from copying the original features he contributed, but he may not pre-

not unanimous, appears to be against it.[290] In other words, "[t]he basic idea of copyright law is to protect unique expression, and thereby to encourage expression; it is not to give to the first artist showing what has been depicted by nature a monopoly power to bar others from depicting such a natural scene."[291] If we recognize Twain as the author of Cord's words, not Cord, we essentially give Twain the power to own an exclusive right in what he observed in nature — the words he heard another person speak.

But we need not fully reject this view, what we might call "creative selection of nature," to decide in favor of Cord's causal argument and against Twain's.[292] There is something more to be said for the creative selection of nature when it comes to natural scenes caused by nonhuman forces — it encourages photographers to find and distribute interesting and educational scenes of flora and fauna.[293] Without the nature photographer, there is little to no chance that the exact scene will be recreated or fixed, i.e., but for the taking of the picture, the expression would reach no one's eyes who wasn't there.[294] But a lion has no ability to give or withhold consent to someone fixing and publishing an image of its pose, nor the ability to recreate it for artistic purposes.[295] Twain could, however,

---

vent others from copying elements of expression that nature displays for all observers, or that the glass-in-glass medium suggests to all sculptors. Satava possesses a thin copyright that protects against only virtually identical copying."); Folkens v. Wyland Worldwide, LLC, 882 F.3d 768, 776 (9th Cir. 2018); Neal F. Burstyn, *Creative Sparks: Works of Nature, Selection, and the Human Author*, 39 COLUM. J.L. & ARTS 281, 306 (2015).

290 *Id.*; *see also Craft v. Kobler*, 667 F. Supp. 120, 130 (S.D.N.Y. 1987) (recognizing, without analysis, that Igor Stravinsky was the author of his spoken words that were written down by his interviewer, the plaintiff Craft) (Leval, J.). *But see* Terry S. Kogan, How Photographs Infringe, 19 VAND. J. ENT. & TECH. L. 353, 402 (2017) (finding "wrong-headed" *Satava*'s notion that realistic depictions of objects in nature are entitled only to thin protection).

291 *Folkens*, 882 F.3d at 776.

292 This connects generally with "creative selection," which courts have recognized can sometimes qualify for copyright protection. *See, e.g.*, Matthew Bender & Co. v. W. Pub. Co., 158 F.3d 674, 681 (2d Cir. 1998) ("The Copyright Act protects original and minimally creative selection of preexisting, unprotected materials (such as facts) for inclusion in a work."). But it has been noted that creative selection of either preexisting works or natural scenes, without more, such as some causation of the observed phenomena, is unlikely to result in protection over that phenomena. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 275 (1998); Burstyn, *supra* note 289, at 297-98.

293 *See* Kogan, *supra* note 290, at 405-06.

294 *Id.*

295 But see Martha C. Nussbaum, *What We Owe Our Fellow Animals*, N.Y. REV. OF BOOKS (Mar. 10, 2022), for our expanding understanding of at least some animals' cognition and self-awareness.

have asked Cord for her permission to write and publish her prose. And if she refused, Cord could continue to tell it, possibly learning to write it down herself or giving someone else permission to write it.

Thus, the causal reason for why we might deem the nature photographer an author of a natural scene — without the photographer, there is no chance that exact scene would be fixed — does not apply to Twain and Cord's situation. Cord had the capacity, and should have the right, to decide if and when her words should be written down, and by whom.[296] Twain was not merely observing nature. He was observing an autonomous person.

So, if we decide that Cord did not cause the creation of a copyright-protected work, we effectively bar her from speaking her story aloud, to anyone, without risking the chance it is overheard, written, and published by someone, anyone, even one she did not want doing so. For example, if we decide that Twain, by virtue of being first to write down Cord's story — even without her consent — has caused the first copyright-protected work to come into existence, then, later, if Cord had decided that someone else should write her story and publish it, Twain could have successfully sued *her* for violating *his* copyright.[297] If that strikes us as wrong, then I think we have answered the causal question here, and we've answered it in Cord's favor.

In sum, Twain did undoubtedly cause something to come into existence. Whether it was a work of fully original authorship or a work that infringed on Cord's previously existing copyright ultimately depends, I think, on our conclusions above about the copyrightability of oral expression and intent in authorship.[298] Because I have argued both that Cord's

---

[296] *See* Chon, *Right to Say No*, *supra* note 224, at 169 ("Professor Anita Bernstein's thesis that the common law can support feminist legal progress through its protection of negative liberty — the right to say no to what one does not want."); Craig & Dhonchak, *supra* note 264 ("[F]rom our perspective, the harm, if any, of using another's expressive work without acknowledgement, looks more like that of silencing: it is the refusal to acknowledge the other as speaker, and in many cases, the power to deny that they spoke at all. Such refusal reproduces the muted subject of the subaltern woman.").

[297] While it's probable that Cord and others similarly situated would have defenses against such a suit — perhaps unclean hands and even implied license — that doesn't alter the problem in principle: having to defend oneself against someone else's copyright in one's own expression.

[298] *See supra* Part III.A. Further, if Cord was not an author of her spoken words, then the next best conclusion is likely that Twain was not the author of her words, either, and they were in the public domain from the start. *See* Rokeach v. Avco Embassy Pictures Corp., No. 75 CIV. 49 (CHT), 1978 WL 23519, at *7 (S.D.N.Y. Jan. 17, 1978) (internal citations omitted):

> It is conceded that certain words or phrases which are [used in the defendants' movie] owe their origins to words or phrases spoken by the

oral expression was copyrightable and that she had the requisite authorial intent, I conclude that Cord did, in Professor Balganesh's phrasing, cause a copyright.[299]

IV. CONCLUSION

Let's return to the hypothetical at the start: Twain tells a story of his adventures as a steamboat captain on the Mississippi. A household worker writes it down and publishes it without consent, credit, or compensation to Twain.[300] Would this violate his rights? Knowing his pro-copyright views and penchant for copyright litigation,[301] we can venture a fair guess that Twain would have thought so.

If we disagree with that — perhaps because we think spoken words are all up for grabs — then Cord's claim would similarly fail. I do understand this notion, i.e., that the better policy is zero copyright for oral expression, given the potential difficulties in deciding such claims. I understand it, but I disagree. As treatise-author Drone advocated in 1879, and New York Court of Appeals Judge Fuld opined in 1968, I too think there are limited cases where copyright should protect the purely spoken word — such as where an original story is told privately to someone who admits to writing it down and publishing it — and courts should be allowed to hear these cases, subject to all the defenses copyright law affords, such as consent and fair use.[302]

But if we agree — that a wrong has occurred in that steamboat-story scenario and that Twain should have a remedy — then why should Cord's situation be different? Perhaps it's ultimately because Twain regarded himself as an author and Cord did not — why should society recognize copyright in those who are unaware of it? I understand this notion as well; there is logic to minimizing exclusive rights where they are not needed. I

> mental patients in [the plaintiff Rokeach's book] "The Three Christs," . . . . [However,] [i]n no real sense can Rokeach claim to have created these statements any more than an historian or biographer can claim to have created the facts and statements reported in a work about an historic personage. Nor does the fact that statements made by the mental patients may have occurred during conversations between them and Rokeach or the latter's research assistants give rise to copyright protection insofar as Rokeach is concerned. . . . Barnes utilized the statements made by three real-life paranoid schizophrenics in order to give his fictitious "Christ" some authenticity, a "grounding in reality." The statements were valuable because they were factual, and not imagined, created or embellished by Rokeach.

299 Balganesh, *supra* note 49, at 11.

300 *See supra* Part I.

301 *See supra* notes 23, 38, and accompanying text.

302 *See supra* Part III. Regarding defenses, see also McFarlin, *A Copyright Restored, supra* note 14, at 53-73 and 79-88.

just see them as needed here. If we recognize authorship for what it does, not just for how it views itself, I believe we can better spread knowledge among us all.

Maybe, though, we view Cord's situation differently for another reason: Twain, the writer, could publish great art with her story, and without him, the world may never have heard it. Twain's tale of the Mississippi had simply not yet been written;[303] Cord's may never have been written at all. This poses the ultimate question: do the ends justify the means?[304] I don't think they do here, particularly when a middle path was possible.

Twain and the *Atlantic* could have given credit, or at least compensation, to Cord for using her story.[305] That this was a common practice in their time with stories like Cord's, to me, solidifies Cord's claim to authorship. But just because they could have done this, and even should have done this, did they need to do this as a matter of law? In other words, by not doing so, did they infringe Cord's copyright? And if they did, could that infringement still somehow be remedied today?

The second part of this project, "A Copyright Restored,"[306] answers these questions and suggests a way forward both in this case and others like it.

---

303 In 1875, Twain published the *Old Times on the Mississippi* series in the *Atlantic*, ultimately compiled and expanded in a standalone book, *Life on the Mississippi*, in 1883. *See supra* note 93.

304 *Cf.* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT xxxiv (1990) (observing "one of the greatest issues invoked by the life of Lyndon Baines Johnson: the relationship between means and ends").

305 *See supra* Part III.

306 McFarlin, *A Copyright Restored*, *supra* note 14.