2025 Christopher Meyer Lecture

THE COPYRIGHT ACT NEVER GOES OUT OF FASHION

By DAVID NIMMER[1]

In this lecture, David Nimmer looks at how the 1976 Act has been amended, and suggests that many departed from the spirit of the original Act. He asks if the proposed fashion bills fit within the trajectory of amendments? The talk discusses the Semiconductor Chip Protection Act of 1984, the Audio Home Recording Act, anti-bootlegging legislation, boat hulls, sound recordings and small claims. He ends with a section on how we should interpret what he defines as "two decades of decline" and the "depths of stealth amendments," and suggests how the fashion bills fit within the landscape.

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[1] © 2026 by David Nimmer. Portions of this article replow the furrows of my article *Copyright and the Fall Line*, 31 .CARDOZO ARTS &. ENT. L. J. 803 (2013). Citation: 73 J. COPYRIGHT SOC'Y 53 (2026).

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PRESENTING CHRIS MEYER

Christopher Meyer was a lawyer, law professor, civil servant at both the U.S. Copyright Office and the Patent and Trademark Office, and at the forefront of the field until his untimely death in 1999.[2] Given his important contributions to bringing into our laws protection for computer software, he has bequeathed to us a prism with which to refract the light of today's copyright statute.[3]

Consider, in particular, the perennial efforts to augment the copyright laws of the United States to include designs for items of clothing. How do those efforts fit into the larger fabric of the law? What lessons can we derive from Christopher Meyer's career?

INTRODUCTION

As originally formulated, the Copyright Act operated as a uniform field, as Part I sketches. It lacked protection for fashion, occasioning various bills to fill that breach, described in Part II. Though those bills failed to reach enactment, Congress distended the Act in various other particulars, as shown in Part I II, Two decades on, things deteriorated even further, as Part IV illustrates. Since that time, the failures have been checked, as detailed in Part V. The process leaves us with abiding lessons, as filtered through the prism of those fashion bills per the illumination in Part VI.

I THE COPYRIGHT ACT OF 1976

A. Passage of the Act

At enactment, the Copyright Act of 1976 consisted of eight separate chapters, covering about 45 pages.[4] That length makes it much longer than the predecessor 1909 Act.[5] Indeed, the disparity was so great as to move my father to lament, in the preface to the 1978 edition of *Nimmer on Copyright*[6] that the Act had become, in his eyes, "a body of detailed rules reminiscent of the Internal Revenue Code."[7] Nonetheless, the saga was just beginning. A mere 45 pages is positively svelte compared to the bloat that we will observe presently.

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[2] Lawyer Christopher Meyer Dies, WASH. POST (Jan. 27, 1999), https://www.washingtonpost.com/archive/local/1999/01/27/lawyer-christopher-meyer-dies/49100554-a394-47c2-a323-f2b9a80e4b7c/.
[3] *Id.*
[4] Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).
[5] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).
[6] As I observed in tribute to my father, when taking over the treatise in 1986, "the Supreme Court in *Mills Music v. Snyder* even cites to the 1978 Preface, so definitive did Mel Nimmer's every word become." *In Memoriam* to NIMMER ON COPYRIGHT 1986 edition.
[7] Preface to 1978 edition, NIMMER ON COPYRIGHT.

B. Its Abortive Title II

It can be added that the law, as enacted in 1976, was much shorter than one would have expected as of the previous year. In 1975, the House of Representatives passed Title I—which eventually became the eight enacted chapters—along with another Title II, namely "Protection of Ornamental Designs of Useful Articles."[8] This particular provision created what we can call "circle-d" protection.[9] But the most salient aspect about that ⓓ incorporated into the bill is that it did not survive to enactment.[10] Thus, the 1976 Act never embodied protection for ornamental designs.

C. Computer Software Copyright Act of 1980

Before the 1976 Act even entered into force on January 1, 1978, the process of amendment was underway. In its first year of operation, Congress amended it for a second time.[11] Over the decades to come, the pattern would continue—amendments have proceeded roughly at the pace of once every six months.

It was not until the third amendment to the Copyright Act that matters proved substantive. The pertinent story dates back to 1974, when Congress created the "National Commission On New Technological Uses Of Copyrighted Works."[12] Known byits acronym CONTU, the resulting body studied the then-vexing issues of photocopying and protection for computer software.[13] As I have set forth at length elsewhere, my father served as vice-chair of CONTU and an "expert staff aided the commission," notably including Christopher Meyer.[14]

Putting aside the benefits accruing from CONTU's study of photocopying,[15] the commission's primary contribution lay in the realm of software. How should it be protected? The novelty of software crossed boundaries—arguments could be made for according it protection as a matter of patent, trademark, or trade secret law. Yet none of those doctrines fit perfectly. An alternative argument to all of those possibilities was to accord copyright protection. Again, certain considerations militated in favor of that view, but the fit was less than congruent with prior law. For that reason, an additional option

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[8] *See* S. 22, 94th Cong. tit. II (1975).

[9] "Whenever any design for which protection is sought under this title is made public as provided in section 209(b), the proprietor shall, subject to the provisions of section 207, mark it or have it marked legibly with a design notice consisting of the following three elements: (1) the words "Protected Design," the abbreviation "Prot'd Des." or the letter "D" with a circle thus ⓓ. . . ." *Id.* Sec. 206. (a)

[10] *See* H.R. Conf. Rep. No. 1476, at 82.

[11] *See* Pub. L. No. 95-598, 92 Stat. 2549, 2676 (amending §201(e), Title 17, United States Code, to permit involuntary transfer under the Bankruptcy Law), enacted November 6, 1978.

[12] *See* Act of Dec. 31, 1974, Pub. L. No. 93-573, 201, 88 Stat. 1873, 1873-74.

[13] *See generally* National Commission On New Technological Uses Of Copyrighted Works, Final Report of the National Commission on New Technological Uses Of Copyrighted Works (1979) [hereinafter CONTU Final Report].

[14] David Nimmer, *Codifying Copyright Comprehensibly*, 51 U.C.L.A. L. Rev. 1233, 1258 & n.165 (2004).

[15] *Id*. at 1260.

was to cobble together a new doctrine of intellectual property tailored to the software domain. That *sui generis* protection could be anything that the commissioners, writing on a blank slate, cared to adopt.

At the end of the day, CONTU recommended slotting computer programs into the traditional domain of copyright protection. In the Computer Software Copyright Act of 1980,[16] Congress adopted its handiwork, almost to the letter.[17] One cannot overstate how epochal that decision has been. The presence of computer software as a species of protectable works has affected the law of copyright writ large. Landmark rulings and legislation have come down across multiple domains, including setting the bounds of copyright protection;[18] defining the parameters of substantial similarity;[19] delineating the principal defenses to infringement, *i.e*. fair use[20] and first sale;[21] and on and on.[22]

Had CONTU instead recommended a *sui generis* approach that Congress were to have adopted, the path of copyright law of the past forty-five years would have been incomparably different.[23] In a very real sense, therefore, the choices made in 1980 continue to reverberate powerfully through the present.

II. THE FASHION BILLS

The 1976 Act continued prior law by placing clothing designs outside of copyright protection. Over the years, interested parties have introduced bills to alter that state of affairs.[24] Included, for example, are:

- A bill to Provide Protection for Fashion Design, which dates back to 2006;[25]
- The next year, the Design Piracy Prohibition Act;[26]

[16] Pub. L. No. 96-517, 94 Stat. 3015, 3028 (amending §101 and §117, Title 17, United States Code, regarding computer programs), enacted December 12, 1980.
[17] Nimmer, *supra* note 14, at 1260-63. The sole change it made was to eliminate CONTU's reference to the "rightful possessor" of a copy of software to the "owner of a copy." *Id*. at 1265-66.
[18] *See* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided court*, 516 U.S. 233 (1996).
[19] *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).
[20] *See* Google LLC v. Oracle America, Inc., 593 U.S. 1 (2021).
[21] *See* MDY Indus, LLC v. Blizzard Entm't, Inc., 629 F.3d 928 (9th Cir. 2010).
[22] Just the issue of reverse engineering alone has attracted both judicial opinions and legislation. *See* Sega Enters. Ltd. v. Accolade, Inc. 977 F.2d 1510 (9th Cir. 1992); 17 U.S.C. § 1201(f).
[23] The single example of fair use is illustrative—without software protection, the Supreme Court could not have handed down its 2021 ruling in *Google v. Oracle*, meaning that the field would have evolved differently.
[24] Apart from the enumeration to come, the focus in more recent years has moved elsewhere. For instance, in 2023, Rep. Nadler introduce a bill "to amend the Fair Labor Standards Act of 1938 to bar employers from paying employees in the garment industry by piece rate, to require manufacturers and contractors in the industry to register with the Department of Labor, to appoint an Undersecretary of the Garment Industry through the Secretary of Labor, and to establish a National Domestic Garment Manufacturing Support Program." FABRIC Act, H.R.5502, 118th Cong. (2023).
[25] H.R. 5055, 109th Cong. (2006).
[26] H.R. 2033, 110th Cong. (2007).

- In 2010, the Innovative Design Protection and Piracy Prevention Act (IDPPPA);[27]
- The latter in resurrected form, re-introduced in 2012.[28]

Let us focus, as representative, on the IDPPPA.[29] At its outset, the bill proclaims its purpose as "to amend § 1301 of Title 17 of the Copyright Act."[30] Specifically, it accomplished that goal by adding a section labeled, "Designs Protected" in order to "extend protection to fashion design…."[31]

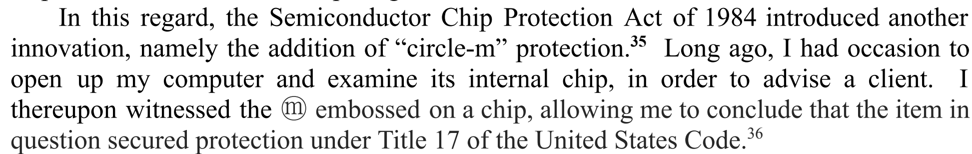
With that introduction out of the way, we can drill down on that proposed § 1301.[32] By the time the IDPPA was introduced, that provision already existed as part of Chapter 13 of the Copyright Act. Given the previous observation that, at enactment, the 1976 Act contained only eight chapters, the question arises whence those other five chapters emerged. Our investigation therefore turns to that topic.

III. TWO DECADES OF DESCENT

After the considered decision in 1980 not to create a *sui generis* right for software, Congress radically shifted directions.

A. Chapter 9: Semiconductor Chip Protection Act of 1984

Following 1980, the next major amendment to Title 17 was to add Chapter 9 onto the eight chapters that comprised the original Act. This chapter added fourteen sections to the Copyright Act,[33] to confer protection on "mask works," the integrated circuits responsible for the whole computing revolution.[34]


In this regard, the Semiconductor Chip Protection Act of 1984 introduced another innovation, namely the addition of "circle-m" protection.[35] Long ago, I had occasion to open up my computer and examine its internal chip, in order to advise a client. I thereupon witnessed the ⓜ embossed on a chip, allowing me to conclude that the item in question secured protection under Title 17 of the United States Code.[36]

The SCPA seems to be drawn from a universe wholly separate from the rest of the Copyright Act. These provisions did not grow up organically, as the rest of the Copyright Act did, to protect works of authorship. Instead, the fourteen implicated sections sprung full-grown from the brow of Zeus—or from the pen of Congress—to impart a wholly new flavor. In particular, as compared to all that came before, they embody a different

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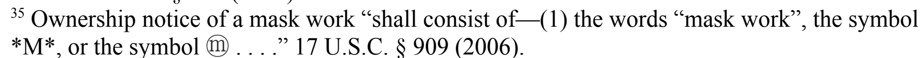
[27] S. 3728, 111th Cong. (2010).
[28] S. 3523, 112th Cong. (2012).
[29] S. 3728, 111th Cong. (2010).
[30] *Id.*
[31] S. 3728, 111th Cong. (2010).
[32] *See* 17 U.S.C. § 1301.
[33] *See* 17 U.S.C. §§ 901–914 (2006).
[34] *See* 17 U.S.C. § 902 (2006).


[35] Ownership notice of a mask work "shall consist of—(1) the words "mask work", the symbol *M*, or the symbol ⓜ . . . ." 17 U.S.C. § 909 (2006).
[36] 17 U.S.C. § 102.

term of protection;[37] different formality (the aforementioned ⓜ);[38] different standard of reverse engineering.[39] Just about every aspect differs from the rest of the Copyright Act. Why would Congress would pursue such an unusual tack? To answer that inquiry, we have to go back to the great international conventions.

First, there is the Paris Convention for the Protection of Industrial Property, the oldest international IP treaty. Today the Paris Convention boasts 181 signatories. Then, within the copyright realm, we have the Berne Convention for the Protection of Literary and Artistic works. That Convention likewise has 181 adherents. today. The dream in Washington D.C., as of 1984, was that there be would a parallel development; in consonance with that goal came the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, promulgated in 1989, which was to provide the groundwork for our new electronic revolution.[40] Nonetheless, experience has been less than kind as to that particular treaty. The totality of nations that have ratified the treaty to date consists of the following enumeration:

- Bosnia and Herzegovina;
- Egypt; and
- the Caribbean island of St. Lucia.

That recitation hardly encompasses the chip-producing powerhouses of the planet. Not even Washington has joined its own eponymous treaty! So the entire enterprise has been less than salutary.

How many reported decision cases have arisen under U.S. law pursuant to the Semiconductor Chip Protection Act of 1984? The answer is four:[41]

- *Brooktree Corp. v. Advanced Micro Devices, Inc.*;[42]
- *Brooktree Corp. v. Advanced Micro Devices, Inc.*;[43]
- *Brooktree Corp. v. Advanced Micro Devices, Inc.*;[44] and
- *Altera Corp. v. Clear Logic, Inc*.[45]

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[37] 17 U.S.C. § 904(b).
[38] 17 U.S.C. § 909(b).
[39] 17 U.S.C. § 906(a).
[40] *Treaty on Intellectual Property in Respect of Integrated Circuits*, May 26, 1989, 28 I.L.M. 1477 (1989).
[41] To be sure, other courts have cited the SCPA as a contrast in order to shed light on different provisions of the Copyright Act. See Brownstein v. Lindsay, 742 F.3d 55, 76 (3d Cir. 2014). Included is the U.S. Supreme Court : "Congress hardly lacks capacity to provide for international exhaustion when that is its intent. Indeed, Congress has expressly provided for international exhaustion in the narrow context of semiconductor chips embodying protected "mask works." See 17 U.S.C. §§905(2), 906(b). See also 2 M. Nimmer & D. Nimmer, Copyright §8A.06[E], p. 8A-37 (2012) (hereinafter Nimmer) ("[T]he first sale doctrine under [§906(b)] expressly immunizes unauthorized importation.")." Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 577 (2013) (Ginsburg, J., dissenting).
[42] 705 F. Supp. 491, 496 (S.D. Cal. 1990).
[43] 757 F. Supp. 1088, 1099 (S.D. Cal. 1990).
[44] 977 F.2d 1555 (Fed. Cir. 1992).
[45] 424 F.3d 1079 (9th Cir. 2005).

Obviously, the first three of those citations simply represent different proceedings in one and the same case. The bottom line, therefore, is that, with the passage of over four decades, we have witnessed a total of two distinct reported cases arising under the Semiconductor Chip Protection Act of 1984. Far from reflecting a real-world locus of activity needing legislative guidance. the experience shows that this domain does not call out for a whole new legal regime—as could have been predicted (and was) at the outset.[46]

B. Chapter 10: Audio Home Recording Act

Onward to the next installment, Chapter 10: Digital Audio-Recording Devices and Media.[47] In particular, the Audio Home-Recording Act added ten sections to the U.S. Copyright Act. Again, they are drawn from a universe wholly separate from the rest of the Copyright Act, envisioning a blank tape royalty and elaborate systems to track what generation a given sound recording might be, in order to determine attendant royalty obligations.

What is the guiding rationale here? Congress just *knew*, as of 1992, that every man, woman, and child throughout the United States would soon be equipped with that ubiquitous device, without which life itself was destined to become well-nigh inconceivable: DAT—a Digital Audio Tape Recorder. That inexorable future promised to equip every living room with a DAT recorder, with the concomitant necessity to maintain an additional DAT in the dining room. Plus, the future would undoubtedly bring pressure to place yet another DAT in each bathroom (not to mention in cars as well, no doubt). Because Congress *knew* that this future was ineluctably coming—its crystal ball left no doubt to the effect—it needed to add ten sections to the Copyright Act.

An extraordinarily elaborate set of specifications, the Serial Copy Management System minutely regulates exactly what can happen in the context of exploiting music through the medium that everyone was going to use.[48] Now, of course, Congress included exceptions here; after all, this new scheme should not govern professionals who are in recording studios.[49] Besides that exception, Congress included another. Consider that only the geekiest propeller-head, as of 1992, would do something like *listen to music through a computer*!

Therefore, this 1992 enactment was drafted with another exception—it does not regulate music that is listened to through the computer.[50] The bottom line is that Congress managed to pass a law at the beginning of the 1990s crafted perfectly to miss

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[46] *See Comments of Jean-Francois Verstrynge*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 165, 166-67 (1993) (blaming United States for introducing notion of reciprocity in protecting intellectual property under Semiconductor Chip Protection Act).
[47] 17 U.S.C. §§ 1001-1010.
[48] The details are set forth in the "Technical Reference Document," which is reproduced in 9 NIMMER ON COPYRIGHT at pages App. 36-33 to 36-59.
[49] *See* 17 U.S.C. § 1008 (2006).
[50] *See* 17 U.S.C. § 1001(5)(B)(ii).

the very innovation that would mark the end of that decade, namely Napster,[51] Grokster,[52] and their progeny.[53] As a result, we reach the grand total of matters litigated pursuant to this enactment:

- *RIAA v. Diamond Multimedia*;[54]
- *RIAA v. Diamond Multimedia*;[55]
- *Alliance of Artists & Recording Cos. v. General Motors Co.*;[56],
- *Alliance of Artists & Recording Cos. v. DENSO Int'l Am, Inc*.[57]

The first decision determined that the AHRA did not apply to a handheld device equipped with headphone; the second affirmed that ruling.[58] The third decision determined that the AHRA did not apply to automobile navigation systems that included a hard drive to which drivers could upload their CDs;[59] the fourth affirmed that ruling.[60] Again, the cumulative total is two separate cases.[61] We therefore see the same pattern unfold—a large accretion is added to the Copyright Act, drawn from a different legal universe, with painfully little real-world results.

C. Chapter 11: Bootlegs

Moving on, we are forced into Chapter Eleven. The subject matter now under review is captioned "Sound Recordings and Music Videos." In 1994, Congress passed the Uruguay Round Agreements Act.[62] The sole section comprising Chapter 11 includes protection for "unauthorized fixation,"[63] among other changes to other parts of the 1976 Copyright Act.

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[51] *See* A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2001).
[52] *See* MGM Studios v. Grokster, 545 U.S. 913 (2005).
[53] "We agree with the district court that the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives." A&M Records, Inc. v. Napster, 239 F.3d 1004, 1024 (9th Cir. 2001).
[54] 29 F. Supp. 2d 624 (C.D. Cal. 1998).
[55] 180 F.3d 1072 (9th Cir. 1999).
[56] 162 F. Supp. 3d 8 (D.D.C. 2016). This opinion attracted my attention as an exceedingly scholarly and lucid explication of impenetrable statutory language. It was the first time that the name of the district judge attracted my attention: Ketanji Brown Jackson.
[57] 947 F.3d 849 (D.C. Cir. 2020).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Once again, other courts have invoked these provisions by way of comparison, such as for the proposition that when Congress intended to create personal exemptions, it did so expressly. See Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 499 (1st Cir. 2011). Another example is the Alabama prisoner who appealed his conviction by challenging the constitutionality of a state statute prohibiting the knowing sale of bootleg records on the basis that it purportedly violated the rights accorded to the public by the Audio Home Recording Act. *See* Powell v. State, 72 So. 3d 1268 (Ala. Crim. App. 2011).
[62] Act of Dec. 8, 1994, Pub. L. 103-465, 108 Stat. 4809.
[63] 17 U.S.C. § 1101 (2006).

To what does that language refer? Picture a jazz band at Preservation Hall coming up with some extemporaneous music (not simply playing a cover of a pre-existing song) or imagine Dame Kiri Te Kanawa appearing live at Carnegie Hall to sing an aria by Mozart. (Wolfgang, by the way—spoiler alert—is not a proprietor whose works are durationally eligible for U.S. copyright today). In both those instances, the live performance finds newfound protection under U.S. copyright law by virtue of § 1101.[64]

We now need to bother our heads with a pesky thing called the U.S. Constitution. Congress's practice, whenever passing copyright legislation, historically has been to specify its constitutional foundation. In fact, the matter was subsequently embodied into a formal rule.[65] As a result, I am very used to reading the House and Senate Report for copyright bills that explicitly reference the Copyright Clause of the U.S. Constitution.[66] Consider the following, from the Sonny Bono amendment: "Pursuant to Article I, Section 8 of the United States Constitution, Title 17 of the United States Code gives the owners and authors of creative works an exclusive right to keep others from using their work for a limited period of time through copyright protection."[67] Occasionally, those reports ground their rationale in the Commerce Clause[68] or on something else (such as the Treaty Clause).[69] So how did Congress ground its handiwork in the context of the Uruguay Round Agreements Act? The Copyright Clause would be a good guess. But they did not reference the Copyright Clause. The Commerce Clause is also a good guess —but again wrong, as it happens. What other clause could Congress have referenced? The Treaty Clause comes to mind; but there was no reference to it, either.

So what *did* Congress consider when rooting the Uruguay Round Agreements Act in the United States Constitution? The answer is—nothing. The pertinent reports simply omitted any reference. In other words, Congress decided not to follow its own practice of identifying the constitutional underpinning for this law, thus betokening the suspicion that it so acted precisely because the bill in question had *no constitutional underpinning*. We can now understand why a case went to the U.S. Supreme Court, challenging the constitutionality of a portion of the Uruguay Round Agreements Act.[70] At issue in that case was restoration of qualifying works of foreign origin, conferring on public domain

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[64] 17 U.S.C. § 1101.
[65] See H.Res. 5 § 2(a), 112th Cong. (2011); Constitutional Authority Statements, House Rule XII, clause 7(c). The rule requires that all bills and joint resolutions provide a statement that states "as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution" to be accepted for introduction by the House Clerk.
[66] U.S. Const. art. I, § 8, cl. 8.
[67] H.R. Rep. No. 105-542 (1998) at 3-4.
[68] U.S. CONST. art. I, § 8, cl. 3. Consider the previously encountered Semiconductor Chip Protection Act of 1984: As originally introduced, H.R. 1028 had a further provision limiting the definition of the semiconductor chip products protected under the Act to those in or affecting commerce. H.R. 5525 is premised on a finding that original mask works are "writings" within the meaning of Article I, section 8, clause 8 of the Constitution. In the unlikely event that a court should find mask works not to be writings, authority for the legislation is found in the commerce clause, to the extent that the chip products and piratical conduct occur in or affect interstate commerce. H.R. Rep. No. 98-781 (1984) at 16 n.36.
[69] U.S. CONST. art. II, § 2, cl. 2. See 3 NIMMER ON COPYRIGHT § 9A.07.
[70] See Golan v. Holder, 565 U.S. 302 (2012).

works a new term of copyright protection, notwithstanding the Copyright Clause's language that protection may be conferred only "for limited Times."[71] In that particular instance, the Court majority rebuffed the challenge—two justices dissented, so the challenge cannot be dismissed as makeweight.[72] Nonetheless, although that particular facet of the Uruguay Round Agreements Act survived constitutional scrutiny, it must be recognized as the straightforward portion of the enactment.

The far more controversial part of the Uruguay Round Agreements Act, the aspect that is truly mystifying, is how it could come into being, given that the Constitution limits Congress to protecting "Writings" of "Authors."[73] I understand how "Writings" can be viewed as an expansive term. It may extend to protect not only a poem and novel, but even a sculpture (in some sense, a "writing").[74] I even understand how the stencils of mask works were embraced within Title 17 as of passage of the Semiconductor Chip Protection Act in 1984 can, in some tenuous, removed sense, be viewed as "writings."[75] But what is the implicated "writing" underlying, for example, a live jam session (producing new music) at Preservation Hall? At enactment of Uruguay Round Agreements Act, it mystified me that bootlegging a live performance can constitute a violation of Title 17 of the U.S. Code. Years later, Justin Hughes heroically constructed a partial defense, rooted in the Necessary and Proper Clause.[76] But even he conceded that the statute, as drafted, cannot be entirely defended.[77] This addition to the Copyright Act therefore remains teetering on a wobbly foundation.[78]

In sum, the three chapters—Chapters 9, 10, and 11—added to the Copyright Act starting in 1984 deformed Title 17. By adopting provisions springing full-grown from the brow of some celestial notion rather than growing organically as part of copyright doctrine, they diminished the Act by adding to it. But the damage only continued as time marched on.

IV. SINKING FURTHER: THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. In General

When the Act had been in effect for a bit more than two decades, Congress passed the landmark Digital Millennium Copyright Act.[79] Included in that omnibus enactment were a host of developments taking copyright law in new directions.Although the

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[71] U.S. CONST. art. I, § 8, cl. 8.
[72] Justices Breyer and Alito dissented. Justice Kagan did not participate in the case, given her defense of the law in her previous role as Solicitor General. *Golan*, 132 S.Ct. at 894.
[73] U.S. CONST. art. I, § 8, cl. 8.
[74] Walter J. Derenberg, The Meaning of "Writings" in the Copyright Clause of The Constitution, 3 COPYRIGHT L. REVISION 61, 96 (Nov. 1956).
[75] *See* § III.A *supra*.
[76] *See* Justin Hughes, *Understanding (and Fixing) the Right of Fixation in Copyright Law*, 62 J. COPYRIGHT. SOC'Y 385 (2015).
[77] *Id*. at 63.
[78] *See* 3 NIMMER ON COPYRIGHT § 8E.05.
[79] Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

amendments enacted contained five titles,[80] earlier versions included more subject matter. For instance, on August 4, 1998, the House or Representatives passed the Collections of Information Antipiracy Act as part of the DMCA.[81] That enactment set forth eight sections that defined the extraction of material from databases to constitute misappropriation, with exceptions for verification, news reporting, and various scientific purposes.[82] It included criminal provisions, but excluded protection for computer programs. By its express terms, its addition to Title 17 was intended to stand separately from copyright.[83] Happily, the Senate did not pass that database chapter, so it did not come into fruition.[84] But that does not mean that the statute resisted further deformations upon enactment of the Digital Millennium Copyright Act. The locus of that shipwreck had to do with boat hulls, as discussed next.

B. Chapter 13: Boat Hulls

The DMCA shattered all barriers by adding the longest chapter to the Copyright Act, containing a legendary thirty-two sections.[85] Their provenance from a different universe is even more pronounced than their predecessors'.[86] Again, we see different duration,[87] different standards for infringement,[88] different fees,[89] different regulations,[90] different registrations,[91] the works—right down to a its own distinctive notice requirement, namely resurrection of the long-moribund ⓓ.[92] What was the need for this major addition to Title 17? This subject matter here encompasses protection for boat hulls, a proposition supposedly necessitated by the Supreme Court's decision in 1989 regarding "plug molding."[93]

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[80] On Title I, see § IV.C *infra*. On Title II, see 4 Nimmer on Copyright Chap. 12B. On Title III, see 2 Nimmer on Copyright § 8.08[D]. As to Title IV, it made miscellaneous changes throughout the law of copyright. For Title V, see § IV.B *infra*.

[81] *See* 10 Nimmer on Copyright app. 55.

[82] *See* H.R. 2652 (1998).

[83] The bill included this language:

> Relationship to Copyright.—Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection or limitation, including, but not limited to, fair use, in any work of authorship that is contained in or consists in whole or part of a collection of information. This chapter does not provide any greater protection to a work of authorship contained in a collection of information, other than a work that is itself a collection of information, than is available to that work under any other chapter of this title.

[84] The parallel is thus complete with the 1975 "Protection of Ornamental Designs of Useful Articles." *See* § I.B *supra*.

[85] 17 U.S.C. § 1301-1332.

[86] *See* § III *supra*.

[87] 17 U.S.C. § 1305.

[88] 17 U.S.C. § 1309.

[89] 17 U.S.C. § 1316.

[90] 17 U.S.C. § 1317.

[91] See § I.B *supra*.

[92] 17 U.S.C. § 1306(a)(1)(D).

[93] Bonito Boats, Inc. v. Thunder Craft Boats, Inc. 489 U.S. 141 (1989).

My vast erudition on the subject allows me to formulate a highly technical and scrupulously accurate description of plug molding: Take a boat, turn it upside-down, and spread Silly Putty all over it; after you remove the goop, then turn it right-side-up, and pour silicon in the resulting space. Now, you have a new boat that is identical to the old boat. That is "plug molding," also known as "hull splashing."

This practice used to be illegal under Florida law, until the case reached the U.S. Supreme Court.[94] *Bonito Boats* ruled that the state law in question was regulating affairs that belong in the domain of copyrights and patents.[95] Legislating anti-plug-molding statutes might be a good idea, or it might be a bad idea—but it is a *national* idea, meaning that *Congress* has to be the body to take action.[96] After that 1989 ruling, Congress reacted expeditiously—a mere nine years later.[97] In particular, as a portion of the previously encountered Digital Millennium Copyright Act, Congress acted to rectify the evidently devastating effects that *Bonito Boats* must have been exerting on the boat hull industry.[98] The resulting Vessel Hull Design Protection Act sets forth the thirty-two sections needed to fill the gap.[99]

It stands to reason that, over the course of those nine long years, society must have witnessed proof of the terrible economic effects that boat manufacturers were suffering. Here is what the Congress had to say on the subject:

> "Hull splashing" is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded in the sense that they are not benefitting from the many attributes of hull design, other than shape, that are structurally relevant, including those related to quality and safety.[100]

"Quality and safety" is thus the first rationale for this enactment. How do those concerns play out? Let us imagine that someone who knows nothing about hull design starts to manufacture boats. If that ingenue were to design a boat from scratch, the result is likely to be a poor-quality and unsafe vessel. To redress such issues, Congress should have passed standards that require minimum competency in nautical technology. In addition, it could have established a board to determine what makes safe boats and avoids accidental drowning.

But all those quality and safety strictures are resolutely missing from the Vessel Hull Design Protection Act itself, which limits its focus to regulating the design.[101] Very well—if design regulation is the only tool available, then how do we improve the unsophisticated manufacturer's performance? The only step that comes to mind would be to *require* plug molding of an existing design that itself has stood the test of time. In other words, if our naïf were to exactly copy a design from a rival who had produced a safe and high-quality boat, at least there can be some hope that the knock-off will share

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[94] FLA.STAT. § 559.94 (1987).
[95] David Nimmer, *Copyright and the Fall Line*, 31 CARDOZO ARTS & ENT. L.J., 803, 824 (2013).
[96] *Bonito Boats*, 489 U.S. at 157–168.
[97] Nimmer, *supra* note 95.
[98] *Id.*
[99] *Id.*
[100] H.R. Rep. No. 105-436, at 13 (1998).
[101] *Id.* at 825.

those characteristics.[102] Therefore, taking seriously Congress' stated concerns quality and safety, it has managed to pass a law that is exactly backwards.[103]

Let us continue with our quotation from the pertinent legislative history, to see if other concerns actually underlie the enactment:

> It is also highly unlikely that consumer [sic] know that a boat has been copied from an existing design. Most importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await.[104]

Here, a new rationale is asserted—consumers are defrauded when unaware that a given design has been copied. At this point, let us imagine your typical boat purchaser: a billionaire who walks into a showroom and sees a seventy-two-foot yacht. "My, that's beautiful," he intones. "She's yar." Congress is positing that, if only the billionaire had been told that particular hull design was copied from a previous exemplar, he instead would have declaimed, "Get that monstrosity out of my sight." Though theoretically possible, the claim seems incredible on its face; it follows that putative concern about fraud is just a smokescreen.

Even more strikingly, the legislative history contains no attempt to adduce economic proof about how many billionaires actually *are* dissatisfied with what they bought between 1989 and 1998, or any empirical investigation at all into boat customers. And what was the economic impact? Given the reference to "research and development costs" that are not going to be recouped, the question immediately arises what the experience has been during the previous nine years during which all legal protection has been lacking. If a regression study showed that ninety percent of the boat hull manufacturers had gone bankrupt in that interim, we could conclude that Congress was acting sensibly—your tax dollars at work for a good purpose. Instead, though, the stated rationales seem to be all pretense and no substance.

So now that we have Chapter 13, how many cases have been brought under it? By now, we can discern a pattern. There have been two reported decisions brought under these additional thirty-two sections added to the Copyright Act in 1998.[105] In one, the plaintiff lost protection for its registration, which failed to constitute a substantial revision

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[102] Conversely forcing the newcomer to design a model wholly from scratch seems more likely to produce a design that is less safe than a tried-and-true form.

[103] The very proposition that design is a surrogate for quality and safety seems highly questionable. But, if that first proposition holds, then the point is that it follows that *copying* seems superior to *independent design*. It is for this reason that the Vessel Hull Design Protection Act has been exported from a topsy-turvy universe.

[104] H.R. Rep. No. 105-436, at 13 (1998).

[105] As observed with respect to predecessor amendments, *see* note 41 *supra*, some courts have reasoned from Chapter 13 to construe other provisions of the Copyright Act. An example is the Third Circuit, which adverted to the authority granted to courts under the VHPA to revoke registrations and on that basis inferred that the lack of comparable authority in the Copyright Act proper meant that courts were not authorized to do so. *See* Brownstein v. Lindsay, 742 F.3d 55, 76 (3d Cir. 2014).

over a previous design that was time-barred.[106] In the other a plaintiff tried to extend coverage from boats to hats, arguing that the statute "does not say a useful article is 'only' a vessel hull or deck."[107] The court decapitated that stance as meritless, but nonetheless not frivolous, given that the amendment "is a bit misleading at first glance."[108]

In sum, as with Chapters 9, 10, and 11 that preceded it, Chapter 13 has largely become a dead letter in the annals of the Copyright Act. Adopted full-blown from an alien brow, it continues the process of accreting the handiwork of different universes onto Title 17 of the United States Code.

C. Chapter 12: Anticircumvention

An entirely different dynamic unfolds as to the other chapter that the DMCA added to the Copyright Act. Chapter 12 added provisions against anti-circumvention devices[109] and protecting copyright management information.[110] Far from being dead wood, these provisions have generated scads of important decisions.[111] Grounding this innovation in prior doctrine, we have already seen the ⓓ of 1976 and the ⓜ of 1984.[112] In addition, the © has been a fixture part of copyright law since time immemorial.[113] But the DMCA has conferred unprecedented force and scope on the ©, by virtue of codifying it as an element of "copyright management information."[114]

When the DMCA was under deliberation, sixty-two copyright professors submitted written testimony to Congress opposing the bill.[115] They condemned it as an "unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law."[116] My reaction to their claim is that it is completely mistaken—one need simply revert to the discussion above of Chapter 9, Chapter 10, and Chapter 11.[117] Viewed against that backdrop, the Digital Millennium Copyright Act does not represent "an *unprecedented* departure;" to the contrary, it constitutes an *all-too-precedented* departure into "paracopyright"—indeed, it simply weaves more fabric onto the same quilt that Congress has been weaving for decades.

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[106] *See* Maverick Boat Co. v. American Marine Holdings, Inc., 418 F.3d 1186 (11th Cir. 2005).
[107] *See* Tooker v. Whitworth, 212 F. Supp. 3d 429, 433 (S.D.N.Y. 2016).
[108] *Id*. at 436 (denying sanctions).
[109] 17 U.S.C. § 1201.
[110] 17 U.S.C. § 1202.
[111] *See* NIMMER ON COPYRIGHT Chap. 12A.
[112] *Id.*
[113] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909), amended July 30, 1947, ch. 391, 61 Stat. 657 § 19 (1947), "In the case . . . of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed with a circle, thus © . . . ."
[114] *See* 17 U.S.C. § 1202.
[115] *See* 144 Cong. Rec. E2136–02 (daily ed. Oct. 13, 1998).
[116] *Id.*
[117] *See* NIMMER, *supra* note 95, at chs. 9-11.

Let us recall the circle-d that underlay the House bill for the 1976 Act, plus the circle-m added to mark semiconductor chips, against the ubiquitous background of circle-c.[118] Simply adding to that formulation the letter 'A' for the Audio Home-Recording Act yields a quasi-mathematical proof that the 1998 addition of Chapter 12 to the Copyright Act stands for no new innovation.[119]

ⓓ + ⓜ + © + A = DMCA

This is not to say that the innovations of Chapter 12 are all salutary. When previously plowing this field, I noted how I successfully defended Skylink, the purveyor of a universal garage door opener, against the overreaching claim of Chamberlain that its proprietary garage door openers prevented tinkering with its copyright code.[120] My conclusion was that "I never would have imagined, when I started writing my copyright career, that one day I would litigate a case about universal garage door openers as something arising under the Copyright Act."[121] Some issues never go away. While putting the finishing touches on the current article, I learned that Chamberlain continues its crusade to the present, using the DMCA as its primary battering ram.[122]

V. SAILING FORWARD WITH FINAL CHAPTERS

History did not stop with enactment of the DMCA. In the decades since, Congress has added two more chapters. Interestingly, however, those additions share none of the infirmities of the extraneous chapters added to the Copyright Act discussed above.[123] Instead, one of these amendments simply continued the 1976 Act's process of integrating pre-1972 sound recordings into traditional copyright protection and the other one created a procedural mechanism to litigate traditional copyright claims when not a lot of money is at stake.

A. Chapter 14: Sound Recordings

Twenty years after the DMCA, Congress passed another omnibus amendment. This blockbuster went under the caption Orrin G. Hatch-Bob Goodlatte Music Modernization

[118] NIMMER, *supra* note 95, at 822.
[119] *Id*.
[120] *See* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004).
[121] NIMMER, *supra* note 95, at 823.
[122] *See* Brian N. Chen, *Why One Man Is Fighting for Our Right to Control Our Garage Door Openers*, N.Y TIMES (Dec. 11, 2025) https://www.nytimes.com/2025/12/04/technology/personaltech/why-one-man-is-fighting-for-our-right-to-control-our-garage-door-openers.html.
[123] Reference here is to Chapters 9, 10, 11, and 13 of the Copyright Act, discussed above.

Act.[124] If my father was disheartened by the 1976 Act occupying 45 pages, it is frightening to gauge how he would have reacted to this 65-page monstrosity.[125]

As part of music modernization, Congress included a title labeled Classics Protection and Access Act.[126] Unlike the massive portions preceding it, that aspect sets forth but a single section.[127] Its effect is to correct a historical anomaly. As of its effective date of January 1, 1978, the Copyright Act federalized all extant works fixed in a tangible medium of expression.[128] But it contained an exception for sound recordings that were fixed prior to the advent of federal protection on February 15, 1972.[129] In other words, state law continued to protect Elvis' and the Beatles' discography, to name two examples.[130]

That state of affairs arose out of a gap in time—the federal Act was essentially finalized in 1965, but it took eleven years to work out residual issues relating to jukeboxes and cable television.[131] By the time that Act was passed in 1976, Congress failed to advert the fact that it had added the category of sound recordings to federal protection five years earlier.

In 2018, time caught up with the inattention of the 1970s. Chapter 14, belatedly added to the Act in 2018, effectively confers the same type of copyright protection over pre-1972 sound recordings as is enjoyed by all other subject matter from that time period. As a result, this amendment is blissfully free of all the defects that we previously saw from the addition of *sui generis* forms of protection—it does not purport to set forth a new form of notice, different standards for substantial similarity, its own duration of protection, *etc*. Instead, it sensibly adds copyright protection to the one subject matter from which it formerly was conspicuously absent.

B. Chapter 15: Small Claims

Starting in 2006, the Copyright Office initiated the possibility of overcoming the high cost of litigation for copyright owners to vindicate their rights.[132] Decades later, the process culminated in adoption of the Copyright Alternatives in Small-Claims Enforcement Act of 2020, as Chapter 15 to the law.[133]

The CASE Act adds eleven sections to the Act. They are procedural in nature, setting up a system for voluntary participation of litigants before a Copyright Claims Board, which is authorized to make modest awards. The law governs trials, post-trial

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[124] Act of Oct. 11, 2018, Pub. L. 115-264, 132 Stat. 3676.
[125] Just the provisions covering the mechanical license take up 40 pages of legislation! *Id*. tit. I, Sec. 102. *See* 17 U.S.C. § 115 (2018).
[126] *Id*. Title II.
[127] 17 U.S.C. § 1401.
[128] 17 U.S.C. § 301(a) (1976).
[129] 17 U.S.C. § 301(c).
[130] Each state had its own legislation or common law tradition. For instance, in California the subject vehicle was Cal. Civ. Code § 980(a)(2).
[131] *See generally* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 873-75 (1987).
[132] U.S. Copr. Office, *Report on Orphan Works* (Jan. 2006).
[133] 17 U.S.C. § 1501-1511 (2020).

proceedings, appeal, precedential effect, and the like. What it does not do is to create a new universe for copyright-adjacent protection. It happily avoids such pitfalls as new notices, new registrations, new standards for substantial similarity, and the like.[134]

In short, like the Chapter 14 that preceded it, this Chapter 15 comes from the same universe as the 1976 Act itself. It simply sets forth streamlined procedures to resolve simple copyright disputes.

VI. CHARTING THE COURSE OF HISTORY

With the benefit of the exposition set forth above, we may draw some conclusions about statutory development across the last five decades. As we will see, over the course of two decades following the Copyright Act of 1976 becoming effective, it experienced decline. Subsequently, it has been on a course of restoration.

A. Two Decades of Decline

Starting at the beginning, the decision to clothe computer software with traditional copyright protection rather than as a *sui generis* project continues to reverberate to this day, as we have laboriously seen.[135] Chris Meyer's legacy 1978 continues to pay dividends.[136] Concomitantly, the decision in 1984 to adopt the *sui generis* path for semiconductor chips (adding 14 sections in Chapter 9) has been largely a failure.[137] The same decision in 1992 with respect to DAT players (adding 10 sections in Chapter 10) has similarly been a bust.[138] Ditto the decision in 1995 to come up with yet another *sui generis* scheme for bootletting (adding 1 section as Chapter 11).[139]

And what about the last in this sequence? The 1998 decision to cobble together yet another *sui generis* scheme for plug molding (adding 32 section as Chapter 13) has been the biggest failure of them all.[140] Indeed, its worst aspects have not yet been described—so will be the subject of the next section.[141] Those developments focus the failure as beginning in 1984 and continuing through 1998. But the next year actually witnessed an even more precipitous decline. The subject matter involves that same Chapter 13 of the Copyright Act—with due attention to the worst aspects just adumbrated.

B. The Depths of Stealth Amendments

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[134] *See* § IV.B *supra*.
[135] *See* § I.C *supra*.
[136] CONTU issued its report that year, although Congress did not implement it into the statute until 1980.
[137] *See* § III.A *supra*.
[138] *See* § III.B *supra*.
[139] *See* § III.C *supra*.
[140] *See* § IV.B *supra*.
[141] *See* § VI.B *infra*.

In addition to the baleful tale told above, what worse aspects punctuated Chapter 13? To answer, let us focus on one aspect of the Copyright Act that seldom if ever attracts any attention: the Satellite Home Viewer Improvement Act of 1999.[142] In particular, our focus is on what is captioned "Technical amendments."[143] What are technical amendments? They consist of refinements along the lines of correcting grammar. For instance, when a previous copyright enactment referred to "programing," then the amendment steps in to add the missing "m" and thereby spell the word correctly as "programming."[144] Likewise, technical amendments are needed to fix internal cross-references to various sections within bills as they gain or lose subparagraphs.[145]

In the midst of these "technical" amendments, what else did Congress decide to do? It did nothing less than work a fundamental amendment to Copyright law's work-for-hire doctrine by adding a definition that sound recordings qualify as works made for hire.[146] To illustrate, let us take the example of Bruce Springsteen previously entering a recording studio; after the passage of thirty-five years, he would be able to reclaim rights to his individual recordings.[147] The effect of this 1999 law is to deprive him of that ability.[148]This matter qualifies as a "midnight amendment," inasmuch as practically no one could have known what was going on, except for a staffer on the House Judiciary Committee.[149] In fact, it was so controversial[150] that it later had to be eliminated.[151]

We have now reached the all-time worst example of something that may be termed a "stealth amendment" to U.S. copyright law. But it is not the only one. In fact, it is not even the only example of a stealth amendment afflicting the Copyright Act to appear in the Satellite Home Viewer Improvement Act of 1999.[152]

The other example affected the sunset date that was originally included as part of the Vessel Hull Design Protection Act. At enactment, Chapter 13 of the Copyright Act provided that no cause of action could be filed at the end of a two-year period.[153] In other

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[142] Act of Nov. 29, 1999, Pub. L. No. 106-113, app. I, 113 Stat. 1501.
[143] *Id.* at § 1011.
[144] *Id.* at § 1011(a)(1).
[145] *See id.* at § 201(j).
[146] *Id.* at § 1011(d).
[147] *See* 17 U.S.C. § 203.
[148] *See generally* David Nimmer and Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. Copyright. Soc'y, 387 (2001).
[149] *See* Lital Helman, *When Your Recording Agency Turns Into An Agency Problem: The True Nature Of The Peer-To-Peer Debate*, 50 IDEA 49, 62 n. 56 (2009).
[150] *See* Eric Boehlert, *Four Little Words: How the Record Industry Used a Tiny Legislative Amendment to Try to Steal Recording Copyrights from Artists—Forever*, Salon.com, Aug. 28, 2000. http://www.salon.com/2000/08/28/work_for_hire/.
[151] *See* § VI.B *infra*.
[152] Strictly speaking, the matter now under investigation formed part of the Intellectual Property and Communications Omnibus Act of 1999, Pub. L. No. 106-113, 113 Stat. 1536 § 5005 (Nov. 29, 1999), the omnibus bill with which the Satellite Home Viewer Improvement Act of 1999 was consolidated for enactment.
[153] *See* Digital Millennium Copyright Act, Pub. L. No., 105-304, 505, 112 Stat. 2860, 2918 (1998) ("No cause of action based on Chapter 13 of Title 17, United States Code as added by this title, may be filed after the end of that 2-year period.").

words, when passed as part of the DMCA in October 1998, the new thirty-two sections were destined to expire in October 2000.

An essential feature of the enactment itself was that Congress ordered two reports to be prepared within that two-year experimental window "evaluating the effect" of these new provisions.[154] The arrangement was that Congress could study those reports in order to determine whether to sunset the new approach as of 2000, or by contrast to continue it for another two years on an experimental basis, or—if it proved to be a smashing success—could even institute it permanently. Senator Orrin Hatch explicitly conditioned his approval for the bill on that "sunset" provision.[155] Senator Strom Thurmond elaborated that, in his estimation, those features rendered the whole amendment "truly experimental."[156]

What happened next? The answer is another stealth amendment—the same 1999 law that covertly added sound recordings as works for hire also unceremoniously *eliminated* the two-year sunset of the Vessel Hull Design Protection Act![157]

As a result, we currently have 32 statutory sections that continue in effect, a quarter-century after they were due to expire and counting.[158] As currently constituted, they will continue to subsist into the twenty-second century and beyond. But what about the reports that Congress ordered by 2000? They had not even been prepared as of only one year after the Vessel Hull Design Protection Act came into effect; therefore, when the Satellite Home Viewer Improvement Act of 1999 eliminated the sunset, Congress certainly did not rely on any experience of its success. In fact, no reported decision at all had arisen during that interval under the law in question.[159] We can now appreciate the depth of sinking from the acme of 1980 to the nadir of 1999. Happily, though, they turned around in short order.

C. Up Periscope

The turn of the millennium brought in its wake a fundamental turn as well in copyright amendments. No longer would Congress add to the Copyright Act subject matter culled from alternative universes. Instead, its post-2000 handiwork simply followed the contours of traditional copyright, by regularizing its subject matter (Chapter 14)[160] and streamlining the procedures required to litigate its infringement (Chapter 15).[161]

Indeed, the process of descent abruptly hit bottom immediately after the worst of the worst, namely the Satellite Home Viewer Improvement Act of 1999.[162] Sheryl Crow, for

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[154] *See* Pub. L. No., 105-304, 504, 112 Stat. 2860, 2918 (1998).
[155] 144 CONG. REC. 24,466 (1998).
[156] *Id.* at 24,465. Nonetheless, even as time-bound, another senator rose to condemn this approach as a fundamental shift in the tradition and breadth of copyright law. *Id*. (remarks of Sen. Ashcroft).
[157] Intellectual Property and Communications Omnibus Act of 1999, Pub. L. No. 106-113, 113 Stat. 1536 § 5005 (Nov. 29, 1999). *See* Music Modernization Act, *supra* note 124.
[158] 17 U.S.C. §§ 1301–1332.
[159] The first reported case thereunder did not arise until 2005. *See* Hughes *supra* note 76.
[160] *See* § V.A *supra*.
[161] *See* § V.B *supra*.
[162] *See* § VI.B *supra*.

example, testified to Congress about the deficiencies in these "technical amendments" made in 1999.[163] Congress listened. In 2000, it enacted the Work Made for Hire and Copyright Corrections Act of 2000 to undo the previous year's mischief.[164] In hindsight, we can recognize this elevation as the beginning of a return to sanity in the annals of copyright legislation.

Unfortunately, no figure comparable to Sheryl Crow testified to Congress about the equally underhanded innovation of the same 1999 law, namely its unceremonious elimination of the two-year sunset for the Vessel Hull Design Protection Act.[165] That aspect therefore continues to the present day, with the result that the 32 sections legislated as part of the plug molding amendment constitute a permanent feature of governing copyright law.

D. More Fashionable Treatment

When we bore down deeply, features become apparent that give rise to the specter of further stealth amendments. Those aspects tie in directly to the fashion bills mentioned above.[166] The heading of Chapter 13 is "Protection of Original *Designs*."[167] Its section captions follow suit:

> § 1301. *Designs* protected
> § 1302. *Designs* not subject to protection
> § 1306. *Design* notice[168]

The same language choice emerges from the statute's very first provision:

> In general. – The *designer* or other owner of an original *design* of a useful article which makes the article attractive [has protection under this enactment.[169]

It is these features that led one court to reject the argument that it protected an item of clothing, at the same time that it conceded that the statutory language is "a bit misleading at first glance."[170]

What is the "design" underlying all those emphasized words? Its language is as broad as can be. Only upon deep immersion in the statutory scheme can one discern the limits—it turns out that the only designs actually protected are those that pertain to "a useful article"[171] and, in turn, a "useful article" turns out to be a term of art referring

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[163] United States Copyright Office and Sound Recordings as Work Made for Hire, Hearing Before the Subcommittee on Courts and Intellectual Property, Serial No. 145 (May 25, 2000) at 79.
[164] *See* Act of Dec. 9, 2010, Pub. L. 111-295, 124 Stat. 3180.
[165] *See* § VI.B *supra*.
[166] *See* § II *supra*.
[167] 17 U.S.C. ch. 13 (emphasis added).
[168] 17 U.S.C. §§ 1301, 1302, 1306 (emphasis added).
[169] *Id*. § 1301(a)(1) (emphasis added).
[170] *See supra* note 108.
[171] 17 U.S.C. § 1301.

exclusively to a "vessel hull or deck."[172] So, appearances notwithstanding, protection fails to extend to designs writ large and is confined to the nautical realm.

In short, somebody went to the trouble of constructing a statute dripping with references to *designs* of any "useful article" while simultaneously incorporating the only pertinent limitation into what can be loosely called "the fine print." As I have previously observed,

> [E]verything about the amendment screams its intent to inject design protection into the Copyright Act. Such a course of action would overrule the drafting decision reached in crafting the 1976 Act to omit a proposed title providing such protection. Though the Senate passed that title, the House of Representatives deleted it, meaning that it failed to make its way into the final Act.[173]
>
> It is only later upon minutely parsing the details of Title V of the Digital Millennium Copyright Act that one realizes that protection has been limited to "a vessel hull." Evidently someone went to the trouble to draft the thirty-two sections of the Vessel Hull Design Protection Act as broadly as possible. One need not be a conspiracy theorist to speculate that the reason behind it might have been to set the stage for yet another stealth amendment to the Copyright Act in the future.[174]

In this instance, happily, those previously expressed misgivings have not come to fruition. Instead, it is gratifying to observe that the IDPPPA currently under examination is *not* the type of stealth bill that I previously feared.[175] Instead, the drafters expressly limited their handiwork to protecting "fashion design," which they defined as "the appearance as a whole of an article of apparel, including its ornamentation. And just as the previous instantiation was limited to vessel hulls, the current amendment defined "apparel" to mean [176]

> (A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;
> (B) handbags, purses, wallets, tote bags, and belts; and
> (C) eyeglass frames.

Rather than trying to bring "circle-d" protection for every ornamental item through the back door, this legislation remains true to its billing by rigorously focusing on fashion—it proposes to add copyright protection over that domain, and that domain only. Whatever the merits or demerits of the substantive move to bring clothing into the realm of copyright protection, this bill at least escapes the taint of subterfuge.

WRAPPING UP: A QUARTER CENTURY REGAINING EQUILIBRIUM

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[172] *Id.* § 1301(b)(2).
[173] *See* § I.B *supra*.
[174] NIMMER *supra* note 14, at 1318 (footnotes and bullet points omitted).
[175] *See* § I.B *supra*.
[176] S.3523, 112th Cong. § 2(10) (2012).

So where does that leave us? With enhanced appreciation for the course of action plotted in 1980. The path that CONTU pioneered, thanks to its commissioners ably assisted by staff members such as Chris Meyer, has stood the test of time—to weave new material into the weft and warp of the 1976 Act rather than to create a new form of *sui generis* protection.

By contrast, the course of action of the following two decades simply highlights what does not work. The addition of new chapters to the Copyright Act, culminating in the Vessel Hull Design Protection Act, can be seen in hindsight as almost a complete bust—essentially no real-world effect has inured from the copious statutory amendments gathered in Chapters 9, 10, 11, and 13. The sole exception is Chapter 12, which has been the subject of active litigation ever since its enactment.

The ship of state righted itself in 2000. That year, Congress repealed the disastrous amendment of 1999.[177] Ever since, it has refrained from adding extraneous subject matter to the Act that is drawn from a different legal universe. To be sure, it added Chapters 14 and 15, but those bring forward the 1976 project rather than lurching the statute into new directions.[178]

In that regard, the experience with fashion is encouraging. First, the implementing bills were designed to be free of the underhanded legislative legerdemain that marred the 1999 statutory changes (which had to be undone the following year).[179] Second, they were designed to fit into the existing statutory structure rather than to take copyright law in new directions of duration, notice, and the rest, as characterized by such past forays as those into semiconductor chips and boat hulls.[180] Third, they did not pass![181] Far from demonstrating willingness to cobble together new universes of protection based on what seemed to be inexorably true foreknowledge of the future (which turned out to be totally wrong),[182] Congress exercised due circumspection.[183] Finally, they have not even been re-introduced over the past decade.[184] That circumstance may speak loudest of all about the lack of appetite in Washington, D.C., to port Title 17 into new directions.

Of course, nothing is guaranteed. Fashion bills may come roaring back before this article even sees the light of day, and the next year might witness the incorporation into Title 17 of multiple new chapters replicating the worst of semiconductors and hulls into even more severe deformations. For the moment, however, the track record is clean—we are heirs to a quarter century in which the traditional strictures stand firm. May that fashion long continue!

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[177] *See* § VI.C *supra*.
[178] *See* § V *supra*.
[179] *See* § VI.C *supra*.
[180] *See* §§ III.A, IV.B *supra*.
[181] *See* § II *supra*.
[182] *See* § III.B *supra*.
[183] The Supreme Court has had numerous occasions to invoke Sherlock Holmes in evaluating the logic that "the dog did n*ot bark"* serves as a tool to interpret legislative history of congressional enactments. *See* Chisom v. Roemer, 501 U.S. 380, 406 (1991). In the present context, the fact that Congress did not *bite* is of cardinal importance.
[184] *See* § II *supra*.