Excerpted from:

Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke,
Copyright in a Global Information Economy, Ch.2 (Fifth Edition, 2020)

B. THE HISTORY OF U.S. COPYRIGHT LAW

The basic copyright framework devised over 200 years ago has weathered dramatic changes in the means of producing and distributing creative works. This section reviews the history of copyright law in the context of these changes.

1. From Censorship to Markets

The history of copyright law in the United States begins, not surprisingly, in England. What *is* surprising to many students of copyright law is that the first real copyright statutes there were tools for government censorship and press control. Copyright did not become a tool for promoting knowledge and learning until later.

In the years before the printing press, reproducing a work involved the laborious task of hand copying. This fact, along with an extremely low literacy rate, made legal regulation of unauthorized copying practically unnecessary. When William Caxton introduced the printing press in England in 1476, the economics of copying changed drastically. Booksellers felt this advance to be a mixed blessing. The printing press reduced both the time it took to bring a book to market and the cost to print copies. If a book was popular, however, other printers could quickly copy it.

The English booksellers and others in related trades had been organized as a guild prior to the introduction of the printing press, but guild rules could not be invoked to prevent copying by nonmembers. The threat of encroachment by outsiders caused the guild to seek ways of making its system of private law enforceable against nonmembers as well. Printing patents, granted by the sovereign at his royal prerogative, offered one such method of enforcement, but their availability was limited. Therefore, the printers also sought a more robust governing body in the form of the royally chartered Stationers' Company, created in 1557. The booksellers' desires for greater enforcement ability coincided with the Crown's desire to gain control over the dangerous possibilities of the printed word and to prevent the publication of "seditious and heretical material." Lyman Ray Patterson, *Copyright in Historical Perspective* 20-29 (1968). The 1557 charter reserved the printing of most works to members of the Stationers' Company and granted the company the right to search out and destroy unlawfully printed books. In the sixteenth and seventeenth centuries, several Star Chamber decrees and the Licensing Act of 1662 continued the regime of press control using the members of the Stationers' Company as enforcers. By agreeing to assist in the censorship desired by the Crown, the members of the Company obtained a mechanism for preventing nonmembers from publishing works owned by members.

The system of copyright protection for members of the Stationers' Company was designed to benefit the publishers and the Crown, not authors, and became widely criticized. In a now-famous passage, author John Milton wrote in protest that ideas were not "a staple commodity…to [be] mark[ed] and license[d] like our broadcloth and our woolpacks." John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* 29 (1644) (H.B. Cotterill ed. 1959). After the Glorious Revolution of 1688, the royal licensing laws were allowed to lapse. In 1695, the last of the legally sanctioned censorship acts ended and the Stationers were unsuccessful in convincing Parliament to reinstate their control.

After their defeat in Parliament, the publishers changed their tactics and sought to obtain legal protection for writings on behalf of authors—who, of course, would have to assign their

rights to the publishers in order to be paid. In 1710, Parliament enacted the Statute of Anne, which granted an assignable right to authors to control the publication of their writings. The new copyright act was fundamentally different from the previous proclamations and licensing laws in two ways. Instead of a tool of censorship, the Statute of Anne was expressly meant to be, as its title stated, "[a]n act for the encouragement of learning."[1] Additionally, the Statute of Anne granted rights of limited duration (two 14-year terms), whereas previously the Stationers' right had endured in perpetuity.

Of course, a copyright of limited duration does not hold the same profit potential for authors and publishers as one that extends in perpetuity. Before the English courts, the publishers sought ways to obtain a copyright of longer duration than the statute provided. For a number of years, they were successful in persuading the courts that they also had a common law copyright, separate from the statutory copyright, that lasted forever. However, in the case of *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774), the House of Lords rejected perpetual copyright. *Donaldson* established beyond a doubt that copyrights in published works were subject to the durational limits of the Statute of Anne.

For a detailed account of the historical development of copyright law, see Patterson, *supra*. *See also* Ronan Deazley, *On the Origin of the Right to Copy* (2004); Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 Conn. L. Rev. 1 (2014) (discussing the *Donaldson* case).

2. "Progress," Incentives, and Access

England had taken centuries to arrive at a copyright law that embodied a public purpose and reduced the threat that copyright could be used as a tool for government censorship. That history was not lost on the Framers of the Constitution, who expressly incorporated the requirement that copyright must serve a public purpose in the wording of the Intellectual Property Clause: "The Congress shall have Power…*To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., Art. I, §8, cl. 8 (emphasis added).[2] The Constitution, like the Statute of Anne, also makes explicit the guarantee of a public domain; the "exclusive Right" granted to authors may only be for "limited Times."

In 1790, the first Congress embraced the idea of copyright having an educational purpose, entitling the first copyright law "An act for the encouragement of learning" and providing for two 14-year terms of protection. Act of 1790, 1st Cong., 2d Sess., ch. 15, 1 Stat. 124 (1790). To receive this Act's protection, an author had to comply with various formalities, including

---

[1] The statute's preamble stated:

WHEREAS Printers, Booksellers, and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For preventing therefore such Practices for the future, and for the Encouragement of learned Men to compose and write useful Books [this statute is therefore enacted].

Statute of Anne, 8 Anne, c. 19 (1710).

[2] Before the adoption of the Constitution, each of the original 13 states except Delaware enacted its own copyright statute. Many followed the example of the Statute of Anne, and many began with a preamble that stated the public purposes that the grant of copyright was intended to serve.

registration of title, publication of the registration in a local newspaper, and deposit of a copy of the work with the Secretary of State within six months of publication.

The deposit requirement effectively meant that the federal government came into possession of a great store of knowledge. In 1800, Congress passed legislation authorizing the establishment of a library for its own use. That institution evolved into the Library of Congress, which today is the de facto national library of the United States. Beginning in 1846, the Library became the repository for copies of works deposited under the Copyright Act. The Copyright Act of 1870 centralized all registration and deposit activities in the Library of Congress. Finally, in 1897, Congress established the Copyright Office as a department of the Library of Congress and created the position of Register of Copyrights to oversee the administration of the copyright system.

In the United States, as in England's *Donaldson* case, litigants presented arguments to courts claiming the existence of a perpetual, common law copyright. In the famous case of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the Supreme Court addressed the question of copyright protection for reports of the Court's opinions. The Court recognized that the opinions themselves could not be copyrighted, but other material added by the Court's reporter, such as summaries of the parties' arguments, was eligible for protection. However, the reporter had failed to comply with the statutory formalities required for protection. Thus, if there were to be any copyright protection for the reporter's material, it would have to arise outside the bounds of the federal statute. As in *Donaldson v. Beckett*, the plaintiff asserted common law copyright protection; as in *Donaldson*, the high court rejected it:

> That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.
>
> The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published.…
>
> In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long; and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.
>
> The result of their labours may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.…

> That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

Id. at 657-58.

The *Wheaton* Court's rejection of any kind of common law copyright in published works effectively meant that copyright in such works would be governed exclusively by the federal statute adopted by Congress. That is the rule today. As you will see later, Congress has extended the exclusive scheme of federal protection to unpublished works as well.

Court opinions from the nineteenth century also recognized that not every piece of written expression is subject to copyright protection. As already noted, the *Wheaton* Court observed that the opinions of the Court could not be copyrighted but were part of the public domain—free for anyone to copy. Several years later, in *Emerson v. Davies*, 8 F. Cas. 615 (1845), Justice Story reasoned that the nature of authorship requires some freedom to build on certain aspects of past works:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.

Id. at 619.

Courts further reasoned that the same policies required some leeway to use copyrighted material produced by others. Four years prior to his opinion in *Emerson*, in the case of *Folsom v. Marsh*, 9 F. Cas. 342 (1841), Justice Story expressly recognized that using selections from a preexisting work "fairly" did not constitute an infringement of copyright. That recognition marked the beginning of the venerable fair use doctrine in U.S. copyright law.

By the end of the nineteenth century, copyright protection was firmly established in U.S. law as a means of encouraging progress in knowledge and learning. The protection afforded

by copyright law was subject to important limits, and those limits were also seen as necessary for encouraging the creation of new works. The rapid technological changes that began at the start of the twentieth century, however, posed difficult challenges for the basic copyright framework.

3. Copyright Law and Technological Change

The copyright system established by the first Congress has expanded considerably beyond its original bounds. As new forms of creative expression have developed, Congress has extended copyright protection accordingly. The current Copyright Act thus covers a much greater variety of creative output than the original Act of 1790. And as new technologies have emerged for disseminating creative products, Congress has revised the protections afforded by copyright law to reach these new distribution and communication media.

a. *New Methods of Creating New Works*

The first Copyright Act extended copyright protection to authors of maps, charts, and books. Over the next century, Congress gradually expanded the list to include engravings, etchings, and prints (1802); musical compositions (1831); dramatic compositions (1856); photographs and negatives (1865); and paintings, drawings, chromolithographs, statuary, and "models or designs intended to be perfected as works of the fine arts" (1870).

As this brief history illustrates, continuing change in the prevailing methods of producing creative works required numerous amendments to keep the list of protected works current. This legislative practice continued in the 1909 overhaul of the Copyright Act, which stated that copyrightable works included "all the writings of an author," but then proceeded to list the following as classes of works protected by copyright:

> (a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;
>
> (b) Periodicals, including newspapers;
>
> (c) Lectures, sermons, addresses, prepared for oral delivery;
>
> (d) Dramatic or dramatico-musical compositions;
>
> (e) Musical compositions;
>
> (f) Maps;
>
> (g) Works of art; models or designs for works of art;
>
> (h) Reproductions of a work of art;
>
> (i) Drawings or plastic works of a scientific or technical character;
>
> (j) Photographs;

(k) Prints and pictorial illustrations.

Almost immediately, Congress amended this list to include "motion-picture photoplays" and "motion pictures other than photoplays" (1912). Still later, Congress added "prints or labels used for articles of merchandise" (1939) and, finally, sound recordings (1971).

In the 1976 Act, Congress chose a new approach to enumerating the works protected by copyright. This approach was intended "to free the courts from rigid or outmoded concepts of the scope of particular categories." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666. Rather than listing works according to the particular form or medium in which they were expressed (e.g., "books" and "periodicals"), the Act set forth broad categories of content that the law protects. Section 102(a) of the 1976 Act listed seven such nonexclusive categories: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." These categories subsume many of the kinds of works that were listed separately in the 1909 Act and have proved more adaptable to change. Congress did not, for example, need to amend the Act when digital audio recordings and later DVD movies became available, because the statutory definitions of "sound recordings" and "audiovisual works" were already worded broadly enough to encompass the new media. Since 1976, Congress has added only one more category to the list in §102(a)—architectural works (1990). It did so not because of changing technology but to comply with treaty obligations.

b. *New Technologies for Distributing and Copying Works*

In addition to enabling new forms of creative expression, technological changes have transformed the ways in which creative works are produced, distributed, and accessed by members of the public. These changes have greatly complicated the task of defining a copyright owner's rights.

For centuries, the only viable means of making copies of creative works for mass distribution was the printing press, and proximity to a physical copy was required to read or view a work. Musical compositions were distributed in the form of sheet music, which musically inclined customers could play on instruments of their own.

Near the start of the twentieth century, however, the print-based copyright landscape began to change rapidly. First came methods for distributing and playing recorded sounds and displaying moving images. The late 1800s and early 1900s witnessed the commercial marketing of both the mechanical player piano and record players. In 1894, the motion picture was invented and the first films were exhibited to the public. Shortly thereafter, in the 1920s and 1930s, first radio and then television provided means for transmitting sounds and images over great distances. Both radio and television penetration increased sharply after World War II. By 1950, radio ownership averaged 2.3 sets per household, and more than 50 percent of U.S. households owned a television.

Next, in the mid-twentieth century came inexpensive, readily available methods of reproducing texts, images, and sounds that did not require the assistance of the customary publishing intermediaries. By the late 1970s, analog audiotape equipment capable of recording as well as playing pre-recorded tapes was widely available in consumer markets. A

U.S. government study conducted in 1989 found that 41 percent of respondents had engaged in home audiotaping during the previous year. U.S. Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law* 151 (1989). The automatic plain-paper photocopier, first marketed by the Xerox Corporation in 1959, was in widespread use in offices by the 1960s. By 1966, 14 billion photocopies were made each year; by 1985, the annual total exceeded 700 billion. The first videocassette recorders were marketed in the United States in the early 1960s; by 1987, VCRs were in use in 50 percent of U.S. homes.

The digital technologies that emerged in the late twentieth century accelerated these trends. The introduction of the personal computer in the late 1970s and early 1980s was followed in rapid succession in the late 1980s and 1990s by pre-recorded compact discs; digital audio recording media; digital multimedia technology; sophisticated desktop publishing software; pre-recorded and recordable digital versatile discs; the Internet; the World Wide Web; digital compression formats for storing and transmitting high-fidelity audio and video files; and software-based audio and video players, "rippers," and recording tools. These technologies provide enormous versatility. Once a work consisting of text, sounds, and/or images has been rendered in digital form, it can be reproduced instantaneously without the degradation in quality that characterizes analog reproduction technologies such as traditional tape recorders. Anyone with access to the Internet can transmit such works instantaneously, with a few taps on a keyboard, to anywhere else in the country or the world, and anyone with access to a Web server can display the works for others to see, modify, and forward to others with access to the Internet. The emergence of networked communication platforms that facilitate the sharing and tagging of media files has empowered users to engage in a wide variety of activities that utilize creative works available in digital formats. As you will see, copyright law has attempted to respond to all these changes.

c. *Legal Responses to New Technologies*

Nineteenth-century copyright law generally granted copyright owners the rights to control printing and publication of their works. The law additionally granted the right to control public performances to the owners of copyright in dramatic compositions. As public performances of first live, and then recorded, music grew in popularity and sales of sheet music declined, however, the owners of copyrights in musical compositions demanded broader protection.

In 1909, Congress enacted a comprehensive revision of the copyright law. The Copyright Act of 1909 extended rights of public performance to musical compositions and granted owners of musical composition copyrights a limited right to compensation, via a compulsory license, from those who prepared "mechanical" sound recordings of their works. (At the time, this meant phonograph records and player piano rolls.) The 1909 Act also extended the term of copyright protection, which had evolved over time from a maximum of 28 years in 1790 to a maximum of 42 years in 1908, to a new maximum of 56 years.

The new media of the twentieth century rapidly tested the limits of the new statute. Public performance rights had to be extended to other works enabled by new technologies, such as motion pictures and television broadcasts. Owners of copyright in pictorial works such as drawings and photographs argued that they deserved analogous rights to control the broadcasting of these works. Meanwhile, the existing formal requirements for copyright

protection, which were based on concepts like publication of copies with notice of copyright, could not easily be applied to the new broadcast technologies.

These and other perceived inadequacies ultimately led to enactment of the 1976 Copyright Act, which took effect on January 1, 1978. The 1976 Act defined five exclusive rights of copyright owners. Those rights included not only the traditional rights of reproduction and distribution, but also broadened rights of public performance and display and a newly defined right to create derivative works based on the copyrighted work. In addition, it abandoned the 1909 Act's focus on publication as the trigger for federal copyright protection and provided that protection would attach from the moment that a work was fixed in a tangible medium of expression—which, for broadcast works, could be the making of a contemporaneous recording. Finally, the 1976 Act substantially lengthened the copyright term once again. Although, as you will soon see, the 1976 Act has undergone numerous changes in recent years, it provides the basic structure for U.S. copyright law today. Note, though, that many works under copyright today were created before 1978, so it will be necessary for you to study certain provisions of the 1909 Act as well.

4. The Political Economy of Copyright Law

The 1976 Act is a curious amalgam of broad, general rights; open-ended exceptions like the fair use doctrine; and complex, technical licensing provisions. In part, this facially odd mesh of different types of provisions reflects the continuing challenges posed by new technologies. In part, however, it reflects an unusual degree of involvement by affected constituencies in the drafting process and in the negotiation of subsequent amendments.

a. *The Copyright Legislative Process*

The process of copyright revision that culminated in the 1976 Act witnessed the full-fledged emergence of a novel interest-group model for drafting copyright legislation. As Professor Jessica Litman describes:

> A review of the 1976 Copyright Act's legislative history demonstrates that Congress and the Registers of Copyrights actively sought compromises negotiated among those with economic interests in copyright and purposefully incorporated those compromises into the copyright revision bill, even when they disagreed with their substance. Moreover, both the Copyright Office and Congress intended from the beginning to take such an approach, and designed a legislative process to facilitate it.
>
> One might argue that this was an improper way to create a statute, on the ground that it involved an egregious delegation of legislative authority to the very interests the statute purports to regulate. Alternatively, one might argue that the process constituted an ingenious solution to the problem of drafting a statute for an area so complicated that no member of Congress could acquire meaningful expertise.

Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 879 (1987).

Professor Litman identifies two principal drawbacks to this process. The first concerns the extent to which it addressed the concerns of all relevant industries:

> [O]f course, it wasn't possible to invite every affected interest. Some interests lacked organization and had no identifiable representatives.…In the conferences convened in the 1960s, painters and sculptors did not attend and the Copyright Office's efforts to seek them out proved unavailing. Choreographers, theatrical directors, and computer programmers sent no representatives because they had no representatives to send. Other interests that would have profound effect on copyright did not yet exist at the time of the conferences.…[T]here were no video cassette manufacturers, direct satellite broadcasters, digital audio technicians, motion picture colorizers, or on-line database users to invite in 1960.

Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275, 311-12 (1989). In part for this reason, although participants in the drafting process hoped that the eventual result would be a statute both sufficiently flexible and sufficiently enduring for the modern era, the result has been somewhat different. Technologies have continued to change, putting pressure on copyright law, and the demands of globalization have increased, adding to that pressure. In the decades since the 1976 Act, it has been amended many times. Today, the Copyright Act is a complex and ungainly document. The Copyright Act of 1909 was 14 pages long. The Copyright Act of 1976 was 62 pages long when enacted; after all the intervening amendments, the current Act is much longer.

Professor Litman's second critique is different:

> Nor could the rest of us be there.…Many of us are consumers of copyrighted songs and also consumers of parodies of copyrighted songs, watchers of broadcast television and subscribers to cable television, patrons of motion picture theatres and owners of videotape recorders, purchasers and renters and tapers of copyrighted sound recordings. Although a few organizations showed up at the conferences purporting to represent the "public" with respect to narrow issues, the citizenry's interest in copyright and copyrighted works was too varied and complex to be amenable to interest group championship. Moreover, the public's interests were not somehow approximated by the push and shove among opposing industry representatives.

Id. at 312. We will return to this critique below.

b. *The Traditional Copyright Industries*

As Professor Litman's investigation of the copyright legislative process suggests, no study of modern copyright law would be complete without consideration of the economic and political roles of the copyright industries and their influence on copyright law and policy. As information and entertainment goods have assumed increasing importance within the United States and global economies, the industries that produce and disseminate those goods have grown correspondingly. It should come as no surprise, then, that those industries wield considerable political power, both domestically and in international trade matters.

Throughout the twentieth century, technological developments facilitated the domestic growth and global expansion of the traditional copyright industries. In 2017, the "core" copyright industries (i.e., "those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials . . . [such as] books, newspapers and periodicals, motion pictures, recorded music, radio and television broadcasting, and software in all formats, including video games") accounted for 6.85 percent of the U.S. economy and added value in excess of $1.3 trillion dollars to the U.S. GDP. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2017 Report*, 3 (2018). Meanwhile, as technology has brought the world closer together, foreign consumers increasingly have demanded the products of American copyright industries. One estimate of the foreign sales/exports of selected copyright industries ("recorded music; motion pictures, television, and video; software publishing; and non-software publications including newspapers, books and periodicals") was $191.2 billion in 2017. *Id.* These foreign sales/export numbers have outstripped those of many other sectors. *Id.* at 14-16.

As the economic power of the core copyright industries has continued to grow, so too has their domestic political power. Each industry is represented on Capitol Hill by at least one, and often more than one, major trade association. These associations have large budgets and considerable clout. New copyright legislation is often initiated at the copyright industries' request, and the relevant legislative committees routinely invite representatives of the copyright industries to submit proposed statutory language. Trade associations representing the major copyright industries also play a significant role in both international and regional trade negotiations, as well as in norm-setting activities at various international fora.

c. *The Rise and Importance of New Intermediaries*

From its earliest origins, the effective functioning of the copyright system has required the involvement of third parties—intermediaries—to help move copyrighted content to consumers, ensuring that the public has optimal access to copyrighted works through a variety of channels. Bookstores and libraries are examples of classic intermediaries, as are museums and archives. Intermediaries also facilitate licensing processes, ensuring that users have lawful and cost-effective methods of accessing and paying for uses of copyrighted works. ASCAP and BMI, created in the early twentieth century to facilitate licensing of public performance rights in the music industry, are good examples of this type of intermediary. Whether intermediaries are public institutions such as libraries and museums or private actors like ASCAP and BMI, the roles they play in achieving the copyright system's objectives are important considerations that shape copyright law. International copyright treaties and the copyright statutes of many countries contain explicit provisions specifically directed at intermediaries that balance their interests with those of copyright owners.

With the proliferation of networked information technologies and user platforms, new intermediaries have emerged. The resulting conflicts have required fresh consideration of intermediaries' role in the copyright system. Online intermediaries, such as Internet service providers (ISPs)—e.g., Comcast and Time Warner—and online service providers (OSPs)—e.g., YouTube, Facebook, and Google—distribute, host, and help users locate content on the Internet, much of which is protected by copyright. These intermediaries play a vital role in our information-driven society by providing the infrastructure through which information is transmitted, shared, and experienced. The services they provide, however, have raised questions about who should be liable for infringing uses of copyrighted works and about the appropriate extent of intermediaries' responsibility for enforcing copyright rules in the digital

environment. How intermediaries are treated within the copyright system greatly affects the overall strength and stability of the protection afforded by copyright law.

The topic of intermediary liability also raises questions about the effect of the copyright system on technological innovation. In an attempt to balance the competing interests in copyright protection and innovation, Congress amended the Copyright Act in ways that attempt to impose some responsibility for copyright infringement while also preserving the business models on which many of the new intermediaries were built. But with the constant development of new online services and business models, the traditional copyright industries have continued vigorous lobbying and litigation efforts to strengthen intermediary liability. In these ongoing discussions, digital intermediaries wield considerable economic and political power of their own, and now are routinely invited to the legislative bargaining table alongside the traditional copyright industries.

In response to copyright industry-sponsored reports regarding the value of copyright protection to U.S. industries, the Computer & Communications Industry Association (CCIA) publishes competing reports that highlight the economic importance of the "fair use industries," i.e., industries that benefit from and/or rely on limits to copyright. *See* Andrew Szamosszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, CCIA, 2017. According to the authors, these industries include manufacturers of consumer devices that allow individual copying and recording, educational institutions, software developers, and Internet search and web hosting providers. *Id.* at 5. The fair use economy accounted for $4.6 trillion in revenues in 2010 and grew to $5.6 trillion in 2014. *Id.* at 15. According to the report, value added by the fair use industries in 2014 accounted for about 16 percent of the total U.S. current dollar GDP. *Id.* at 6, 16-17.

C. THE ROLE OF INTERNATIONAL TREATIES AND INSTITUTIONS

Congress has made significant changes to U.S. copyright law in the last two decades in response to international treaties or legislative developments in other countries. The United States has also initiated several multilateral and regional agreements, all intended to raise international standards for copyright protection and enforcement. There is considerable irony in these developments. As the following materials reveal, the United States has evolved from a copyright isolationist to a leader in setting global copyright policy. Below, we trace that evolution as well as that of the international copyright system generally.

1. From Pirate to Holdout to Enforcer: International Copyright and the United States

Following passage of the Statute of Anne in England in 1710, other European countries began to enact legislation to protect the rights of authors in their creative works. The intra-European wars that accompanied empire building and the resulting conquests of other nation-states helped expose new countries to the emerging system of copyright protection. In more peaceful times, trade relations with countries that lacked domestic copyright protection typically led to recognition of such protection on a *reciprocal* basis: Two countries would agree that each would protect copyrighted works of the others' citizens, but each would remain free to provide that protection under its own substantive law. Meanwhile, countries

such as England, Germany, and France that had significant colonial territories in Africa, Asia, and the Americas typically extended domestic copyright legislation to their overseas territories. These developments signaled the beginnings of an international system of copyright protection.

To say that some form of copyright protection existed in many parts of the world from the eighteenth century onward, however, is not to say that authors could obtain protection for their works in any part of the world. Instead, the copyright law of most countries explicitly excluded foreign authors and their works from protection.

The United States was no different. For more than a century after independence, foreign works could be freely copied and sold. This rule allowed U.S. publishers to pirate popular works of foreign authors such as Charles Dickens, Sir Walter Scott, William Makepeace Thackeray, and William Wordsworth. Indeed, much of Dickens's tour of the United States in the 1840s was devoted to arguing for protection for his works.

Discrimination against the works of foreign, non-U.S.-domiciled authors continued to be the rule until 1891. The Copyright Act of 1891 extended copyright protection to works of non-U.S.-domiciled, foreign authors if their home countries accorded comparable protection to works of U.S. authors. With this change, the United States took an important first step toward the national treatment principle that is the cornerstone of modern trade agreements, including international copyright agreements. Under a national treatment principle, member countries cannot discriminate against foreign authors but must agree to accord the same protection to foreign authors as to their own authors. The 1891 Act also extended protection to works of foreign authors if the United States joined an international agreement that required reciprocal protection of the works of citizens of other countries that were parties to the agreement.

The 1891 Act, however, conditioned protection for foreign authors (and for U.S. authors) on *production* of their works within the United States. The statute required that deposited copies "be printed from type set within the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom," and prohibited importation of copies made outside the country for the duration of the copyright. Act of Mar. 3, 1891, §3, 26 Stat. 1106, 1107 (1891). This provision became known as the "Manufacturing Clause." Although amendments over the years narrowed its scope, it remained in force until July 1, 1986.

The 1909 and 1976 revisions to the copyright law retained the then-existing three categories of foreign authors whose works the copyright law would protect: (1) foreign authors domiciled in the United States at the time of first publication of their works in the United States; (2) foreign authors whose countries afforded comparable protection to the works of U.S. authors; and (3) foreign authors from countries that were parties to an international agreement ratified by the United States. For most of the twentieth century, however, the United States declined to join the preeminent international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (1886), for reasons discussed in section C.2 below. Instead, in 1954, the United States joined the Universal Copyright Convention (UCC), a less rigorous agreement developed by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) whose members primarily included developing countries. Consistent with the provisions of the 1909 Act, the United States then extended protection to works of citizens of UCC member states.

As international trade flows became increasingly important to the U.S. economy, and particularly as intellectual goods became major export commodities, the United States gradually grew more interested in international enforcement of intellectual property rights. The U.S. Trade Representative (USTR) negotiated several bilateral trade agreements that included provisions for protection of intellectual property rights. In the 1980s, reliance on this strategy increased dramatically. The Omnibus Trade and Competitiveness Act of 1988 amended §301 of the Trade Act of 1974 to authorize the USTR to identify nations that have violated a trade agreement with the United States or whose policies unjustifiably burden or restrict U.S. commerce. This amendment, known as "special 301," authorizes the USTR to target violations of U.S. intellectual property rights in foreign countries by publicly listing such countries and using those listings to press for strengthened intellectual property protection and enforcement. Finally, the United States embarked on a process to accede to the Berne Convention.

2. The Berne Convention

Prior to the mid-nineteenth century, bilateral trade agreements were the most common and effective method for a country to ensure protection of its citizens' creative works outside its own boundaries. The proliferation of such agreements, and the uncertainty and confusion they generated, ultimately led European states to form a multilateral agreement regarding copyright protection. In 1886, ten countries signed this agreement, known as the Berne Convention.[1] The signatory countries included the greatest colonial powers, so the Berne Convention encompassed a significant part of the world.

For a number of reasons, the United States was the last industrialized country to join the Berne Convention. First, the Berne Convention requires that members extend protection to works of authors from other Berne member countries on a national treatment basis. The United States did not wish to be obligated to provide all foreign works with a uniformly high substantive standard of protection. Second, the Berne Convention provides that the enjoyment of copyright "shall not be subject to any formality," Berne Conv., art. 5(2), and the United States did not want to abandon its system of formalities. Third, the Berne Convention required protection for some works, such as architectural works, that were not currently protected under U.S. copyright law. Finally, it required protection for noneconomic or "moral" rights of authors, which the United States, with its emphasis on economic rights, had never explicitly protected in its copyright law.

In the 1980s, as international protection of intellectual property rights became a high priority for the United States, and as the U.S. copyright industries agitated for U.S. adherence to the Berne Convention, Congress reconsidered its resistance to ratification. However, Congress also sought to respond to the concerns of groups that opposed ratification. In the Berne Convention Implementation Act of 1988, Congress adopted a "minimalist" approach to ratification, making only those changes to copyright law that were absolutely necessary to qualify it for membership. The legislative history of the Berne Convention Implementation Act (BCIA), which took effect on March 1, 1989, observed: "Adherence to the [Berne] Convention…will ensure a strong, credible U.S. presence in the global marketplace" and "is also necessary to ensure effective U.S. participation in the formulation and management of international copyright policy." S. Rep. No. 100-352, 100th Cong., 2d Sess. 2-5 (1988),

[1] These countries were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, the United Kingdom, and Tunisia. The United States and Japan attended the final drafting conference as observers only.

Once the United States ratified the Berne Convention, it turned its attention to one of its principal motivations for joining: strengthening the international intellectual property system. Together with the European Union and Japan, the United States commenced negotiations for a comprehensive intellectual property agreement to be adopted within the context of the multilateral trade system of the General Agreement on Tariffs and Trade (GATT).

3. The TRIPS Agreement

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement or TRIPS) is one of a number of agreements that comprise the Final Act of the 1994 Uruguay Round of multilateral trade negotiations under the auspices of the GATT. This celebrated round of negotiations, which involved the majority of the trading nations of the world, commenced in 1986 and concluded in 1994. The Final Act created a new institution, the World Trade Organization (WTO), to provide a forum for ongoing trade negotiations and to oversee the administration and implementation of the various agreements that constitute the Final Act. As of 2019, 164 countries are members of the WTO.

The TRIPS Agreement is premised on the position, advanced primarily by the United States, that intellectual property protection is a trade issue. According to this view, in a global economy increasingly characterized by trade in information goods, failure to protect intellectual property rights distorts the flow of trade and undermines the welfare benefits flowing from the GATT system. Thus, the TRIPS Agreement's preamble states that an overall concern is "to reduce distortions and impediments to international trade…taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.…"

To that end, the TRIPS Agreement establishes minimum universal substantive standards for the protection of intellectual property. It covers all of the major categories of intellectual property—copyrights, patents, and trademarks—as well as ancillary categories such as geographical indications, industrial designs, layout designs of integrated circuits, and trade secrets. Member countries may choose to enact protection that exceeds the level specified by the TRIPS Agreement's provisions.

Part I of the TRIPS Agreement sets forth the basic rules that apply to all categories of intellectual property protection. These include the classic international trade standard requiring national treatment (art. 3) and the related concept of most-favored-nation (MFN) treatment (art. 4). Like the national treatment principle, the MFN principle is one of nondiscrimination; it requires each member nation to accord other members the same level of treatment that it currently extends to the nation with which it has the best relations (in other words, its most favored nation). Finally, and importantly, Article 8 of the TRIPS Agreement sets forth the agreement's goal:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Part II of the TRIPS Agreement outlines the substantive requirements for copyright protection. Article 9 requires members to comply with the substantive provisions of the Berne Convention, thus explicitly incorporating the Berne Convention's standards into the TRIPS Agreement. Article 9, however, does not require recognition of moral rights. The TRIPS Agreement also mandates protection for some subject matter not covered by the Berne Convention, such as computer programs and compilations of data. Article 12 sets the minimum duration of copyright protection at life of the author plus 50 years. Finally, Article 13 sets forth the standard for permissible limitations or exceptions to owners' rights, requiring that such limitations be confined to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." This provision, known as the "three-step test," has proved particularly important in defining the scope of copyright law in the post-WTO era. The three-step test is now a standard provision in international (including regional and bilateral) trade agreements relating to intellectual property.

The TRIPS Agreement establishes minimum standards for enforcement procedures and remedies that must be available to rightholders under the national law of WTO member states. As envisioned by the TRIPS negotiators, effective national implementation must include authorization of private actions for infringement in local courts. Another important aspect of the TRIPS Agreement is the WTO dispute settlement process that provides legal redress for violations of WTO obligations by member states. The Berne Convention's lack of an enforcement mechanism had long been a source of dissatisfaction for industrialized countries, and addressing this perceived deficiency in the international intellectual property landscape was a major focus of the Uruguay Round negotiations. We discuss the WTO's dispute settlement framework in section 4.b., *infra*.

4. Post-TRIPS International Copyright Lawmaking and Enforcement

Although the TRIPS Agreement represented a significant extension of treaty obligations relating to copyright, the international copyright landscape has continued to evolve. By the conclusion of the Uruguay Round negotiations, a new round of treaty-making in response to the emergence of the Internet was unfolding outside the WTO. In addition, as described above, the Berne Convention offered important substantive protections for authors but lacked a mechanism to ensure treaty compliance by member countries. The creation of the WTO radically changed this established paradigm. Last but not least, powerful developed economies, including especially those of the United States and the European Union, continued to pursue progressively stronger copyright protections via bilateral and regional trade initiatives. This section explores the institutions and processes responsible for the continuing evolution of international copyright law and for international norm-setting and enforcement.

a. *The World Intellectual Property Organization (WIPO)*

The World Intellectual Property Organization (WIPO) is the oldest and most well-known of the international intellectual property institutions. WIPO's origins date back to 1883, when European nations adopted the major international patent treaty, the Paris Convention for the Protection of Industrial Property and then, later, the Berne Convention in 1886. Both the Paris Convention and the Berne Convention provided for international secretariats. These

secretariats were placed under the supervision of the Swiss government and located in Berne, Switzerland. In 1893, the two organizations were integrated; over the next several years, the new organization went through several name changes. The Convention Establishing the World Intellectual Property Organization was signed in 1967 and entered into force in 1970. Today, WIPO is located in Geneva, Switzerland, and is one of the specialized agencies of the United Nations. It operates autonomously, with its own membership, budget, staff, programs, and governing bodies.

As a result of its long history and expertise in international norm-setting, and importantly its significant budget, WIPO remains the leading forum for ongoing discussion of the substantive policy questions concerning the optimal scope of intellectual property rights. WIPO regularly convenes expert panels on a range of intellectual property-related topics within the context of its mandate "to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization." Convention Establishing the World Intellectual Property Organization, art. 3.

An obvious question is how WIPO fits within the framework of the TRIPS Agreement. As discussed in section C.3 above, the TRIPS Agreement explicitly incorporates the Berne Convention's standards (except those relating to moral rights). Under Article 20 of the Berne Convention, member countries may enter into "special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention." Thus, WIPO members may agree to other intellectual property treaties that implement higher standards of protection. Additionally, countries that are not members of TRIPS may sign WIPO treaties on particular topics.

In 1996, WIPO sponsored two important treaties designed to address copyright protection and related rights in the digital age: The WIPO Copyright Treaty (WCT and the WIPO Performances and Phonograms Treaty (WPPT). The United States ratified both treaties and passed implementing legislation in 1998.

b. The World Trade Organization

Established in 1995, the WTO is the international organization responsible for administering the multilateral trade agreements concluded in the Uruguay Round, including the TRIPS Agreement. The functions of the WTO also include providing a forum for negotiations among member states and administering the Dispute Settlement Understanding (DSU). Commentators regard the DSU as one of the most important accomplishments of the Uruguay Round, particularly because of its implications for intellectual property enforcement. In essence, all WTO member countries have agreed to limit their sovereignty by submitting to a binding international process for the settlement of disputes, including those relating to TRIPS obligations. As you have learned in other law school courses, the power to settle disputes is rooted in the authority to interpret rules. The WTO, through its dispute settlement process, is responsible for interpreting the TRIPS Agreement, and thus, as a practical matter, for enforcing the level of protection for copyright owners required by the TRIPS Agreement.

The DSU provides for a Dispute Settlement Body (DSB) that is charged with administering the rules and procedures of the DSU. The DSB establishes panels to hear disputes, adopts the reports of the panels, and oversees the disputing parties' implementation

of panel rulings and recommendations. In many ways, the DSU hearing process resembles a typical lawsuit in an American court, except that the parties are countries. Parties have strict time limits for all submissions, and ex parte communication with the panel members is forbidden. Citizens of countries that are parties to a dispute are disqualified from serving on the panel. Panels may seek information, technical advice, and expert counsel on aspects of the dispute. In addition, the DSU provides for third-party submissions from countries that have interests in a disputed issue. Finally, and importantly, there is appellate review. Both panels and the DSU's appellate body are charged with resolving disputes promptly.

The DSB will adopt the panel's report or, if applicable, the appellate body's report unless it decides by consensus not to do so. Afterward, a member nation whose laws or measures were ruled inconsistent with the TRIPS Agreement must inform the DSB of its intentions. If a member asserts that it cannot comply immediately with the ruling, the member is required to state a reasonable time period in which it will do so. Failure to comply with the DSB's ruling may lead to the suspension of concessions or other trade privileges by the aggrieved member nation until the offending country corrects the problem or the parties reach a mutually satisfactory agreement. A panel may also award the aggrieved country compensation for the value of lost benefits under the TRIPS Agreement.

Several copyright-related disputes have been submitted to the WTO to date, including two that involve the United States as the defendant. We discuss the first, which involves public performance rights in musical compositions later. In the second, the European Union filed a complaint against the United States, alleging that the "special 301" process, discussed in section C.1 above, is inconsistent with the WTO dispute settlement process. The WTO panel ruled in favor of the United States but noted that its decision was based "in full or in part" on undertakings by the U.S. executive branch that the United States would not use §301 to violate international obligations. The panel noted that should these undertakings "be repudiated or in any other way removed by the U.S. Administration or another branch of the U.S. Government, the findings of conformity contained in these conclusions would no longer be warranted." Panel Report, *United States—Section 301-310 of the Trade Act of 1974*, WT/DS152/R, at 351 (Dec. 22, 1999).

c. Free Trade Agreements and Bilateral Investment Treaties

As noted earlier, bilateral and regional economic agreements historically have played a key role in the development and diffusion of copyright norms. Many of the key provisions in the Berne Convention and TRIPS Agreement, for example, have their origins in bilateral and regional trade and investment agreements between European city states that date back hundreds of years. Those economic agreements, and the institutional frameworks they established, served to incubate a variety of principles for the cross-border protection of intellectual property rights, including the nondiscrimination norms now firmly established in international intellectual property relations.

Today, norms established in bilateral and regional free trade agreements (FTAs) continue to shape the global landscape of copyright law by influencing domestic copyright lawmaking in all countries, including the United States. For example, after the European Union harmonized copyright duration within member states for a term of the author's life plus seventy years, U.S. copyright owners successfully lobbied Congress to extend copyright protection for a same term. A number of other countries have followed suit as a result of bilateral agreements with the European Union or the U.S. See, e.g., 2004 U.S.–Australia Free

Trade Agreement (Article 17.4.4); 2009 EU-Korea Free Trade Agreement (Article 10.6); 2018 U.S.–Mexico-Canada Agreement (USMCA) (Article 20.63).

FTAs that expand upon the scope of obligations codified in the Berne Convention and TRIPS Agreement can limit the domestic policy space for countries to enact legislation appropriately tailored to their level of development. Such so-called "TRIPS-plus" provisions may also require countries to ratify new intellectual property agreements or to adopt particular methods of implementation.

More recently, bilateral investment treaties (BITs) have become an important avenue for global enforcement of intellectual property rights. Unlike FTAs that establish new standards of protection, BITs typically focus on protecting the economic interests of owners of intellectual property rights from actions (regulatory, legislative, or judicial) that may undermine or jeopardize the value associated with intellectual assets. The first intellectual property investment dispute in North America was filed in 2013. The multinational pharmaceutical company Eli Lilly invoked the investment provision of the North American Free Trade Agreement (NAFTA) to challenge a Canadian Supreme Court decision invalidating its patent. Before a private investment tribunal, Eli Lilly argued that the patent invalidation amounted to an illegal appropriation of its investment and sought $500 million in damages from the Canadian government. Although Canada ultimately prevailed in the case, the dispute resolution mechanisms in investment treaties "pose a new threat to states' traditional lawmaking powers by providing foreign actors a singular opportunity to challenge laws [they are unhappy with but] that . . . are in conformity with international intellectual property treaties." Ruth L. Okediji, *Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System*, 35 U. Pa. J. Int'l L. 1121, 1122 (2014).