



## An Act for the Encouragement of Learning— COPYRIGHT LAW THEN AND NOW

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United States copyright law is almost as old as the United States itself. In fact it celebrated its two hundred and twenty-fifth birthday this past May 31. On that date in 1790, Congress instituted the first Copyright Act for the “encouragement of learning,” and within nine days the author John Barry became the first ever American to gain federal copyright protection when he registered his *Philadelphia Spelling Book* with the U.S. District Court of Pennsylvania.

The catalyst for this landmark legislation had come three years prior when, at the Constitutional Convention in Philadelphia, James Madison and Charles Pinckney championed proposals that would become Article I, Section 8, Clause 8 of the United States Constitution. The copyright clause vested in Congress the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The motivating philosophy: to spur creativity and inventiveness by providing creators the necessary protections required to benefit financially from their work, without the possibility of establishing

a permanent imaginative monopoly. It was this limited shelf life for protection that expressed the founders’ ultimate desire to provide wide public access to these works for the betterment of society. But while the clause is the basis for our modern laws governing copyright (and patent), today’s laws bear only a limited resemblance to those embodied in the Copyright Act of 1790.

From its eighteenth-century inception, U.S. copyright law has undergone a sporadic evolution. As the law has changed, so has the nature of the debate over copyright in both the courts and in the culture at large.

### **A Legal Philosophy Takes Shape**

As its name conveniently suggests, copyright law is really all about copying things. In particular, it encapsulates humans’ desire to copy the world around them, and the means by which they choose to accomplish this copying. For millennia, from early cave paintings and oral traditions, to the Egyptian scribes with their papyrus scrolls, on up to the Florentine apprentices diligently mimicking their Renaissance masters, the ability to approximate some

facsimile of that which already existed was, in itself, a touted and respectable art form. To copy well was a veritable gift, a means of livelihood, and often a rite of passage on the road to original creative expression.

This all changed, as it would continue to time and time again, with the introduction of new technology.

With his invention of the first printing press around 1440, Johannes Gutenberg took the first big step in cheapening the value of the copy by taking the process out of human hands and entrusting it to a machine. Reproduction of written texts, which had previously been a painstaking task reserved for experts, was now an easily repeatable and comparatively rapid function. By the late fifteenth century the printing press made its way to England, and it was not long before the authors and printers of books were exploring options for guarding the ability to reproduce their individual manifestations of ideas, which they increasingly began to intermingle conceptually with the legal tradition of personal property.

During the Elizabethan era, what would later be known as intellectual property emerged in the form of royal “favors,” monopolies granted by the queen or the lords to those introducing new techniques. For those producing written material, these monopolies were known as “letters patents.” Not surprisingly, these grants were often abused by the powers that be to create selective monopolies for personal gain. Post-Elizabethan parliaments recognized the detriment this system caused to innovation and free trade, and soon made illegal any monopoly without a defined term of years. The modern era of copyright law was finally born with the Statute of Anne in 1710, which explicitly introduced the concept of an author being the owner of his or her written work.

Our first Congress borrowed directly from the Statute of Anne in its drafting of the Copyright Act of 1790. In doing so, Congress maintained its English predecessors’ healthy mistrust of indefinite monopoly. The reach of eighteenth-century federal copyright protection was thus fairly limited in both subject and duration. An author of “maps, charts, and books” could own the copyright in those works for a period of fourteen years. An additional fourteen-year term was available if the author still happened to be alive to renew the copyright at the end of the first term.

The increased average lifespan of the American author notwithstanding, if one were to apply the 1790 act to today’s world of multimedia entertainment, an author like George R. R. Martin, for example, would no longer own the copyright to his novel, *A Game of Thrones*, by the time he completed writing the final novel in the blockbuster fantasy series it inaugurated. A mogul like George Lucas would be forced to watch helplessly as countless filmmakers profited from personalized remakes of the original *Star Wars* trilogy. Similarly, the *Marvel Universe* franchise juggernaut would

## 15th Century



1440s

Johannes Gutenberg invents the printing press, making the reproduction of texts faster and less expensive.

## 18th Century



1710

The Statute of Anne is the first statute to recognize the rights of authors.



1789

The U.S. Constitution recognizes intellectual property in Article 1, Section 8, giving Congress the 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.”



1790

The Copyright Act of 1790, modeled on the Statute of Anne, granted American authors of any “book, map, or chart” the right to print, reprint, or publish their work for a renewable period of fourteen years.

## 19th Century

1802



Prints are added to protected works.

1831



First general revision of the Copyright Act: The term of protection is extended and music is added to protected works.

1865



Photographs are added to protected works.

1870



Second general revision of the Copyright Act: Protection of paintings is added.

1891



First U.S. copyright law related to foreign copyrights is passed. It authorizes the establishment of copyright relations with foreign countries.

vanish into oblivion, as the vast majority of its superhero legions would suddenly belong to the public domain.

Such was the vision of the first Copyright Act: to promote a society of creators, unhindered by laws that would permit any one rights holder too heavy an influence on the development and distribution of our culture. But despite their foresight, the founders would have needed a time machine to craft copyright legislation translatable to our twenty-first-century reality. As the United States grew from its infancy and began to accelerate toward the new millennium, our copyright laws changed with the demands of the innovations they were meant to foster.

### The Scope Slowly Widens

In its two hundred and twenty-five years the Copyright Act has undergone four major overhauls, and has been affected by myriad amendments, treaty agreements, and court decisions.

Initial change in the law came gradually and reflected a tug of war between the need to expand copyright's sphere and the desire still to limit its potency. Early amendments brought "prints and engravings" into the protective fold, but also demanded that notice of copyright now be printed on works to achieve protection. It was not until 1831, in the first comprehensive revision of the act, that Congress simultaneously increased the breadth and length of copyright, allowing for the protection of musical compositions and doubling the first term of protection to twenty-eight years. The optional term of renewal remained at fourteen years, but could now be sought by an author's heirs in the event of the author's death.

In just forty years, copyright in the United States had mutated from a brief privilege that did not survive the life of the author to an inheritable property right spanning close to half a century. The monopoly was growing.

This fact also exposed a certain schism in the political attitudes of the day. Congress claimed to have extended the term of copyright to give American authors the same protection as those in Europe, where industrialization and urban population density had caused intellectual property law to develop at a more progressive clip. By contrast, the more agrarian United States was in the middle of a century-long period of isolationism, still wary of its recent umbilical ties to Europe. Yet when it came to matters of copyright, American lawmakers appeared reluctantly to envy their European counterparts.

When the author Charles Dickens visited the United States in 1842, he made several speeches calling for Americans to join the growing movement for the international protection of intellectual property. His words directly inspired renowned

politician and newspaperman, Horace Greeley, among others, to take up the cause. Still, it would be another fifty years until the United States would even recognize a foreign copyright, and nearly seventy-five years before President Woodrow Wilson made the United States party to an international copyright treaty. Tellingly, that treaty included no European countries. In 1988, when the United States finally became a signatory to the Berne Convention—the basis for mutual recognition of copyright between sovereign nations and the development of international norms in copyright protection—the treaty was already more than a century old.

## Technology Sets the Pace

As one of his last official acts as president, Teddy Roosevelt signed into law the Copyright Act of 1909. This third major revision of the Act continued to espouse the idea that copyright was a purely statutory right, intended “not primarily for the benefit of the author, but primarily for the benefit of the public.” Nonetheless, it was the authors that gained. While securing copyright now required a combination of publication and notice, it was now also available to unpublished works designed for exhibition, performance, or oral delivery. In addition, the renewal term was raised by fourteen years, extending the maximum length of protection to fifty-six years.

By the time the “American Century” began to unfold, American legislators had already been at work anticipating the need to protect the country’s exponential boom of creative and technological output. Copyright protection now encompassed, paintings, drawings, sculptures, dramatic compositions (and the right to perform them publicly), photographs, advertisements, musical compositions and recordings, and motion pictures, among other categories.

Controversy over the legal parameters of new technologies played out in the courts. In a precursor to future battles over how to fit software to the copyright mold, the Supreme Court ruled in the 1908 case of *White-Smith Music Publishing Co. v. Apollo Co.* that music rolls found in player pianos were not legally “copies” of a composer’s music, as they were not a “written or printed record in intelligible notation.” Instead, they were only a part of the machine that reproduced the music. As such, manufacturers of these pianos did not owe royalties to composers.

The decision led directly to a corrective amendment in the 1909 act, which required a compulsory license for the manufacture and distribution of such “mechanical” embodiments of musical works. Five years later, the American Society of Composers, Authors, and Publishers (ASCAP) was formed to enforce the new licensing regime.

In the lead up to passage of our current Copyright Act in 1976, the reigning dispute

### 20th Century



1909

Third general revision of the Copyright Act: The renewal term for protected works is extended to twenty-eight years.



1912

Motion pictures are added to protected works.



1947

Copyright law is codified into positive law as Title 17 of the U.S. Code.



1976

Fourth general revision of the Copyright Act: It grants authors protection until fifty years after death. In response to new technology, protection is broadened to original works “in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”



1980

Copyright law is amended regarding computer programs.

1998



The United States becomes a signatory of the Berne Convention, the most extensive copyright agreement between nations.

1990

Congress passes the Visual Artists Rights Act.

1992

Congress passes the Digital Audio Home Recording Act.

1997

Congress passes the No Electronic Theft Act.

1998

Congress passes the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act (DMCA).

## 21st Century

2002

Congress passes the Technology, Education, and Copyright Harmonization (TEACH) Act.

2004

Congress passes the Copyright Royalty and Distribution Reform Act.

2005

Congress passes the Artists' Rights and Theft Prevention Act.

2008

Congress passes the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act.

was over the proliferation of copyrighted material due to another revolutionary invention: the photocopier. The Xerox copy ushered in a fresh debate over “fair use” of copyrighted works, an exception to the ban on copying for purposes of education, artistic commentary, and freedom of information.

## Past Is Present

The spirit of 1790 is alive in today’s continued deliberations over “fair use.” The Copyright Act of 1976, along with several subsequent amendments, including the Digital Millennium Copyright Act (DMCA), have generally managed to expand copyright’s protective barriers in a world dominated by Internet technology. Due to passage of the 1976 act, and a bit of legislative help from Congressman Sonny Bono in 1998, the term of copyright now spans the life of the author plus seventy years. It is now possible to create copyrightable work that may not fall into the public domain until the second half of the twenty-second century.

Lawrence Lessig illustrated this modern conundrum when he pointed out that “by the time Apple’s Macintosh operating system finally falls into the public domain, there will be no machine that could possibly run it. The term of copyright for software is effectively unlimited.”

For better or worse, today’s U.S. copyright laws are a far cry from the antimonopoly limitations set by the first Congress. While the courts wrangle over what constitutes “fair use” in cases like *Authors Guild v. Google* and *Cariou v. Prince*, activists like Lessig are appealing to the Internet generation’s egalitarian tendencies in an effort to erode the monopoly through organizations like Creative Commons, which seeks to provide licensing of certain copyrights for free to the public.

It still remains to be seen whether the tide of copyright protection will ever ebb to compensate for the speed of our advances. But one constant in copyright law is its malleability, and in a society so fundamentally averse to stagnation, anything seems possible. Encouraged by our history, we will continue to learn.

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