Opening Keynote & Panel 1: Orgins of the 1976 Copyright Act Transcript | Apr 16, 2026

Pamela Samuelson 0:15
Good morning. It's so good to see you. And I'm Pam Samuelson. I'm a member of the Berkeley Law Faculty and a faculty co director of the Berkeley Center for Law and technology, along with my colleague Molly Van Houweling and also Peter Menell, and we're here to offer a welcome to the 29th annual Berkeley Center for Law and technology, Berkeley Technology Law Journal Symposium this year focusing on the origins, evolution and possible futures of the Copyright Act of 1976 and we are co sponsoring this this year's conference with the Kernochan Center at Columbia University. And special thanks to Jane Ginsberg and to Shyam Balgenesh for their amazing contributions to the architecture and the substance of the program. We're really grateful for that. I always believe in starting a program with thanks, and we have many things to be thankful for this year, not not Donald Trump, but everything else is pretty good. So first, thanks. Go to the Berkeley Center for Law and Technology, Wayne Stacy, our executive director, and especially to Richard Fisk, who's over here and who is our main events coordinator. And also to Abril Delgado, who is another support person for events that we do. And if you like the food, it's partly because Richard is like our star in events planning. So thanks so much for that. You have no idea how much work it takes to do a conference like this, and it's all invisible when it works. And so thank you, Richard in particular, for this. Next I'd like to thank our partners at the Berkeley Technology Law Journal. This has been an annual thing where we have a symposium, and then a number of the people who are who are presenting at the conference also honor us with a paper that they write and that Berkeley Technology Law Journal publishes in its annual symposium. So this year, as I understand it, we're going to have nine papers, including papers by our distinguished keynote speakers, Shira Perlmutter, the register of copyrights, who we are very happy to have here, and also Margaret McKeown, Judge of the Ninth Circuit Court of Appeals, also a great friend of copyright. And so thanks very much for our BTLJ partners, who's going to have to do all the editing work on these papers. We're really, really grateful for that, and we want also to thank our speakers, many of whom came from quite a distance, to honor us with their presence and to illuminate some nook and cranny of the 1976 act that you probably never thought about before, and so that will be, I think, a delightful thing. So thank you to our speakers. And finally, I want to thank our audience. Not all 230 of you have shown up, but we are really super pleased that the program that we have architected has really attracted people from lots of different places. Obviously, some of our students are here, but also we have practitioners. We have other academics, we have people from civil society groups, we have law firm practice people, and we are libraries, and we even have a couple of government officials. So welcome, welcome. Welcome to all of you. And we actually also have some people from from Cambridge, UK, Beijing and Brazil. So this is a really a wonderful feast for all of us to enjoy. So thank you very much. And now Peter will give us a little overview of the program.

Peter Menell 4:23

Thank you, Pam. And it's a real delight to see so many people here reflecting on something that happened 50 years ago. BCLT has been around for about almost 30, well, a little more than 30 years. So so there is a nice historical tradition here. Our goal in organizing this conference has been to explore the 1976 Act from multiple perspectives. The opening panel sets the stage by going back to the genesis of the act. Subsequent panels explore the role of the author, the acquisition and duration of their rights, the scope of exclusive rights and modes of enforcement, the line between federal and state protection, copyrightable subject matter and the special problem of software, and finally, unanticipated consequences of new technologies and practices. We're here on the cusp of another great, very momentous technological revolution. So reflecting back and trying to understand these patterns and how our democracy deals with them, I think, is just critically important, the Copyright Office played an unusually central role in drafting and vetting what became the 1976 Act, the fourth general revision of American copyright law. It's fitting therefore, that we begin our journey with remarks by copyright register. Shira Perlmutter, Molly will introduce our esteemed register of copyrights.

Molly Van Houweling 6:00
Thanks, Peter. It is such a thrill to see so many favorite people from throughout the copyright world here today to celebrate this event, and especially to celebrate both of our wonderful keynote speakers, whom I'll have the pleasure of introducing, and first I'll introduce today's opening keynote speaker, Shira Perlmutter is the 14th register of copyrights and director of the US Copyright Office. In that role, she advises Congress and the executive branch agencies on copyright policy, directs the administration of key provisions of the Copyright Act and leads an office of nearly 500 employees. Prior to her appointment as register, Shira served as Chief Policy Officer and Director for International Affairs at the United States Patent and Trademark Office, Executive Vice President for Global Legal Policy at the International Federation of the Phonographic Industry, Vice President and Associate Counsel, General Counsel for Intellectual Property Policy at TimeWarner, among other roles in private practice, public service and academia, please join me in welcoming. Register Perlmutter.

Shira Perlmutter 7:26
Well, good morning, and thank you so much, Molly. I'm absolutely delighted to be back at Berkeley and at International House, one of my favorite venues to join in celebrating and examining the legacy of the 1976 Copyright Act. Now over the year, this year, there will be, and have already been, multiple events marking this milestone, but this symposium, with its selection of critical topics and its impressive roster of speakers, promises an exceptionally rich and meaningful contribution. Now it is sobering to realize how different the world was 50 years ago when the 76 Act took effect, when President Ford signed it into law, music came on vinyl records. Still does, they still do a bit today, and on eight track tapes, and that was it. The only perfect 10 was Nadia Comăneci's performance at the Olympics. And the idea that someone could sit in their bedroom perform a song they'd written and distribute it to millions around the world was as far out as landing on Mars. But as some of you may recall, we did land on Mars, and the clear pictures that the Viking One Rover transmitted to Earth showed us what was possible, and that was just the beginning of a period of extraordinary technical achievements. So I'll kick us off today by setting the stage looking at the birth of the 76 Act and the extent to

which it has achieved the goals of its drafters. Now, these goals have been taken further in the 50 years since its enactment, although there's always more to be done. Of course, we can never stop questioning the need for change. The copyright law must not remain static. To understand what the 76 Act accomplished, it's important to look at what it replaced, the 1909 Act signed into law by Teddy Roosevelt on his last day in office, was ill equipped for the world of the 20th century. As early as the 1940s it was clear that it needed updating, and I've always loved the colorful metaphor drawn by Zechariah Chafee in his 1945 article, Reflections on the Law of Copyright, explaining why revision was badly needed, he said, copyright is the Cinderella of the law her rich older sisters, franchises and patents long crowded her into the chimney corner, suddenly the fairy godmother invention endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footman. Now she whirls through the Mad mazes of a glamorous ball, and I will say the ball continues today, as my predecessor, Barbara Ringer explained, the revision was intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act. The process was itself extraordinary from today's vantage point, it took two full decades and produced a complete rewrite of the existing statute. Most strikingly, it was a highly deliberative, carefully planned project, relying on expert input and drafting. It was led by the copyright office, with input from eminent academics and practitioners as well as representatives of major copyright industries, authors, groups, libraries and educators, and in Barbara's words, the Act bespoke concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society. The copyright office started this process in 1955 by commissioning dozens of comprehensive studies from current and former staff and from distinguished professors, which were submitted for comment to a general revision panel appointed by the Library of Congress in 1961 Register Kaminstein published a detailed report with his recommendations for what the legislation should look like. After numerous further meetings and consultations, a preliminary draft was produced in 1963 multiple versions followed, and both the House and the Senate held extensive hearings and oversaw negotiations. Finally, enough compromises were reached to enable passage, and the new law came into being on October 19, 1976 now I will say this expert driven and copyright office directed process is hard to imagine replicating today. So what about the outcome? What changed? The drafters had several ambitious goals. Chief among them was a desire to make the act more flexible, able to respond to evolving technology, the Mad mazes of the glamorous ball without the need for constant amendment. They made a deliberate effort to future proof its provisions. As to the subject matter of copyright. They moved from the 1909 acts coverage of all the writings of an author to original works of authorship, fixed 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. This language explicitly covers any future formats and recognizes that technology might be needed to perceive them as a legislative drafter myself, I admire this construction. It has been able to encompass video games, software and gifts. The exclusive rights provided to copyright owners were also simplified. Much of the detail in the 1909 Act was abandoned or approached instead as elements of exceptions and limitations, as set out in Section 106 the rights have been capacious enough to cover many new means of copying and sharing copyright works, from photocopying to streaming. I would argue, however, that the drafters didn't go far enough to ensure adaptability. They still relied on a specific list of rights, rather than a generalized right to exploit

the work publicly, as Chafee had recommended, and some countries have actually legislated, doing so would have obviated the need for continued parsing of the scope of each individual right, as in subsequent debates over public performance rights for sound recordings and the implementation of the making available right required by international treaties. Now this wouldn't necessarily mean giving copyright owners greater control. The scope of the rights could be delineated instead through exceptions and limitations and critically, the fair use doctrine was codified for the first time in Section 107 drawing on decades of judicial analysis, the drafters resisted the temptation to provide greater specificity and left the doctrine open ended to allow the courts to continue its development. This decision turned out to be very wise and key to the acts ability to accommodate technological change. A second major revision goal was to enable the United States to participate fully in the international copyright community under the 1909 act our idiosyncratic copyright system made us an outlier, excluded from membership and the preeminent multilateral treaty, the Berne Convention, while we championed an alternative treaty that accommodated our system, the universal copyright convention, it never gained significant adherence. The 76 act laid the groundwork to join Berne by abandoning most formalities, phasing out the protectionist manufacturing clause over time, and adopting a unitary term based on the author's life. The third goal was to improve the lot of individual creators. The Act established a more author centered copyright system treating copyright as an individual entitlement, rather than primarily an institutional asset. Previously, protection was inextricably linked to publication. Unpublished works were not protected by federal copyright, and publication typically required assigning rights to a publisher, and copyright protection was easy to lose, as it hinged on technical formalities and mistakes could have drastic consequences. In contrast, by protecting works from the moment of creation, published or not, virtually everyone became not only a user, but also an author of works. This change, I think, had far reaching consequences as it brought the average consumer much more directly into the copyright system. The Act also provided authors with a guaranteed second bite at the apple in the form of termination rights, enabling them to take back prior grants and renegotiate for better terms. These provisions were designed to address problems with the renewal system under the 1909 Act, which Congress had described as one of its worst features. To avoid allowing termination rights to be similarly assigned away in advance, the drafters made them inalienable. In addition, the acts work made for higher definition, narrowed common law interpretations that had eliminated authors rights in many commissioned works. So how have these goals held up so far? Despite the drafters best future proofing efforts, the statute has since been amended multiple times, and I will say the copyright office's circular 92 which is our print version of the Copyright Act, has thickened considerably since 1976 but to what extent have all of these changes furthered the drafters three goals on the issue of technology overall, I would say the 76 Act has proven remarkably resilient. The past 50 years have brought truly dramatic technological innovations transforming the way works are created and distributed, as well as the speed and scale of change. By and large, the acts flexible provisions have proven up to the task of meeting these challenges. Nevertheless, the law has seen a series of changes, and some of them have been extensive. The amendments have built on the acts foundational provisions in sections 102,103,106, and 107 but have supplemented or clarified them. Several have added new mechanisms to ensure the continued effectiveness of those provisions given the new means of delivery of content and the growing number and roles of intermediaries. Others have

sought to reverse court decisions that Congress found to be misguided. Important amendments have included performance rights and compulsory licenses for the late to federal copyright category of sound recordings and the updating of exceptions, notably the Teach Act of 2002 which expanded the educational exemption to cover digital distance education. But the most far reaching change was the Digital Millennium Copyright Act of 1998 the DMCA, its safe harbor, immunized online service providers who cooperated in curbing infringement from monetary liability for their users illegal acts. Rather than codifying common law secondary liability principles, as was initially proposed, the final version was detailed and quite technology specific, conditioning service provider responsibilities on four different types of services. In addition to being less durable as business models evolve, this choice may have unforeseen consequences, given the recent Supreme Court decision in Cox V Sony, the DMCA also sought to substitute for physical world safeguards in the online environment by establishing what I've always called technological adjuncts to copyright. Now, some portions of the prohibition on circumvention in Section 1201 are highly technology specific, and some of these may become, or may have already become outmoded, but the rule making process that it established entails a flexible, fair use centric determination, which has served to produce new exceptions every three years, and by allowing copyright owners to rely more securely on technical protection measures to control the terms of use for their works, it ultimately enabled the celestial jukebox foreseen by Paul Goldstein as early as 1994. So what seemed speculative 30 years ago is the world we now take for granted with the proliferation of streaming platforms, digital marketplaces and Cloud libraries.Throughout, Fair Use has played a critical role as a flexible judicial tool, ensuring an essential balance in the copyright system. It has allowed a range of uses undreamed of in 1976 such as home recording of television broadcasts, thumbnail images and search results, and the mass digitization of books to enable search ability. In my view, the success of the doctrine is due to its continued generality, apart from an ill conceived amendment in the 1990s intended to reverse a judicial gloss on the treatment of unpublished works. And since that time, Section 107 has remained untouched, although there is a discussion draft now circulating in Congress that would add another sentence specific to AI ingestion. What about the international scene? It was a mere 13 years after the acts enactment that the United States finally became a member of the Berne Convention. This enabled us to become more of a leader in the global copyright community, we had joined the club and now could fully leverage the influence of our cutting edge technologies and our internationally successful copyright industries. And that meant that our up to date statute began to influence international developments in far reaching ways. Just a few years after joining Berne, the United States proposed updating it to address emerging digital technology, which led to the two WIPO Internet Treaties in 1996. Around the same time, we began incorporating copyright obligations into our trade agenda, generally based on the framework of the 76 act and later the DMCA, we have since negotiated multiple bilateral and plurilateral copyright agreements that export elements of US copyright law around the world, and that's included aspects of sections 512, and 1201, from the DMCA, but also an obligation to incorporate balance through exceptions in national laws. One WIPO treaty now requires countries to put in place an exception based on our 1997 Chafee Amendment, allowing the making and distribution of accessible format copies of works for the blind and visually impaired. The Marrakesh Treaty has been tremendously successful in ameliorating the International Book Famine, and now counts over 100 members who are sharing accessible format copies for their

own communities, even apart from treaty obligations, the 1976 Act has served as a model to other countries in drafting or revising their copyright laws. In addition to mirroring elements of its overall structure, some countries have adopted similar exceptions, including those modeled on fair use in Section 107. What about the focus on the author? Well, while the 1976 framework, the acts framework, improved, the lot of individual creators, as I've discussed, significant challenges did remain. And particularly I'm thinking about the unintentional forfeiture of rights due to renewal formalities, and also the lack of a practical enforcement mechanism for those who couldn't afford the cost of federal litigation, which obviously has only increased over the decades since. These two particular challenges were addressed by removing renewal formalities in the Copyright Renewal act of 1992 and by establishing the copyright claims board, the first small IP, small claims court in the United States in the CASE Act of 2020 continuing challenge is the complexity of the termination procedure, which can serve as a barrier to authors being able to make use of this valuable option. So finally, what comes next? Do we need to consider rewriting the 1976 Act, Back in 2013 when the act was a relatively youthful 37 years old. My predecessor, Maria Pallante, urged enactment of the next great Copyright Act. She identified multiple areas where the statute was outdated or fell short, and Congress followed up with a series of extensive hearings at the end of the day, rather than a comprehensive revision, what emerged was a series of segment and industry specific solutions. The process sparked the enactment of felony streaming penalties, the CASE Act, establishing the Small Claims Tribunal. And the Music Modernization Act, setting up a new blanket compulsory license for music. Such a topic by topic, outcome was not surprising, given how much has changed since the Revision Project of the 1960s and 70s, and in particular, the tremendous range of interests to be considered. So Barbara Ringer was talking about the multiplicity of interests represented in the negotiation of the 76 Act but an even wider range of voices participate in copyright policy discussions today, and that includes technology companies and the other intermediaries that have emerged in the digital environment. It includes consumer and public interest groups that have become much more active, and in addition, individual creators have become better organized and more sophisticated about the policy making process. There is also much more public attention paid to copyright as members of the public are more aware of its existence and impact, with each of them playing the role of both user and author, especially as they use the internet. There's also more money at stake with the copyright industries, copyright intensive industries, becoming truly major, significant contributors to the economy and all of these factors together add up to a much more intense spotlight in the press and in the political arena. So all of that has made achieving results more complex and more difficult in various ways. But to my mind, it's also resulted in a richer and more representative debate and hopefully in balanced and durable solutions. In my view, the statute can and should continue to evolve, but does not need wholesale revision. The basic framework, the building blocks remain sound. And in addition, as a pragmatic matter, apart from the theoretical and academic advantages of change, the statute has now become embedded in a wider global infrastructure of laws and treaties and business arrangements built on top of it, the question of the day, and of course I have to mention artificial intelligence, is whether AI is simply the current iteration of the constant technological challenges that the statute is dealt with, or whether it is simply too cataclysmic a disruption for the act structure to survive. So far, the structure seems to be up to the task, as the Copyright Office has discussed in the reports we've issued so far, the copyrightability issues can be resolved by

existing standards of authorship and originality. The infringement issues can be resolved by the exclusive right set out in the statute as contained and limited by the fair use doctrine and tools such as extended collective licensing, not yet used in the United States, but out there as an option are available to address any areas of market failure that may arise. So I believe the Act will survive the AI revolution as it survived the past revolutions of the printing press, broadcasting, photocopying, the camera, all of the technologies that we have been talking about for decades, with the fundamental building blocks, adaptable, adapted and supplemented as needed. So I very much look forward to the discussion of today and tomorrow. Thank you.

Molly Van Houweling 30:00
Only those of us who are organizers know how masterfully Shira has foretold all of the themes that we'll be discussing over the course of today's panels. And it turns out that our students were on the same wavelength as well. Shira graciously agreed to answer a few questions posed by students and editors of the Berkeley Technology Law Journal have submitted a few, and I've collected those and have them here that I'll read on the student's behalf, with lots of gratitude to the students' participation in the day. So I think we have time for a few of these. So shall we get started? And you've, as I said, they're on your wavelength, so you've touched on some of these themes already, but they would love to hear you elaborate. The first is, did the drafters of the Copyright Act imagine themselves working in partnership with judges in developing the law, or did the drafters imagine judges as sort of agents of Congress and the act?

Shira Perlmutter 30:56
My obviously, my area of expertise is copyright, rather than other areas of law, but it does seem to me unusual the extent to which the drafters did imagine themselves as partners with judges, and I look forward also to hearing Judge McKeown's views at lunch. There were so many explicit references to affirming, adopting and incorporating judge made law, but also not wanting to freeze it in place and to allow judges to continue to develop it. So the most obvious example, of course, is the fair use doctrine. But in addition, the doctrine of secondary liability contribute to infringement, which I'm sure there'll be more discussions about today, given the Cox case, but the legislative history makes very clear that Congress was saying, this is a judge made doctrine. We will refer to it in the statute, but with the expectation that the judge made law will continue to evolve and to control this area. And then I just always find the Copyright Act very interesting in the sense that it combines some extremely detailed technical provisions with provisions that are much more like common law, including fair use, secondary liability, but also, of course, originality, substantial similarity. There's so many areas that are left to the courts to develop.

Molly Van Houweling 32:17
I can't resist putting in a plug for the second installment of this two part bicoastal event in October at Columbia Law School. We will be hosting the second part that will be organized along lines that echo that answer in terms of the different institutions, Congress, the courts, the copyright office, that have played a role in the evolution, in partnership on the evolution of the Copyright Act. So that's a great, you've done a great preview of that as well.

Shira Perlmutter 32:44

And just as a teaser, I didn't talk about this, but one of the very interesting evolutions has been the role of the copyright office. You know, as I mentioned, it was a very leading role in the development of the 76 Act. And that role has changed over the years, expanding in some ways, contracting in others. And I think we will be getting into that at the Columbia event.

Molly Van Houweling 33:01
Okay, our next question is related to the future proofing theme that you talked about. Subsequent legislation seems to demonstrate modifications to the Copyright Act of 76 to keep it up to date regarding, for example, architectural and digital works. What will be the next step?

Shira Perlmutter 33:21
Yeah, good question. I would say, you know, again, you can never totally future proof any statute, but I think what the drafters did very well is to future there should be a word that's future adapt rather than future proof. I have to think of the best word for it, but that's why I was talking about the fundamental building blocks, because those were the ones that were most future proofed. And then there's been obviously a lot of changes since then. There's certainly things that I think even today do need changing or addition or attention. And one of them is something the Copyright Office has and and the administration have both supported for many, many years, which is a public performance right for sound recordings, when music is broadcast publicly. And that's something that exists in almost every country in the world, but not here. And the result of that, because of reciprocity rules in effect in other countries, is a lot of money is collected from American sound recordings being played elsewhere, which is not shared with the performers and producers in the United States. So that's one area. There's also probably going to be increased attention on the issues of remedies and liability, especially since the Cox decision, but there have already been bills introduced in Congress that would require site blocking of infringing, websites dedicated to infringement, and there may be more pressure on that given the Cox case, because secondary liability seems less likely than the question is, can there be any steps taken without prooving liability?

Molly Van Houweling 35:02
I know I've seen some students who were in my intellectual property class in the fall who found the absence of a public performance right for broadcasting one of the great mysteries of the Copyright Act. So they're on your wavelength too.

Shira Perlmutter 35:13
I think, like other things in the Act, some things are just remnants of historical accident. And sound recordings, of course, were not covered by federal copyright law until recently, and then the coverage was relatively narrow. The public performance rate for sound recordings was very specific to the need in the digital environment to cover that. And so this gap has been left.

Molly Van Houweling 35:36
A relic of history, is how I describe many things in my law school classes. Okay next one is also related to future proofing, with AI being the topic invading so many conversations today, how far away from the drafters thoughts or imagination was something like generative LLMs?

Shira Perlmutter 35:55
yeah, that's a great question. Not as far as you might think it's interesting. Back in 1965 Barbara Ringer wrote an article where she talked about the copyrightability of machine generated works, and said, the question is going to be the extent to which the expressive elements were determined by the machine or by a human. We relied on that extensively in part two of our report on copyright AI, I think the concept, the general concept, was in people's minds, certainly Barbara's minds, as far back as the 60s. I don't I'm fairly confident that no one anticipated the extent to which generative AI would be able to reshape the world in the way it has so far and will continue to.

Molly Van Houweling 36:42
I'm glad you're introducing our audience to Barbara Ringer, one of your predecessors as register of copyrights, who I think loom large over many of the panels that we have to come let's see. I think we have time for one last question, and it's obviously from a student who has been studying some of the nitty gritty of the Copyright Act, and not just fact at 76 but the recent amendments as well. How has the Copyright Office balanced the need for right to repair against legitimate safeguards for copyright owners, with respect to the DMCA, and given the increasing amount of anti repair practices, is the DMCA overreaching?

Shira Perlmutter 37:23
Well, that answering that question could require a whole talk. There's a lot there, but I just a few things to mention. So number one, you know, there's a lot of interest in right to repair, and the copyright office has been very supportive of the policy behind right to repair. The issues raised are not just copyright issues, and so we've looked at the specific issues having to do with copyrighted software being embedded into utilitarian objects, and under 1201, we've recommended, and the Librarian of Congress has issued exceptions that relate to specific repair of certain types of devices. So that's included farm equipment, medical devices, and the most recent commercial food preparation machines, sometimes known as the McFlurry exemption for those of you who like ice cream at McDonald's. We have not done anything broader than those very specific things, because the way section 1201, is set up, we are required to be quite specific and to get actual evidence of harm. So it's the fact that the exceptions have been fairly narrow doesn't mean we don't think there should, as a matter of policy, be any broader right to repair. It just means that that's what the evidence before us related to. But one of the challenges for us has been to make sure that when right to repair bills are introduced in Congress, that people recognize they have to deal with the copyright implications because of the software that's embedded in the machines, and often members of Congress and stakeholders and lobbyists don't focus on that aspect. So we've been trying to close that close that loop.

Molly Van Houweling 38:58
Thanks for that, which gives us a nice insight into the multiple roles that the Copyright Office plays, as advisor to Congress, as carrying out responsibilities that are delegated to UN specific statutory provisions and much more.

Shira Perlmutter 39:11
And I'll just add one other thing, we did do a full report on section 1201, which I recommend. It's a little bit old, but we still stand by its conclusions, and we have been urging Congress for years now to legislate on some of the exceptions that we keep renewing every three years so we don't have to keep looking at them afresh each time.

Molly Van Houweling 39:32
Folks, please join me with a warm round of applause. We will move directly to our first panel, my colleague Peter Menell will retake the stage to moderate and introduce our speakers.

Peter Menell 40:10
Register Perlmutter has given us a beautiful overview of this story, and if we were just trying to kind of encapsulate everything. We could all go home now, because she's done that, but we're going to spend the next day and a half going back through the layers that she has summarized to try to set the stage and explore all of that story. So I'm pleased to be joined by professors Jessica Litman and Jane Ginsburg, two of the most prolific copyright scholars. Professor Litman and I will discuss the making of the 1976 act in general terms, while Professor Ginsburg will focus on its international dimensions. The unusual context in which the 1976 Act emerged is key to understanding its features and text. The 1976 Act was the fourth general revision of copyright law in American history. Such revisions have occurred in roughly 40 to 70 year intervals. The first general revision was among the nation's first laws. It reflected the concerns and hopes of a new nation struggling to survive. Hence, it focused on encouraging the creation of maps, charts which were nautical maps and books. In that order, George Washington commended the Act to Congress. There's nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. The 1870 act reflected the aspirations of a developing nation, expanding protection for fine arts, adding additional rights, translation right, expanding public performance and increasing the duration of copyright protection. The 1909 Act tightened formalities and introduced a compulsory license for musical compositions and protection for the domestic printing industry, with great advances in new technologies of dissemination. Reform efforts soon began after the 1909 act, but with the exception of the 1912 amendment extending coverage to motion pictures, these efforts faltered. Finally in 1955 after the US had successfully entered the universal copyright convention, Congress authorized the funding of a new reform effort before turning to that project, it's useful to set the stage. So I'd like to invite you to join me in the time tunnel. And we'll travel back to the mid 1950s the magical technology of television was just reaching American homes. The cost of a television set was about $170 in 1955 currency, which would be about $2,000 today, about 50% of American households had televisions in 1955 none were broadcasting in color. Television broadcasting was relatively new and quite limited. Related to the emergence of television broadcasting communities outside of broadcast range erected reception antenna for receiving and re transmitting broadcasts by way of coaxial cable to homes unable to receive signals. As we will see, this grassroots movement would emerge into bigger and more entrepreneurial businesses that would play a large role in the fate of the Copyright Reform Project. Photocopying was even more primitive than television broadcasting at the time. Xerox is Model A introduced in 1949 was far from a commercial success. It was expensive and

involved 39 manual steps to make a single copy. The prospects for greater success, promoted by the patent system fueled rapid, incremental improvements. The breakthrough product came in 1959 with the introduction of the Xerox 914. The computer industry was also in its infancy. IBM introduced the 704 its first computer with core memory in 1954 the 7046 bit binary coded decimal character set and 36 bit word account was designed for IBM's newly developed Fortran programming language that was formula translation. IBM produced just 123 such computers between 1955 and 1960. What about the state of American culture? Well, rhythm and blues was taking off, but in a segregated America, black performers were popular, but black audiences were either excluded, required to sit in balconies or other cordon second class sections, even the Sally Records was segregated with black. Form is relegated to the race music charts. White artists often copied these works for the mainstream, popular record outlets and charts. The musical revolution, however, helped to fuel a growing civil rights movement. Sam Cooke, Ray Charles, Little Richard, and Chuck Berry were pioneering crossover artists who transitioned from gospel to mainstream pop success, the record industry itself was changing. Stack records begun in Memphis in the late 1950s would contribute anthems for the civil rights movement, and Berry Goodwin Jr's Detroit based Motown record label would soon top the popular record charts. It was a hopeful time and entrepreneurs were taking notice performing artists, songwriters and authors were exciting American youth. The Copyright Office saw author empowerment as vital to economic, social, cultural and racial progress. It was against that backdrop that Congress and the copyright office launched a bold experiment. The experiment reflected four characteristics, a technocratic approach to legislating. The rise of the administrative state with attendant public involvement, the unique circumstance of an administrative agency, the copyright office, operating within the legislative branch and serving as close collaborators in developing legislation, and a broad panel of consultants, publishers, authors, librarians, educators, broadcasters, technology companies, government and the general public to participate in the crafting of the fourth General revision as Arthur Fisher, the register of copyrights at the time explained, much effort and care went into the framing of the 1909 law, but essentially it was the product of compromises arrived at in conferences with interested groups. General revision is being approached today in a somewhat different manner. For the past four years, the copyright office with the aid and advice of specialists experienced in the problems of various groups concerned, has been conducting a program of research and analysis. These studies will result in proposals for a new law. It can be anticipated that compromises and adjustments will be needed to reconcile the convicting interest on many issues, but it is hoped that a new copyright law reflecting the needs of today and flexible enough to accommodate those of the perceived foreseeable future can be enacted long before. So he was very pragmatic, recognizing that we were in a new age, that we were seeing our democracy develop, and the copyright office was going to play a direct role in that. But some view this period not that differently from the 1909 act, that, in fact, it was in back rooms that a lot of these provisions were were developed. And I'll say that in the era that I've grown up in the 80s and 90s, I've seen that unfold in many areas of legislation. But does the copyright, the making of the Copyright Act, reflect that notion? And I think that that's a difference. It's hard for us to see that difference today, because we've we've watched the swamp, the DC swamp, unfold. But the 70s and 60s were somewhat different period, and I come to a more felicitous account of the making of the 1976 Act. The project began with the preparation of 34 detailed studies exploring

historical, philosophical, economic, technological, international, comparative dimensions of copyright law practices. Over 1000 pages of these studies are still very useful today to scholars tragically, Register Fisher died from an acute form of leukemia in 1960 and the mantle passed to deputy, Abraham Kaminstein. Register Kaminstein tasked Abe Goldman, Chief of Research, and later General Counsel and Barbara Ringer, soon to become chief of the examining division with primary responsibility for drafting the legislation. The report that the Copyright Office developed following the 34 studies highlighted the problems of overly strict formalities, interest in expanding copyright law to new forms of expression, concern with authors' rights, expanding international harmonization and repeal of historic anomalies. You've heard about the manufacturing clause, which was basically a protectionist system for domestic publishers, and also a jukebox exception, which allowed jukeboxes to avoid having to pay a public performance rate. The problems, no doubt, seem antiquated by today's standards, or even those of the 1980s following the fallout of the Supreme Court's 1954 decission in Mazer versus Stein design legislation was also proceeding on a parallel track. The registrar's report grounded the general revision process in the American intellectual property philosophical tradition, the report aimed to provide property like rights for a limited time in the primary interest of promoting learning and culture for public welfare. It noted that although some commentators, particularly in European countries, have characterized copyright as a personal right with the author with attended moral rights of attribution and protection against distortion of their works. Copyright protection in the United States was built upon an economic foundation. Register Kaminstein also noted an important secondary purpose, economic reward to the author for the contribution to society, and as a vital motivation to motivate that creativity, authors rights should be broad enough to give them a fair share of their revenue to be derived from the market for their works. And this is where I think a lot of the challenges have arisin. In this period, there were gatekeepers, and having markets operate in that form was very different than today, where we have such open access to public distribution. The general reform project aimed to update US copyright law in light of technological change and expansion of the range of artistic expression, such as architecture, choreography, sound recording and ornamental design of useful articles. The Copyright Office sought to restore authors' ability to reclaim rights after a reasonable period of time, overturning the Supreme Court's 1943 Fred Fisher Witmark decision. The report commended partial codification of the fair use doctrine and authorization for libraries to make single copies of articles. The report further recommended expansion of duration in line with international standards, but did not recommend the burn minimum of life of the author plus 50 years. Rather, proposed extending the duration of copyright to 76 years, 28 years as an initial term, 48 years on renewal based on publication of the work, and also limiting the duration of transfers of copyrights to 20 years unless there was a provision for ongoing royalties. The report retained but somewhat softened formalities and it supported repeal of the mechanical compulsory license, the jukebox exception and the manufacturing clause. The effort, however, soon encountered an impasse. On nearly every recommendation, groups showed up to say that they were, in some cases, violently opposed. It was a very sobering experience for Register Kaminstein, who thought that they would have a draft for Congress within a year or two. Following the reports inauspicious reception Register Kaminstein recognized that the General Revision Project to which the copyright office had devoted such enormous resources was in jeopardy. After a pause to rethink the approach, the copyright office released a preliminary draft

in early 1963 rather than a proposed bill by its title, use of alternative proposals on controversial provisions and tone the preliminary draft signals openness and the need for further ventilation, the office shifted its stance on several contentious issues, notably a burn life plus 50 standard retention of mechanical compulsory licenses, limitation on duration of transfers and domestic book publishing. Testimony revealed deep confusion about whether the preliminary draft exempted community antenna television, cable television, reclassified them as mere reception, or left them fully subject to the performance right as Barbara Ringer would later acknowledge, the nicest thing anyone said about The preliminary drafts broadcasting provision was that it was confusing. Following, the following the extensive vetting of the preliminary draft and more positive reactions, the copyright office set out to draft a bill, and in 1964 we get a full, fleshed out bill in which the Copyright Office opted for the burn duration standard, pulled back on library, phone photocopying, retained the mechanical compulsory license at three cents per copy, effectively repealed the jukebox exemption, narrowed the manufacturing clause and exposed cable television to liability for retransmission. On the contention contentious issue of limitation on assignments, the Copyright Office proposed an inalienable termination of transfers after 35 years, but subject to a broad work made for hire provision. Although the 64 Bill was formally introduced in Congress, the copyright office didn't expect that It would receive consideration. Rather, it was floated to solicit more feedback and to engage the public in trying to figure out what were the political impediments to getting such a momentous bill passed. After further extensive meetings, written comments involving hundreds of stakeholders and members of the public and further refinements, the copyright office was ready to introduce its handiwork to congressional committees the next year. The 1965 revision Bill largely tracked the 1964 revision bill with substitution of the modern numbering system. One surprising shift was they pulled back from the four factor Fair Use Proposal and merely sought to perpetuate what the courts were doing. The 65 Bill was packaged with an extensive supplementary report providing detailed explanation of the meaning and intent behind the next 1965 revision bill. Chapter Two of that report explained the rationale for the exclusive rights. These are the building blocks that Register Perlmutter was talking about. It also set forth how the drafters sought to address technological resilience. And I'll apologize for taking time to read this, but I think it is just a stunning example of what people were thinking in 1965 who were responsible for drafting the provisions. And let me just say, and this is part of another paper that I'll be sharing in the Columbia conference, the modern the 1976 act is almost verbatim in the core architecture and these provisions as the 1967 draft, which this report is describing, obviously no one can foresee accurately and in detail the evolving patterns and the ways authors' works will reach the public 10,20, or 50 years from now. So there was great awareness that we were trying to deal with a changing, dynamic environment, and that copyright had to be written so that it could adapt over time. Now I am not saying that the views that the copyright office had were necessarily the views that I think are appropriate, but for a court that's trying to faithfully interpret a statute, these are meaningful words lacking that kind of foresight, the bill should we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of the works. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no effect on the author's rights can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology, so that as the years go by, the

copyright loses much of the value because of unforeseen technical advances. For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations of them should only go so far as necessary in the public interest. Now, that opens up a lot of opportunity for interpretation, but the statute itself provides a lot of that structure. In our opinion, is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute, a reasonable bargain for its use will be reached. But if the right is denied, the result, in many cases, would simply be a free ride at the author's expense. So this is how Barbara Ringer and Abe Goldman were thinking about how copyright should function then and in the future, then we get some amazing, prescient comments that really dovetail with what Shira talked about in her opening remarks. We are entirely sympathetic with the aims of nonprofit users such as teachers, librarians and educational broadcasters who seek to advance learning and culture by bringing the works of authors to students, scholars and general public, their use of new devices for this purpose should be encouraged. It's already become clear, however, that the unrestrained use of photocopying, recording and other devices for the reproduction of authors works going far beyond the recognized limits of quote Fair Use may severely curtail the copyright owners market for copies of their work. Likewise, and this is a rather remarkable, prescient statement. It is becoming increasingly apparent, this is 1965 that the transmission of works by nonprofit broadcasting linked computers and other media of communication may soon be among the most important means of disseminating them and will be capable of reaching vast audiences. Now, during the hearings in the early 60s, there were many witnesses from various industries who talked about the technology that was coming down the pike, and here you see the copyright office saying, we've read it, and here's what. We think even when the new media are not operated for profit, they may be expected to displace the demand for author's works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe that the day is past when any particular use of work should be exempted for the sole reason that it is, quote, not for profit. So this was an important move where the copyright office was was departing from the 1909 standard, which limited certain rights to for profit, to saying, we now see that that is a dangerous line, and we're writing these exclusive rights specifically to alter that.With so much accomplished, the house judicial subcommittee, chaired by Representative Robert Kastenmeier, was motivated to move the bill to the House floor as soon as possible, beginning in late May and continuing through early September of 1965 the subcommittee convened 22 hearings, heard from 163 witnesses, and received 150 written statements reflecting, quote, the widest spectrum of public and private interest. So this was not a back room discussion. This was all very front room and very public. All of this was later captured in the transcripts, 17 volumes that became available. Unfortunately, a lot of that was lost for a period because it was only available in microfiche form, until 2001. Four impasses, actually four and a half impasses remained. First, the library photocopying in educational use area was very much in conflict, and Representative Kastenmeier wanted that to get resolved and pushed in direct consultation, mediative sessions to get that worked out second cable television that was becoming a very big part of of this whole area, and that was a big impasse, the jukebox exception. Even though everyone agreed, it made no sense. Jukeboxes exist in every congressional district. The music operators of America went to their

local representatives and say, this is small business jobs. You've got to block getting rid of this exception. And I can't believe they were able to do this with a straight face, but they argued in Congress that a jukebox performing in a bar or restaurant is not publicly performing the work. But they would make that argument time and time again, and the Copyright Office rejected it. The manufacturing clause here, we're talking about organized labor and another set of small businesses printers, and they are represented throughout the country. And these became political impasses that the legislators realized that deal with. And then finally, I said four and a half. The half is public performance for sound recordings, and this is exactly what what Shira was talking about. I say a half because it was relatively clear that the broadcasters, also all over the country, were not going to allow that to pass. And so that's the world we were in as this bill was coming up, and the Congress and the copyright office were able to work through a lot of those issues. They came to compulsory licenses for the jukebox. They came up with narrowing of the manufacturing clause. Representative Kastenmeier put together a proposal to try to deal with cable television. And so a lot of these issues got worked out, and we restored the four factor test, in addition to introducing section 108 and also limitations on statutory damages for teachers, the house judicial subcommittee explored a range of intermediate solutions to the cable television issue, but it did not succeed, and so the Kastenmeier proposal unleashed what was referred to by Barbara Ringer, a full scale verbal war between representatives of the broadcasters and the cable industries. It also risks provoking objections from the House Commerce Committee because they had oversight over the Federal Communications Commission, which was also getting involved in the cable television area. And so what the House sub committee did was they stripped out section 111 which was the cable television issue, and they presented what was left to the house, and it passed 200 320 79 to 29 so we almost had a copyright act of 1967 and given that most of the 1976 act dates back to 1967 it's really not the 50th anniversary. Today is more like the 59th anniversary of the Copyright Act of 1976. Okay, so things shifted to the Senate. The Senate immediately held hearings on cable television, and things were, quote, immensely difficult, economically important and politically explosive. A decade long gauntlet devoted to addressing a series of technological disruptions and legacy conflicts unfolded. As the standard struggled to gain traction on cable television, concerns rose about storage and retrieval systems, computer software, the Copyright Office warned that the so called computer problem could well turn out to be the most important issue in the history of copyright law, and that a legislative solution was not at hand. Now I would say, in fact, computer software hasn't turned out to be the big issue, but perhaps the cataclysmic issue that Shira referred to, might well be what Congress was, what what they were thinking about back in the in the mid 1970s. Now, as a result of that, we got section 102 B, which was really just trying to codify what Baker versus Selden and others believe to be in the law, but show that Congress was vigilant in trying to make sure no one missed that meaning. Meanwhile, advances in phonograph reproduction and home taping technology brought concerns about record piracy to the fore, prompting Congress to pass the sound recording amendments of act of 1971 as a interim stopgap measure. In 1974 Congress realized it can't, it couldn't solve the computer software problem, and it diverted that issue and some photocopying issues to a new commission on new technological uses of copyrighted works, clearing the way for completion of the general reform. And so we get the 1976 Copyright Act. And it worked through these, these final set of issues. And so when you look at the 1976 Act, what you see is that it's basically the

1967, Act, with some massive new provisions for some of these compulsory licenses and a copyright royalty tribunal. The final act detailed these newer issues in tremendous detail that they required very skillful legislative mediation to work through those issues, and yes, there were private interests directly involved, but were those issues decided in Hollywood's favor. Let's test the hypothesis that Hollywood and New York content owners wrote the 76 Act, or that they ran the table on these big issues. So I would say there are two major questions here. The first is the relationship between authors and intermediaries, publishers, studios, etc. And on that issue, as Shira highlighted, there was some movement to try to equilibrate the balance. But what I'm going to say is it didn't equilibrate it that much. We got the termination of transfer. We renegotiated the work made for higher limitation, but still, there's a lot of power for people who can control the rights for 35 years, et cetera. What about the bigger set of issues about content owners, device manufacturers, users and consumers? Now, obviously, the legislators were working in a context, in an era in which we didn't have user generated content, in which you had to go through gatekeepers. And so we see this complex set of interactions among all of these players. In addition, we had the design protection issue in the background and computer software emerging. And so my general sense of this is that it was not the kind of overbearing, sort of powerful interest groups running the show, so much as carefully constructed balances that often didn't substantively favor the content donors as much as we might think. So on the sound recording issue, yeah, there was no public performance right, and so this is an issue on which most people agreed, and yet, user groups, radio stations and cover artists seem to get the better end of that deal on photocopying and fair use, very complicated. We end up with section 108 which gives an opportunity for the copyright office to carefully monitor issue reports and stay very active in monitoring this issue. And you know, as an academic, of course, I think we should have gone. Further. But I also have to realize that I am not necessarily representative of the full world. The Authors Guild, formerly the Authors League, they had concerns. These are people who don't have the kind of secure jobs that many of us do. And these are, these are hard issues. The scientific publishers, I think they got more than they should. They were able to to block some of the more generous photocopying, but over time, those have have moderated. On the jukebox, It's true, we got this compulsory license, but the $8 per device per year was very favorable not to ASCAP, but to the device manufacturers and the operators. Now this was a dying industry, and that was part of their argument, but that's how we resolved that issue. And also we said that that was an adjustable rate. It wasn't going to be set forever. With regards to the manufacturing clause here labor unions and small businesses, printers, they somewhat succeeded, but the way we resolved it was to sunset the provision, and it no longer exists, we don't even teach it. Finally, on cable, my best sense is that the cable operators did pretty well. They were able to get a fairly favorable regime, but it's very complicated, and only experts in that industry can really tell you how it plays out and continues to play out today. And it's all subject to a copyright tribunal, which allows for this future proofing. We can adjust these rates over time. And so, you know, the Copyright Act of 76 was a rather remarkable, somewhat balanced solution to a very difficult problem of a general revision. We ended up dropping design at the end, but we added the separability doctrine in the definition of a pictorial, graphic and social work, and we postponed dealing with software. So when I look back on this, I want to kind of come up with a theme. And as former copyright register Marybeth Peters commented upon Robert Kastenmeier's passing, if Barbara Ringer was the mother of the 1976 Copyright Act,

Kastenmeier was its father. These were very dedicated public officials who did a remarkable job in a very difficult environment for 20 years, they pushed to get something through, and they achieved that. Now, as Shira commented, I don't know that we'll ever do this again. I think it's very unlikely, partly because of the burn international complexity of revising statutes, but, but this was perhaps the last great general copyright revision. Now Register Ringer in 1977 was awarded the President's Award for Distinguished Federal Civilian Service, which is the highest honor for federal service, for her leadership in leading this effort, and I think her career is is just an unbelievable model of perseverance, dedication. She didn't go off and work in industry, and this was not a revolving door story. This is a story of highly dedicated public officials, skillful, pragmatic, and so is the statute perfect? Of course not. Democracy is a very messy system. So what are the sort of big takeaway I would say? When you look at this 20 year history, it really breaks down into two very different periods. We draft much of the core architecture and and ultimately pass what was done up through this 65,67 period, and then phase two, is this rather unusual triage period. At various points, the Copyright Office thought reform was dead. When you look at their annual reports, they're saying, Yeah, we wasted a lot of time. We're really disappointed. So what I would say is that the content industries didn't run the table. They participated. They participated actively, and Congress dealt with all of the other constituencies in reaching this conclusion that the core architecture of the Act is the 67 statute. Often as explained by the 65 report, and the 1976 Act was, I think we can say, built for this gatekeeper clearance ecosystem, which soon became relic. And that's where I think a lot of problems are. Even before the ink on the 1976 Act was dry, that ecosystem would be disrupted. In 1975 Sony introduced the Betamax a revolutionary technology that would soon shape how many people have come to see the copyright system as standing in the way of user freedom and privilege and the Supreme Court took that issue on in the famous Betamax case, and what we've seen in that period since then that some areas such as computer software have worked out pretty well. The statute has proven to be relatively adaptable, but in others, particularly relating to the internet, further reforms are necessary. Notwithstanding the long passage of time since the 76 Act, or more accurately, the 67 Act, a fifth general revision does not appear to be likely in a post-Berne era, perhaps further significant amendments, as occurred with the DMCA, can address the acts obsolescence and the challenges posed by generative AI. So... Let me just get you a better screen for the background.

Jessica Litman 1:16:10
so I don't have slides at all, so you can just close that.

Peter Menell 1:16:13
Well, we want people to see that.

Jessica Litman 1:16:16
Okay. Hi. So, some of the inferences I draw from the record Peter just described are a little different from his. I think that Peter sees the story as a continuous sequence in which the copyright office first conducts intensive studies, and then, through a process of iterative peer review, develops the test of the 1967 revision bill, the core of which survived largely intact during the subsequent nine years in Congress. I look at the same material and see more discontinuity.

It seems to me, the Copyright Office sought to conduct its studies and its initial drafting are relatively insulated from the pressures that could be brought by members of the copyright bar, and that on the basis of its studies, it came up with what it believed would be a wise copyright revision, and the copyright bar hated it. The intensity of the opposition persuaded the copyright office to push the restart button and encourage negotiations among different copyright affected interests to come up with the substance and in many cases, the language of new copyright law, and then to embody the compromises in a revision bill, I agree with Peter that The Copyright Office and the Library of Congress kept pretty good control of the drafting pen at least most of the time, at least during the initial years. And I certainly agree with them that the records of that 20 year process and the meetings and negotiations hosted at the Library of Congress are extremely useful for figuring out what the language that became part of the 1976 Act was supposed to mean at the time and how it was supposed to work at the time. So for legal scholars like Peter and Jane and me, for whom the questions surrounding the drafting of the 1976 Act are quite literally academic. The insights drawn from this record might be their own reward, but one might reasonably ask how useful that information is beyond its intrinsic academic interest. So what does the intended meaning of the words in the statute 60 or even 50 years ago have to do with what they mean now? There are lots of reasons why knowing what the language meant back then might not be much help in interpreting what it means today. For one thing, legislative history was seen in the 60s and the 70s and even the 1980s to be a crucial tool in interpreting statutes. In the 21st century, most judges tell us that it's neither useful nor reliable evidence of anything. Let's ignore that obstacle, we still face the obvious problem that Congress has amended the statute more than 70 times over the past 50 years, and frankly, the crafters of many of those amendments were unaware of and paid little heed to what the extant statutory language meant back in the day or was intended to mean. Then, we need to confront the malleable meaning of key statutory words, which do not necessarily mean today what they meant back in 1964. So copy, for example, bears a different meaning in 2026 than it did in 1966. So, I think the inescapable conclusion is that what we learn about the original intended meaning of the words in the 1976 Copyright Act is of only very limited use, if what we're trying to do is figure out what the statute means today. This is a sad admission for me to make, since I have spent large chunks of the past 40 years in close examination of copyright legislative history. And I don't mean for a moment to suggest that I think these explorations aren't useful. I think they're enormously useful. I just don't think they yield much in the way of citable authority that the statutory language means what I or Peter or Jane would like to argue that it means, but it's a super useful resource for looking at questions of legislative process. It's also super useful for learning about the history and structure of the book publishing business and the music business and the consumer electronics business and teaching in schools and churches and printers unions. So I've written a fair amount over the years about the pitfalls of relying on a legislative process that assembles all the important copyright insiders and tasks them with coming up with important copyright rules that will apply to everyone, insiders and outsiders alike. And I've argued that this sort of process produces statutes that are inhospitable to the excluded outsiders, whether they were deliberately not invited or they couldn't be invited because they didn't exist yet. More recently, I've become fascinated with the question of how the negotiated statutes worked out for the insiders who agreed with each other on the compromises that were embodied in the statutory text. So the negotiations among copyright interests that fashioned the

substance and language of the 76 Act were predicated on assumptions about how the law and how the world would develop. The point of future proofing involved making some assumptions about what the future was going to look like. They also incorporated implicit and explicit promises about how the different interests would implement and interpret the provisions they agreed on and how they would treat each other going forward. So if the assumptions turn out to be wrong, or if the promises ended up getting broken, that can radically shift the balance that the negotiated negotiating interests believed they were agreeing to strike. So I want to speak briefly to both the assumptions and the promises. Many of the assumptions, both the ones about the world and the ones about the law, didn't prove out. So in terms of how everyone assumed their businesses would develop over time, I think it's fair to say that they seem to be looking at the future as not likely to be sharply different from the then present. I believe they didn't anticipate the breathtaking consolidation that was about to overtake every corner of the entertainment industry. I think they imagined that while computers were becoming more and more important, they'd continue to be niche devices used by scientists, students and educators, and they didn't envision the changes to the world that network computing would be responsible for some years from then. And as a result, even though they talked about the terrible danger of unlicensed personal uses, I think they figured that unlicensed personal uses would continue to be a manageable annoyance rather than an existential threat, and so they didn't devote any energy to devising some remedy for facilitating infringement that would be palatable to courts. I think you could argue that one reason that Sony came out the way it did, and one reason Cox came out the way it did, is that the remedy of okay pay statutory damages for every single infringement every single person who used your device or service has committed is not a palatable remedy. In terms of how they assumed the law would develop, they appeared to assume that the copyright law would stay the same until the revision statute they were working on changed it. So I'm just going to give you one example of a change in the law that nobody was anticipating. I've been looking at works made for hire recently, so this one is top of mind for me. The definition of works made for hire and the nitty gritty details of terminations of transfer were settled in April of 1965 as the result of hard bargaining among organizations representing all of the book publishers, all of the music publishers, all of the songwriters and the Authors League of America. At the time, courts treated works created by employees as works made for hire for which the employer was the author. They treated works created by independent contractors as not works for hire. Instead, the independent contractor was the author, but the creation of the work was subject to an implied agreement to transfer the copyright to the person or business who commissioned the work, and under the 1909 act, one could assign copyrights and works that were neither published or registered without assigned writing despite the statutory requirement, because the courts had held that federal statutory copyright had not yet attached, so the signed writing requirement didn't apply. So as a practical matter, the only significance of the distinction was that after the initial 28 year term expired, the person who created the work was the person entitled to apply for a renewal term in a commissioned work, unless there were a contract assigning the renewal right. Now, since the vast majority of works were not renewed, it didn't come up much, but the legal distinction was clear. The Copyright Office work made for hire study documented it carefully. The Supreme Court would later rely on it in CCNV V Reid, and so the grand compromise on termination and the definition of work made for hire was negotiated against this background. And what it did is it added four categories of

commissioned works for hire to the definition making works made for hire broader than they had been under prior law, and that excluded works made for hire from termination. Once that compromise was reached, the organizations who agreed on it embodied it in a memorandum and delivered it to the copyright office and to Congress. And over the next few months, some of the signatories wanted to change a word or a phrase in some way, and everyone from the copyright office to the other organizations, insisted to Congress that changing even one word would destabilize the deal and send everyone back to the bargaining table. So the deal endured in pretty much its final form, although some other categories of Commission works ultimately got added to the definition. Okay, some months later, the Ninth Circuit and then the Second Circuit decided cases involving works created by independent contractors and both courts of appeals held that both sorts of works should be treated as works made for hire and governed by the same rule. Both opinions got to that result by confusing or conflating the line of cases holding that employers were legal authors of works made of works created by employees with the line of cases holding that independent contractors implicitly agreed to transfer the copyright to the person who paid for the work. In a 1983 case, Estate of Burne Hogarth V Edgar Rice Burroughs, Judge Jon Newman examined the cases very carefully and concluded that holding that employee created and commissioned works should both be treated as works made for hire under the same rules had been a mistake. Had been based on a misreading of the cases. He wrote that, unfortunately, because the court had reaffirmed the rule in subsequent decisions, he was bound to imply it, unless the circuit agreed to take the case en banc, even though it had been a mistake based on a misreading of the cases. Now, obviously, the mistake has no effect on termination under Section 203, which would be governed by the new work made for higher definition. What it did do was greatly narrow the availability of termination under Section 304C for copyrights and works created before 1978. At the time they negotiated the Grand Bargain, authors and songwriters who had created works on commission believed with good reason, they'd be able to terminate their copyright transfers. So this is one set of examples of both factual and legal assumptions that didn't prove out. Let me move to explicit and implicit promises that the interests bargaining over the language made with one another about how they would interpret the language and implement the bargains. There are lots and lots of these, I'm sure each of you can supply some favorites from the corner of copyright law, where you tend to hang out, I'm going to stick with termination, because I've already reviewed a bunch of the background. As the Copyright Office report on renewal had detailed, and as both Peter and Shira have mentioned, Congress had intended the 1909 acts recapture a renewal term to enable authors to recapture their copyrights, but the Supreme Court had gutted the effectiveness of that by holding that authors could assign it in advance. So what authors and songwriters want, wanted was a copyright reversion that could not be assigned in advance. Publishers and music publishers obviously wanted no reversion at all, and what they compromised on in the same Grand Bargain was a reversion that became available after a longer period than the 28 year term that required all sorts of complicated maneuvers to claim, and that was subject to what everyone at the time agreed was a pretty narrow Derivative Works exception, but that could not be assigned away in advance. So I'd argue, at least implicitly, publishers promised authors that if authors gave them the initial period of exclusivity, waited until the later appointed moment and jumped through all the Hoopes, they would get their copyright back. But of course, the promises that representatives of copyright interested groups made to

one another about how they would interpret the statutory language were never enforceable. They weren't legally binding. The lawyer for the Music Publishers Protective Association, during the discussions that yielded this compromise, had no legal authority to bind the Mills Music publishing company to respect the terms of that deal 17 years later. To the extent that statutory language was susceptible of more than one interpretation, it's hard to blame the Mills Music Company for exploiting that ambiguity, and it did. when Ted Snyder's heir sued a, served a notice on Mills Music terminating Snyder's assignment of the copyright in Who's Sorry Now?, Mills insisted that under the derivative works exception it was entitled to keep collecting royalties for all past uses of the song. That's a way broader understanding of the derivative works exception than anyone had contemplated back in 1965. The Supreme Court, though sided with Mill's Music, largely because Barbara Ringer, who said she had wielded the pen that wrote down the words of the derivative works exception, had used the passive voice. Ringer came out of retirement to urge Congress to pass an amendment, overruling the Supreme Court and restoring the original intended understanding of the language. And at this point, all of the other music publishers, or at least 30 or 40 of them, sent letters to Congress opposing the amendment. They didn't claim that Ringer was wrong about what the compromise had initially meant. Rather, they claimed that music publishers were themselves also deserving and should be allowed to continue to profit from the copyrights and works they had developed. And they also argued that now that the Supreme Court had told us what the language of the statute meant, It had always meant that and Congress couldn't take publishers interest away by amending the statute without violating the takings clause of the Constitution. So the bill fell. So we might like to think of the promises. Is that publishers made to authors as part of the Grand Bargain as morally enforceable, even if they aren't legally enforceable. The Copyright Office has sometimes, for example, suggested that it's important for publishers to give effect to the statutory termination provisions, because authors gave up a lot to secure an inalienable reversion, and by the time that reversion is supposed to become effective, copyright owners have already enjoyed the benefits that authors bargained away to get it. But it's hard to think about moral enforceability when the individuals who would need to keep the promises are different people entirely from the individuals who made them. And so as authors have sought to terminate copyright grants, grantees have proffered a variety of arguments why termination is not available or authors are entitled to recapture only a narrow slice of the copyright. Now, not all of those arguments have been successful, but it has meant that, in practice, an author who wants to exercise her termination rights must first jump through all of the statutory hoops and then be prepared to pursue litigation. So broken promise example is illustrative. As I said, I'm sure you can supply your own. So what's my point? We can look at this record and gain a fine grained understanding of how various copyright interests believed the provisions of the statute would work. We can look at the world we live in and appreciate the reasons that they are not, in fact, working out that way. But I don't think there's a way to leverage our understanding of how the drafters of the 76 Act intended their compromises to work as a tool to now persuade courts to understand the language of the current statute, after all the amendments and all the failed assumptions and all the broken promises. So if I'm right about that, does any of this matter in the real world? I think there are a bunch of lessons we can extract from the record that may be useful at a more abstract process level. First, even when it was new, the 1976 Copyright Act looked better on paper than it would turn out to work in the world. The mistaken assumptions

and latent broken promises were weak points in the statutory scheme that were poised to become points of failure. Second, Jane is going to explain in a minute how the creators of the 76 act pursued the important goal of putting authors and creators in a better position than they were under the 1909 act. I'd argue that if we look at the position of authors and creators under the copyright law in 2026 they're not doing well. They tell us they are earning less and that they have fewer choices than they once did, and I believe them. It may be that there was a Halcyon era in the late 1970s or early 1980s when authors prospered as compared with how they'd been doing in the 1960s and early 1970s, but even if that was true, then it doesn't seem to be true now. To the extent we're trying to revise the law to give authors and creators a stronger hand of cards to play, we need to recognize that's just a really difficult problem. The EU, which takes this very seriously, has been making a bunch of efforts recently in that direction, not at all successfully. So far as I can tell, this is a really hard problem to fix. It doesn't have many durable solutions, and it's definitely not a fix it and forget it problem. Third, the negotiations among copyright interests that gave rise to this 65 revision bill, or the 67 revision bill, were intense, but they were respectful and even cordial. There was a sense of shared enterprise. Each of the organizations was pursuing its members advantage, but they were also trying together to build a workable Copyright Act. And those of you who became copyright lawyers in the 21st Century might have difficulty recognizing that world given the Viper pit that characterizes the current copyright bar. Fourth, and finally, one lesson I take from these stories is it turns out to be really important who the register of copyrights is. We don't currently have much control over the decisions that will end up either allowing us to keep Shira Perlmutter as register or allow the government to choose a different one. But it's, I think, important for us to keep in mind how crucial the choice is, whether we can control that choice or not. Barbara Ringer once told me that it was essential for the register to be someone who was strong enough to stand up to the copyright lawyers for all the different interests, and I think she was right about that.

Jane Ginsburg 1:40:30
Thank you to all the Berkeley organizers for the opportunity to talk about the influence of international copyright norms on the evolution of the 76 Act. I have to say after Jessica's chastening presentation, I'm wondering whether everything I'm about to say is one naive, and two useless, because I'm not sure that it's going to provide any guidance as to interpretation of the 1976 Act, much less its successive amendments, but I hope that it's at least an interesting story, and we can put up the next slide. How do I do the next slide? Okay, this is the only slide that I'm showing. I don't have any cool morphing visuals, but this is just so that you can follow where I'm going in this talk. So, shortly after the 1976 Acts passage former register, Barbara Ringer, a leading architect of the 1976 act, declared, with some satisfaction, there has been a shift in the philosophical base on which the copyright law of the United States rests. This change may not be readily apparent. Many people regard the establishment of a single federal system as a purely procedural matter, the change in the term of copyright as merely adding years, and the revisions in the sections on ownership and formalities as mere legalistic tinkering, but taken as a whole, these changes mark a break with a 200 year old tradition that has identified copyright more closely with the publisher than with the author. That shift reflects the United States gradual acceptance of fundamental, universal copyright norms expressed in the Berne Convention. While it would require three more amendments in 1988, 1990, and 1994

to bring the United States into almost full Berne compatibility. The 1976 act took the essential test step of vesting copyright in authors from the works creation without precondition of compliance with formalities and for a unitary term of the life of the author, plus 50 Years. International norms substantially informed this re centering of protection, ultimately placing authors at the fulcrum of a system formerly focused more on dissemination than creation, this international and comparative law infused shift is all the more noteworthy for its contrast with the prior 200 years of US resistance to international norms and international protection. I will therefore preface this examination of the influence of international norms on the development of the 76 act with a survey of us copyrights relative imperviousness to those norms in the 1909 Act and its predecessors. I will then turn to the legislative history of the 76 act to consider how the copyright office in Congress resolved the principal points of divergence for international norms to draw the US law closer to international standards, I will examine the legislative history of aspects of the 76 act that embody Berne relevant reforms in order to illustrate the role of international and comparative concerns in shaping those changes to our domestic copyright law. I will not cover some of the smaller reforms affected by foreign or international norms and practices, such as the scope of the public performance right, ephemeral recordings, library photocopying, and the jukebox exception. Similarly, despite abundant discussion in the legislative history, I will not address foreign or international law influenced reforms that Congress did not adopt, such as elimination of the manufacturing clause and of the compulsory license for reproduction of non dramatic musical compositions in phonograms, the mechanical license. With respect both to reforms Congress did enact and those it rejected, appendices to this talk in our charts detailing the evolution of proposed statutory language and relevant excerpts from copyright office, studies, registers, reports and various hearings, which are all available on the resources page for this conference. So let's start with American exceptionalism. While the earliest copyright law borrowed heavily from England, that assimilation also incorporated the isolationism of the Statute of Anne, which explicitly denied protection to any books in Greek, Latin or other foreign language printed beyond the seas. The 1790 US Act Section Five went even further in excluding foreign including British, works, that nothing in this Act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States of any map, chart book or books written, printed or published by any person, not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States. This provision effectively favored the pirating of English works, and ultimately undermined domestic markets for US authors undersold by the piracy depressed pricing of British authors. It remained in US copyright law for over 100 years, until its repeal by the Act of March 3, 1891. That act first instituted protection for foreign works, but at the price of having them printed in the US under the manufacturing clause, which persisted in limited form into the 1976 Copyright Act, as we've heard. Like its predecessors, the 1909 Act paid scant attention to international standards. In the run up to that revision, a presidential message of 1905 noted that countries around the world were revising their copyright laws in light of modern conditions, but did not suggest that the US should follow any of those countries substantive leads. Indeed, the Librarian of Congress testified in 1906 that, I quote, the bill is not an attempt at abstract and theoretic perfection, nor is it an attempt to transplant to this country, theoretic, or what might be charged to be sentimental provisions of foreign law, it tries to be a bill possible for this country at this time and under conditions local here. Although the US sent the register of copyrights,

Thorvald Solberg, as an observer to the 1908 Berlin revision of the Berne Convention, and he expressed his personal sympathy for its goals, he declined to take any positions on the matters under discussion, noting the pendency of the 1909 revision and his unwillingness, quote, to engage the United States in a way that could embarrass the legislative power and impede it from choosing the path it finds most opportune. The opportune path Congress chose in 1909 generally rejected or ignored international norms that would have required substantial changes to the US system, notably respecting formalities and duration of copyright. While neither comparative law nor international law suffused the 1909 Act, there were several subsequent attempts to amend the US Copyright Act to bring it in line with Berne Convention minima, and thus to enable adherence to that international instrument. In 1929, Register Solberg combined high minded and pragmatic justifications for burn adherence. He said the purpose of international copyright is to secure to all authors automatically protection for their works everywhere. The product of an author's mind is property of a kind that lends itself to such world protection. Under modern conditions, an author can send his work to all parts of the world, but he should be assured that it will be respected wherever it goes. Between 1924 and 1946 major bills were introduced and another 20 or so modified and reintroduced. All failed. The principal points of divergence between us, copyright law and evolving burn standards concerned as a contemporary document said, automatic copyright in the author upon creation of the work, i.e. without formalities, such as notice to positive copies and registration, removal of the requirement for domestic manufacturer of foreign books and periodicals, retroactive copyright protection of foreign works, the duration of copyright for the life of the author and a period of years after his death, copyright in oral speeches and the moral rights of authors, a very tall order. The US inability to accede to the principal multilateral Copyright convention quote, because it embodied concepts at variance with American copyright law disfavored US economic interests in the post World War Two, period of considerable expansion of exports of us cultural productions. We needed to join the international copyright fold, but rather than trying to shelter our sheep within the Berne Convention's enclosure, we built our own sheepcote. Rather than making our law conform to variant concepts, we sponsored the creation of a new international instrument, substantially made to our copyright order. The universal copyright convention preserved member states imposition of formalities, albeit in simplified form, and devised a minimum copyright term of 20 years from publication, designed to accommodate our 28 year initial term and to avoid controversies over renewal. The UCC required us to extend protection to works first published in other member states or by authors domiciled in or nationals of those states, and to restrict the application of the manufacturing clause to foreign printed works of US Nationals. On the whole, however, the UCC was, in the words of the Senate sponsor of its ratification quote a document which not only embodies the most acceptable concepts of American and European practice, but which recognizes the basic principles governing the law of copyright In the United States. Over time however, remaining outside Berne presented a variety of shortcomings. Many countries whose protection the US would have sought were members of Berne, but not of the UCC. Moreover, Berne countries provided a higher level of substantive copyright protection than the UCC protection we desired abroad, if not always at home. Indeed, US, stakeholders and officials had long recognized that several of the distinctive features of US copyright, including our draconian formalities and our complicated duration of protection under state common law and short renewable terms under federal copyright law were, quote,

hopelessly behind the times, embarrassing, undignified and criticized. Our outlier status kept us off the world stage at a time of increasing need for international cooperation. As Register of Copyrights Abraham Kaminstein acknowledged in the 1965 supplemental registers report, since 1961 when the registers tentative draft first issued, I have also acquired a deeper understanding of the importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not enough for us merely to seek and extend as much international cooperation as possible. It is startling to realize in an era when copyright materials are being disseminated instantaneously throughout the globe that the United States has copyright relations with less than half the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious our national interest is the lack of the cultural bridge between countries that copyright furnishes. And as Register of Copyrights, Barbara Ringer testified in 1975 looking back on the revision process on the eve of enactment of the 76 Copyright Act, quote the achievement of bringing the United States into the international copyright community through the UCC also served to dramatize once more, how archaic and inadequate the US copyright statute of 1909 had become. To claim that aspiration to adhere to the Berne Convention primarily motivated the 76 acts principle reforms would overstate the role of that instruments norms in the development of the 76 act we recognize that maintaining American copyright exceptionalism disadvantaged our authors and cultural industries, but the insuperable impediments to complete conformity with Berne were clear from the start of the revision process. Nonetheless, the drafters understood that we could undertake some reforms that would reflect foreign practices and thus bring us up to Berne standards. In addition, we could adopt other measures that would move us closer to Berne, inviting the prospect that future reforms could close the remaining gaps. Most importantly, many of the revisions that aligned our law with international norms also fundamentally changed the nature of US copyright, making it more consistent with international concepts of authors, rights. The new author centrism of US copyright that Barbara Ringer celebrated may have been more a consequence of pragmatically oriented changes to duration and formalities than in intentional philosophical shift. Or as then Professor Benjamin Kaplan wrote in his 1958 Copyright Office study of registration, debate on the question of formalities could proceed at a high level of abstraction, pitting natural rights advocates, detractors of formalities against social contractarians, supporters of formalities. Quote, but it seems proper to forego arguments of this kind here descend to particulars and ask, what are the benefits and countervailing disadvantages or demerits of a registration scheme on the present American lines? Not surprisingly, then the legislative history generally descends to particulars and does not ascend to the abstraction of a widely shared awareness of how changes to duration and formalities and other Berne inflected reforms would combine to orient, reorient the US copyright. In preparation for what became the 76 Act, the copyright office, starting in 1955 undertook a series of studies covering the issues to be resolved in a new copyright law, as we've heard, in addition to a specific study on international copyright law, the studies included sections on foreign and international law, often highlighting differences between US copyright and copyright laws elsewhere in the world. From the outset, then the copyright office and Congress were fully apprised of contrasts between the US and the rest of the world. The role of the UCC. Just as work on the future 1976 act was to begin, the United States acceded to the universal copyright convention. As mentioned earlier, that treaty posed our

answer to the Berne Convention, taking the appealing aspects of that convention, such as national treatment, but adopting a lower standard of substantive minimum protection, particularly regarding formalities and duration. Nonetheless, those reduced standards still marked important departures from our formality, fraught system, they made it easier to take the next step toward compliance with the more demanding international norms of Berne. one might surmise that Barbara Ringer, who was the principal drafter of the 1971 revision of the UCC perceived international protection as a key element in the long game of domestic copyright reform. The UCC hastened our relinquishment of formalities as a prerequisite to copyright protection by providing in Article 31 that registration, deposit, and domestic manufacture, three of the four horsemen of copyright divestment, were no longer required, so long as the copyright proprietor conformed to a simplified form of notice. Article 32 made clear that the UCC did not oblige member states to give up formalities with respect to domestic works. The UCC, like Berne, thus allowed member states to two tier their approach to formalities, inverting the ancient Athenian practice of democracy at home, tyranny abroad, the UCC permitted draconian formalities at home, so long as foreign works enjoyed the more forgiving UCC regime. Two Tier solutions, however, are predictably unstable. Why should domestic authors and right holders suffer from confiscatory formalities and domestic manufacturing requirements when foreign UCC works enjoyed a comparatively negligible burden of compliance, or as Joseph Dubin, head of the legal department of Universal Pictures, queried during the panel discussion on the 61 registers report, why should we impose a greater burden on the works of our nationals and give greater rights to the work of non nationals? Turning to comparative law, while the UCC got us halfway there, with respect to formalities, its elaborate and US friendly provisions on duration did not provide the impetus for adopting a unitary term of life plus 50 running from creation and fixation of the work. The driving force between that most consequential 1976 act reform was the desire for uniformity with the laws of foreign national markets for our works. Since most of those countries were Berne members, that meant that the prevailing norm in comparative copyright law was 50 years post mortem auctoris. Berne membership also meant that in those countries, under the principle of automatic protection, copyright arose in the works upon creation. Conforming to the general standard would entitle us to reciprocal protection for duration, but were we to maintain our comparatively truncated norms, we would come up against the rule of the shorter term, incorporated both in Berne and in UCC, Article 44. As applied to 1909, US Act works, that rule meant that a life plus 50 member state incurred no obligation to protect a US work past 56 years from publication if renewal occurred, or past 28 years from publication if there was no renewal. As the legislative history frequently underscores, in a period of rapidly expanding exports of us creative works, authors, right holders, and government agencies, including the Copyright Office and the State Department, perceived the gap between US copyright term and foreign laws to be increasingly untenable. Comparisons with foreign laws did not efface all US copyright anomalies however. For example, the much maligned jukebox exception became a compulsory license and wasn't given up until we joined the Berne Convention and we retained the manufacturing clause for a while. Despite the copyright office's extensive study of foreign law practices and its initial recommendation to forego the mechanical rights compulsory license, Congress determined to retain it, and of course, we did not legislate in the area of moral rights, claiming, perhaps disingenuously, that non copyright common law rights supplied adequate coverage. Neither did we go full Berne with respect to formalities, while

they are no longer constitutive of protection nor divestitive, registration remains for us, works two tiers, a prerequisite to suit, and registration remains for all works a precondition to the remedies of statutory damages and attorneys fees. Perhaps curiously, a mistaken understanding of foreign law was invoked to justify a notably author unfavorable feature of the 1976 copyright act, the designation of employers for hire as authors. The 1961 registers tentative draft set out the copyright office's initial recommendation regarding works for hire, and it neither extended works made for hire status to commissioned works, as we've heard, nor bestowed authorship status on the employer. The 1963 draft, however, provided that in the case of a work made for hire, the employer shall, for purposes of this title, be considered the author, and shall have all the rights comprised in the copyright unless the parties have expressly agreed otherwise. This draft continued to exclude commissioned works by 1965 however, works great for hire encompass certain commissioned works, notably contributions to audio visual works. Why did it not suffice to vest all rights in the employer, but leave authorship status to the actual creator, particularly of Commission works? The legislative history indicates that the motion picture industry stressed the need to designate employers and film commissioning parties as authors, because only that status would ensure that motion picture producers would enjoy the full panoply of rights under copyright abroad. As a lawyer for Universal Pictures argued in 1962, I should like to address myself to the proposal that instead of indicating that the employer is the author, it should merely provide that the right to secure copyright vests in the employer. I think that the producers of motion pictures would be very much prejudiced, prejudiced by that proposal, because certain rights are said to flow to an author, particularly in foreign countries, which would vest in others than the employer, unless the employer were designated as the author. This declaration may have persuaded the copyright office, but it over optimistically assumed that foreign authorities would accept the United States definitional slate of hand, divesting creators of the title of authors. In fact, when the question squarely arose, France's highest civil law court in its 1991 Houston decision on film colorization spurned our characterization of film producers as authors and applied French law concepts of indefeasible authorship. There are many other respects in which foreign and international norms permeate the 1976 acts legislative history, but I will not detail them here, and I refer you to the appendices on the resource page. Thank you very much.

Peter Menell 2:08:15
Thank you, Jane. Well, we've got a few more minutes. We can open things up for questions. I also would enjoy our ability to do some back and forth, but I'll just invite people who would like to ask question just to come up. We've got some microphones in the middle, but I guess I would like to at least contrast my, you know, my my view on how a court interprets a statute with perhaps what Jessica was saying. You know, in my career, I've spent a lot of time doing education programs for judges, and the thing that stands out for me most is that they never will want to say that they're engaging in policy or trying to change what Congress has given them. Obviously, copyright is somewhat unusual in that it has this kind of mixed heritage of common law and statutory law, but I guess I, you know, I have trouble imagining courts trying to include people who were not present in the legislative process, especially when they couldn't have because the technologies on which brought them in. And so I am, you know, in trying to deal with the rule of law, trying to imagine how judges within our constitutional system have to do that

job. I had the good fortune to clerk for a judge who, you referenced Judge Newman, who I think was one of the most thoughtful, careful readers of the context of legislation in interpreting. And one of the things that just stands out to me, and perhaps our lunch keynote speaker will address this issue, although I suspect it's even beyond what any judge could could really fathom right now, is we live in a country that prides itself on a rule of law, but we don't have a rule of interpretation. That we lack a common framework, you're right that during the 1960s the copyright office was very much aware that they were writing a statute and a user manual in the legislative history. In fact, in the annual reports, they would comment on the fact that their legislative history for a statute not yet even enacted was being cited by courts in interpreting the 1909 act and making other common law esque decisions and so. So that's that's where I am. I I feel I'm somewhat limited as a scholar, trying to describe what the 76 Act is, to the materials that we have to the data and those materials, and I guess I just, I'm not sure how we can go forward with the rule of law if we don't have a rule of interpretation. I don't think we're going to get one anytime soon. So that's my comment.

Jessica Litman 2:11:15
Okay, not a question, well...

Peter Menell 2:11:18
I'm just saying, I struggle to know how we would, how we would implement some of the things that you were saying, just because It just seems judges who are not expert in this area at all. It's very rare. There are probably 15 or 20 judges who have had enough experience with the Copyright Act that they feel comfortable. So they're often just, you know, looking to scholars, to legislative history, to other sources, to treat us writers, etc. And that's, you know, that's, I think, where our state of the rule of law is

Jessica Litman 2:11:53
So, I mean, I think in the 1960s and the 1970s and the early 1980s judges found legislative history very useful. Judges and scholars criticized that for I think, all sorts of good reasons to the extent it was not read by the members of Congress who were voting on the bill. It seemed like an odd source of authority. We have a statute that no one is arguing was written by the members of Congress who voted on the bill, whether you talk about Its being written by the copyright office as a legislative agency with its delegated authority, or you talk about it embodying compromises coming through negotiation among the interests it was designed to regulate. I don't think matters for this purpose, but judges today, I think, figure their big job is to look at the text and see what the text says and interpret the statute by looking at the text and by looking at the judicial decisions construing the text. That is a rule of interpretation. I may not think it is the wisest rule of interpretation, but why, believe me, I spent 40 years looking at legislative history, of course, I think it's important that doesn't mean that. So,

Peter Menell 2:13:30
Right well even, oh sorry, yes.

Jane Ginsburg 2:13:37

When 40 years ago, I started out in this business too, the attitude, used to be, if the legislative history is a clear look at the text of the statute. I don't think anybody would say that today, that there has been something of a discrediting of legislative history, but I don't think it should be overstated either, and I don't know if Judge McKeown wants to enter this fray, but the late Judge Bob Katzmann wrote a book called judging statutes, in which he makes a very strong plea for continuing to consult legislative history, even aware of its corruptibility In the various process issues, because the text isn't always clear, and judges need help, and one place that they get help is the legislative history. The United States, the 76 Act, has a really rich legislative history, perhaps somewhat less corrupt than some other legislative history. So, I certainly would not suggest that it's irrelevant to the continuing interpretation of the act, and notwithstanding lots and lots of subsequent amendments whose legislative history might be a little more dodgy.

Peter Menell 2:14:54
To add further that even the strict textualist say that we don't interpret the words in the statute. We interpret them at the time those words were cemented into the text, and so in order to understand that context, you would want to and you know, even though judges won't put it on the face of their opinion, I've had many conversations with judges where they are very interested in understanding that context. And so, you know, you know, the most recent Supreme Court decision, I think, is going to throw even more sort of confusion into this issue, but, but, you know, that's that goes to, you know, how our democracy is evolving. And you know, I find it odd that that strict textualism is becoming, you know, used by people who I think, or were not that sympathetic to, the people who put that into our jurisprudence. So I see a bunch of questions or hands, Zach, are you making question or are you just a highlighting Yeah, so, Tyler.

Audience 2:16:06
So it strikes me that copyright law is not the best tool to make up for what I perceive as the near complete lack of enforcement of antitrust law in the entertainment industry. So I'm wondering if you have any comments as to the assumptions that were made in 1976 as to competition in antitrust law, and how maybe those have changed over time.

Jessica Litman 2:16:42
So I mean, in 1976 we had many, many, many record labels, music publishers, book publishers, bullshit picture studios and so forth, and they were all competing with each other. And, you know, Justice Black was on the Supreme Court, and we thought of antitrust as an almost constitutional imperative. Now we don't, and so some of the power dynamics that no one was anticipating in the 1960s come from the lack of competition among publishers, record labels, music publishers, and so forth, in a much more concentrated set of industries.

Peter Menell 2:17:36
So if I can add the economics of antitrust and the practice of competition changed dramatically right around the time that the Act passed. What we call network economics was rarely understood, not discussed, almost all of network economic theory developed in the 1980s and we live in a world today where we have tremendous concentration, but in ways that have benefits to consumers through network effects that weren't understood or perceived. You know,

is Spotify a monopoly that's sort of destroying everything? Is Amazon a monopoly? You know, there are also very popular services that have had tremendous benefits. So looking to the 1976 act legislative history to understand the modern antitrust challenges, I think would be just a fool's errand. They weren't focused on those issues with the AT&T break up, with the IBM breakup all around that time, we see this massive transformation in how our economy works and digital economics. So so, you know, I do think that they are tightly intertwined, and that's why, when we think ahead to how we might deal with generative AI legislatively, I don't think it should be limited to copyright. I think we would have to be much more capacious in thinking through all of these effects.

Audience 2:19:11
Thank you. You've described what seems like an idyllic world in which various interests get represented and compromises get worked out. I would like to apply that lens to the extension of the term of copyright from the life of life plus 50 to life of life plus 70. Because, as I understand it, I think I once asked Congressman Goodlatte about it, and he said, Well, it was simple, because the EU had gone to life plus 70, because Germany had gone to life plus 70, so we were just following along. Of course, my response to him was, I didn't think the Republicans were big into European influence on American law. That sort of shut that conversation down. But we are, I've seen a number of explanations of US law developments that we must comply with international obligations, and it seems to be that that deference actually avoids US representation of different US constituencies and compromises here, because we are simply signing on to something that maybe not all the interests here participated in. Can you please comment on that?

Jessica Litman 2:20:26
So I think it's a lie. I think that the foreign compliance was never the reason. It was always an excuse. And I certainly don't think that the 1960s were at all idyllic. They look that way from a 50 Year vantage point, because they weren't characterized by the sort of personal attacks and nasty booby traps and dirty tricks that happened surrounding copyright legislation today, but I think that and this argument was certainly something I made at the time. If we wanted to follow European law when we changed our duration, we would have reduced the duration of copyrights and works made for hire. What we did was we extended the copyrights in works made for hire and thereby enlarged the divergence between US, copyright term in works made for hire and European copyright term in comparable works. And at that time, I think works made for hire were considered to be about 50% of at least works that were registered. So it was a big divergence, and so had we actually been motivated by following Europe? I think this would either have been very different, or it never would have been proposed.

Peter Menell 2:22:02
Jane, you want to comment?

Jane Ginsburg 2:22:04
Yeah. I mean, it's true that the rule of the shorter term meant that if we didn't have the extra 20 years, we weren't going to get the extra 20 years there. Europe was an important market. But I

think that Jessica is also right that with respect to works made for hire, it already that our term of copyright of 75 from publication was already as long as the extended term in Europe. So I'm not going to say that it was completely pretextual. I mean, I think there were some plausible international trade reasons for that extension. There were zero copyright justifications for that extension.

Peter Menell 2:22:58
Are there any other questions? Yes.

Audience 2:23:03
So earlier, the keynote speaker mentioned how the complexity of termination is a great barrier to authors asserting termination right, despite how it was with great pain that authors negotiated that right for them. So I wonder if you could share some ideas for reforming termination, if that's possible at all. I heard that UMG, for example, antitrust, they push back against any termination request.

Peter Menell 2:23:34
Well, I do want to highlight that we are going to cover termination and the work made for hire, provision in the next panel, and David Nimmer, well, I collaborated on on an article that David's going to talk about, but no what I would say is that the termination experiment was very bold. It went beyond anything in international law, an inalienable right, very contrary to the American system of free freedom of contract. And part of the story there is that courts have been somewhat unsympathetic to authors and how they've interpreted that regime. And it is, it was a bold experiment. I think if you want to pick one part of it that is right at the core of the kind of conflicts that we've been talking about, it's sound recording, work made for hire, that that was one of the issues that didn't get swept into the exemptions from work made for hire. My theory of that is that we wrote most of the work made for hire provision by 65. At that time in America, many songwriters and performing artists were employees of the record label / music publishing conglomerate, and whoever was supposed to be at those meetings to say, well, maybe sound recordings are a composite work that ought to also be outside, didn't make that point. And then, because we didn't really go back and revisit many of those provisions over that final nine years of kind of fits and starts. When we passed the 76 act, most sound recordings are no longer fitting into the structure that we had because their independent contractor works and and then around 2000 when people realized that this, this section 203, was going to start to hit, the record companies went to Congress in a very back room deal, exactly the opposite of the kind of the publicness, and they worked something out at the same time Napster happened, and the artist said, we are pretty angry at everyone, and if you don't agree to to withdraw that amendment, part of a technical amendment to a satellite so I think that's one place, and I would start there that. But the thing is, you can't do it retroactively because of the Takings Clause, or at least not very easily. So interpreting the 76 act will continue to be important on the sound recording issue. Any other thoughts on...

Jessica Litman 2:26:22
I've got to wait for the next panel.

Peter Menell 2:26:23
Yeah. Also, you know, I do think we can make copyright work better in terms of enabling people to to get some kind of, you know, some kind of opinion that might have legal significance, that we have it in certain other parts of our law and on issues of fair use, on issues of termination, there are many areas in which I think our courts would appreciate the help, but we would have to reconstruct our system to do that. But I do think that we, you know, we're asking too much of the courts, and these are issues that are making it very hard for lawyers and their clients to navigate these rules. Listen, we're this has been a very long panel, and I really want to thank our audience for their patience. We wanted to provide a very rich foundation for what will be, I think, an amazing array of panels to come. So without further ado, I release you for your break, and we will come back in about 15 minutes for some more.