

Casting Aspersions

--Jessica Litman*

Paul Goldstein graduated from Columbia Law School in 1967. He immediately joined the faculty of SUNY Buffalo Law school,¹ where he taught a course in “Copyright Patent and Trademark.”² That year, Herman Finkelstein, the President of the Copyright Society of the U.S.A., described Goldstein’s course as one of about 20 such courses in law schools anywhere in the U.S.³ Which is to say that the copyright bar in the late 1960s was small.⁴ It was largely homogeneous (overwhelmingly white, almost entirely male, and predominantly a plaintiffs’ bar) and pretty chummy.⁵

The copyright community was at the time deeply engaged in negotiating the contours of legislation that would become the 1976 Copyright Act. While the various

* John F. Nickoll Professor of Law, University of Michigan. I’m grateful to Jon Weinberg, who gave me very helpful comments and suggestions on earlier drafts of this essay, and to law librarians Keith Lacy and Rebecca Domm, who helped me track down crucial books and documents.

1 ASS’N AM. L. SCHS., DIRECTORY OF LAW TEACHERS IN LAW SCHOOLS IN THE UNITED STATES 1968-70 183 (1969).

2 State Univ. of New York at Buffalo School of Law, Electives Second Semester 1967-68, at 3 (manuscript on file with author).

3 Herman Finkelstein, *1968 Annual Report of the President of the Copyright Society of the USA*, 15 BULL. COPYRIGHT SOC’Y U.S.A. 285, 290–91 (1968).

4 See Lloyd L. Weinreb, *Copyright Unbound*, in BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT: REPUBLISHED (ANDS WITH CONTRIBUTIONS FROM FRIENDS) Wein-1, Wein-1 (2005) (“The copyright bar was a small, almost intimate, group of lawyers, who knew one another and had a proprietary attitude toward their field”). The ABA had renamed its Patent Law section the “Section of Patent Trademark and Copyright” in the 1920s. See George W. Jordan III, *ABA-IPL at 125 Years: Celebrating Exhilarating Accomplishments in IP*, 12 LANDSLIDE, Mar./Apr. 2020, at 1. By 1967, despite interest in the ongoing revision of the copyright law, membership on committees of the Section’s Copyright Division still significantly lagged membership in the patent and trademark divisions. See 1967 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT L. PROC. 12.

5 The affability of the copyright bar probably derived in part from its small size, in part from its homogeneity, and in part from its members’ sense that they belonged to what I have described in earlier work as a “priestly class of copyright-knowers.” See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 34 (2010). Like Ralph Brown and Ray Patterson before him and Alan Latman, Wendy Gordon, and Pam Samuelson after him, Goldstein would become a generous mentor to junior copyright scholars. The IP field earned a reputation in the 1990s for being unusually welcoming and supportive of entry-level law professors.

interest groups participating in the project had adverse interests, they seem to have shared a commitment to negotiating in good faith with a goal of arriving at solutions that would be sustainable for the copyright system going forward. More than 100 copyright lawyers attended one or more of the many discussions that the Copyright Office hosted to work out the substance of the revision bill as representatives of different copyright interests.⁶ Other lawyers submitted written comments on the draft bills or testified in Congressional hearings.⁷ Copyright-interested organizations followed the progress of the legislation closely, describing it at those meetings and responding to it in their publications and reports.⁸ Despite the fact that representatives of different copyright interests sought to achieve divergent goals, the discussions, as recorded in the Library of Congress transcripts of the conversations, seem to have been respectful, even cordial.⁹

The drafters of the 1976 Act, as other essays in this volume have described,¹⁰ sought to devise broad, flexible rules that would govern both present and future creators and distributors of copyrighted works. The design of the revision bill incorporated expansive exclusive rights and narrow bespoke exceptions tailored to then-current

6 See, e.g., STAFF OF H.R. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 33–36 (Comm. Print 1965) (listing those present at the August 6, 1964 discussion). The Kaminstein Legislative History Project indexes eighteen sessions at the Copyright Office. Congress published transcripts of those sessions in four volumes. See 1 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 xxxi–xxxiv (Alan Latman & James F. Lightstone eds., 1981) [hereinafter KAMINSTEIN PROJECT].

7 See, e.g., 1 KAMINSTEIN PROJECT, *supra* note 6, at 361–68 (listing witnesses and commenters on fair use during 1973 Hearings); *id.* at 414–17 (listing witnesses and commenters on the question of library copying during 1967 Hearings).

8 Like other members of the copyright professoriate, Goldstein focused on the copyright revision bill making its way through Congress in his scholarship written during the 1960s. See Paul Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 53–55, 73–84 (1969); Paul Goldstein, *Copyrighting the New Music*, 16 COPYRIGHT L. SYMP. 1, 7, 20–22 (1966), reprinted in 17 BUFF. L. REV. 355 (1968).

9 See, e.g., COPYRIGHT LAW REVISION PART 5, *supra* note 6, at 76–80 (colloquy); Robert W. Kastenmeier, *Revision Revisited*, 16 BULL. COPYRIGHT SOC'Y U.S.A. 269, 272 (1969).

10 R. Anthony Reese, *The Technological Afterlife of the 1976 Copyright Act*, 29 STAN. TECH. L. REV. [add page], [pincite] (2026).

copyright interests,¹¹ presumptively requiring anyone without a statutory exception to secure a license from the copyright owner before exploiting a copyrighted work. At the same time as the participating copyright interests sought to protect their turf against each other, they also sought to protect their business models from upstart competitors who might appear in the future.¹² As the future arrived, though, it became apparent that it was not unfolding in the ways that the drafters of the 1976 Act expected. To the extent that it served up unanticipated opportunities to extract commercial value from copyrighted works that escaped copyright owners' control, copyright owners insisted that that was unfair to them.¹³

As Tony Reese's essay in this volume explains, Congress has amended the 1976 more than 70 times since its original enactment,¹⁴ adding hundreds of pages to its length. Many of those amendments were billed as adjustments to close newly appreciated loopholes.¹⁵ Most of them reflect the result of negotiations among some or many of the affected interests. Sometimes, the bargaining has been hosted by the Copyright Office;¹⁶ sometimes, members of Congress have sought to kick-start

11 See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OREGON L. REV. 275, 320–32 (1989).

12 See JESSICA LITMAN, DIGITAL COPYRIGHT 40–45 (2017).

13 See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344–50 (2002); see, e.g., Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?*, 59 J. COPYRIGHT SOC'Y U.S.A. 627, 631 (2012) (complaining that copyright owners “are seeing their profits diverted to service providers who pay nothing for the ability to host and make copyrighted content available.”); Joint Comments of American Association of Independent Music et al., Section 512 Study, Docket No. 2015-7, at 3 (U.S. Copyright Office Mar. 31, 2016) (“At its worst, the DMCA safe harbors have become a business plan for profiting off of stolen content; at best, the system is a de facto government subsidy enriching some digital services at the expense of creators.”).

14 Reese, *supra* note 10, at [pincite].

15 *Id.*; see also, e.g., Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, app. I, 113 Stat. 1501A–521; Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386; Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237; Copyright Renewal Act of 1992, Pub. L. No. 102-307, tit. I, 106 Stat. 264; Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, tit. VIII, 104 Stat. 5089, 5134; Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990).

16 The 1909 Copyright Act and the 1976 Copyright Act were initially hammered out during meetings convened by the Librarian of Congress and Register of Copyrights, respectively, before

negotiations among copyright players;¹⁷ sometimes other government agencies have conducted the discussions;¹⁸ and, sometimes, interested parties have initiated bargaining on their own.¹⁹ I have written a fair amount about the disadvantages of negotiated statutes, but the process of crafting laws through negotiation among the interests the law will affect has the virtue of enabling copyright legislation to surmount political obstacles, and Congress and the copyright bar have relied on it since the early 20th Century.²⁰

If the copyright bar of the 1960s was like a cozy gentlemen's club, the copyright bar of the 2020s is more akin to a viper pit. Lawyers on all sides of controversial copyright issues recognize that the community of copyright lawyers has become deeply polarized, mistrustful, and prone to vicious insults. The pervasive sense of grievance that we copyright lawyers have come to take for granted has spoiled important legislation and is likely to continue to mess up our efforts to respond to technological challenges such as generative artificial intelligence. I have lost the confidence I once expressed that we would eventually give up the nastiness we've become accustomed to,²¹

being turned over to Congress for further negotiations. See DIGITAL COPYRIGHT, *supra* note 12, at 23–28, 40–43.

17 See, e.g., Press Release, Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium Copyright Act (Dec. 22, 2020), <https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act>.

18 The substance of the legislation that allowed the United States to join the Berne Convention was devised by an ad hoc committee of representatives of copyright interests appointed by the U.S. State Department. See Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 4–8 (1988). The Digital Millennium Copyright Act was crafted in negotiations held under the aegis of a Working Group formed as part of the Clinton Administration's Information Infrastructure Task Force and led by Commissioner of Patents Bruce Lehman. See DIGITAL COPYRIGHT, *supra* note 12, at 72–87, 103–25 (describing the history of the negotiations and drafting process that led to the DMCA).

19 The Audio Home Recording Act resulted from discussions that began as settlement talks in a class action infringement suit filed by song writers against Sony. See, e.g., Gary S. Lutzker, *Dat's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991 - Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 145–46, 180–82 (1992); Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 499–501 (1998).

20 See generally DIGITAL COPYRIGHT, *supra* note 12.

21 See, e.g., Jessica Litman, *What We Don't See When We See Copyright as Property*, 77 CAMBRIDGE L.J. 536, 537 (2018).

but I think that if we can't, legislation crafted by negotiation among copyright's most powerful players will result in new very bad laws.

How did we get here? By all accounts, the businesses that call themselves the “core copyright industries” are earning record profits,²² but still complain bitterly that current copyright law treats them unfairly.²³ Lots of different elements have contributed to the poisonous present, but one factor, I believe, is that copyright owners expected too much from the laws that they persuaded Congress to enact and have nursed increasing resentment over those laws' repeated failure to deliver what their proponents thought they had secured.

As new technologies threatened the balance that copyright lawyers hoped they had nailed down with the 1976 Act, they sought new legislation and pursued ambitious litigation to restore their clients to a position of dominance. There are lots of examples, but I'm going to focus on three: the enactment of the Digital Millennium Copyright Act,²⁴ the struggle to persuade Congress to pass the Stop Online Piracy Act,²⁵ and the successful effort to enact the Music Modernization Act²⁶ eight years ago. The unsuccessful attempts to persuade Congress to require online platforms to take more responsibility to prevent the posting of unlicensed material²⁷ and the failed efforts to hold online service providers liable for their customers' infringement to the tune of

22 See, e.g., *2025 Year End Recorded Music Revenue Report*, RECORDING INDUS. ASS'N AM., <https://www.riaa.com/wp-content/uploads/2026/03/RIAA-Year-End-Revenue-2025.pdf> (last visited Apr. 30, 2026); Jessica Dutra & Robert Stoner, *Copyright Industries in the U.S. Economy: The 2024 Report*, INT'L INTELL. PROP. ALL., at 1–2 (Feb. 2025). For a critique of the methodology underlying these reports and others like them, see Glynn S. Lunney, Jr., *Reflections on the Use and Misuse of Economic Analysis in Copyright*, 73 J. COPYRIGHT SOC'Y 183 (2026).

23 See, e.g., Letter from Keith Kupferschmid, Copyright Alliance CEO, to Reps. Darrell Issa and Henry Johnson (Dec. 13, 2023), <https://copyrightalliance.org/wp-content/uploads/2023/12/Copyright-Alliance-Piracy-Letter.pdf> (“[T]echnological changes, court rulings, and other unanticipated changes in the online environment have rendered [the DMCA] less effective, creating an ecosystem where ongoing mass piracy is an unfortunate and regular occurrence, and online infringement has increased exponentially and grown in sophistication, causing widespread harm to the economic and creative vibrancy of the copyright community.”).

24 Pub. L. No 105-304, 112 Stat. 2860 (1998).

25 H.R. 3261, 112th Cong. (2011).

26 Pub. L. No. 115-264, 132 Stat. 3676 (2018).

27 See U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17 (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

billions of dollars in statutory damages²⁸ are other episodes of the story. These efforts to enhance copyright owner control of the enjoyment of their works were less than fully successful. With each failure, copyright owners' frustration and their belief that their opponents must be acting in bad faith seem to have increased.

In the early 1990s, some copyright lawyers concluded that networked digital technology posed an existential threat to their clients' businesses.²⁹ Copyright-owner organizations insisted that unless they were assured extensive control over their copyrighted works, the supply of useful information would be drastically curtailed because copyright owners would refuse to make their works available over digital networks.³⁰ Indeed, they urged that nobody would bother to deploy new digital networks unless they could charge consumers hefty subscription fees to give them access to commercial entertainment and information. They argued that if copyright owners felt that the networks would be insufficiently protective of their copyrights, the Internet would never get built at all.³¹

Bruce Lehman, the Commissioner of Patents under the Clinton Administration and the chairman of a Working Group on Intellectual Property under the aegis of the Administration's Information Infrastructure Task Force, was confident that Congress could be persuaded to help. He (rather than the Copyright Office) took charge of managing the negotiations among copyright owners to devise copyright-friendly legislation to assuage industry fears.³²

Lehman modeled an aggressive, brass-knuckles version of legislative negotiation. He maneuvered around librarian, educator, and public interest organizations' insistence that any new laws make ample provision for fair use and users' rights by setting up a

28 See, e.g., *Cox Commc'ns, Inc. v. Sony Music Ent.*, 607 U.S. 583 (2026).

29 See generally U.S. Patent & Trademark Office, U.S. Dep't of Commerce, National Information Infrastructure Task Force Working Group on Intellectual Property, Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative 31 (Nov. 18, 1993).

30 See *id.* at 15–16 (testimony of Steve Metalitz).

31 See *id.* at 108–115 (testimony of Hilary B. Rosen, Recording Industry Ass'n of Am).

32 See *id.* at 7–14, 257–58 (remarks of Bruce A. Lehman, chairman, NII Task Force Working Group on Intellectual Property).

separate negotiation to address fair use and banishing substantive consideration of it from the bargaining table at which grownups got to sit.³³ When Lehman's working group was ready to send its final report and a draft of the legislation it recommended to Congress, the conference on fair use was still holding preliminary meetings and its recommendations formed no part of Lehman's proposed legislation.³⁴

Lehman's strategy was to assert that if the extant copyright law were interpreted properly, it already entitled copyright owners to exercise capacious control over digital uses of their works. The key to this new understanding was a breathtakingly expansive reinterpretation of the exclusive right to reproduce a work in copies, predicated on a very broad definition of what a copy was.³⁵ Nonetheless, Lehman's report didn't propose that Congress amend the statute to nail that understanding down. Instead, it recommended what it characterized as a few modest amendments.³⁶ First, it suggested defining the copyright owner's exclusive right to distribute copies to the public as including transmission.³⁷ It also proposed a new amendment making it illegal to hack copy protection technology.³⁸

The provisions of the Digital Millennium Copyright Act³⁹ evolved over the next five years.⁴⁰ A large number of copyright scholars objected that that the Lehman

33 See BRUCE A. LEHMAN, CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 2 (Nov. 1998).

34 See *id.*

35 See INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 64–66 (1995) [hereinafter 1995 WHITE PAPER].

36 See *id.* at 212.

37 See *id.* at 213–18.

38 See *id.* at app. 1, at 5–11.

39 Pub. L. No. 105-304, 112 Stat. 2860 (1998).

40 See, e.g., BILL D. HERMAN, THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY 37–57 (2013); DIGITAL COPYRIGHT, *supra* note 12, at 72–142; Bryan Bello & Patricia Aufderheide, *The Public Interest and the Information Superhighway: The Digital Future Coalition (1996–2002) and the Afterlife of the Digital Millennium Copyright Act*, 56 INFO. & CULTURE 49 (2021); Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 129–50 (2006); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 1, 19–25 (1999).

Report's characterization of extant law was not only misleading, but inexcusably so.⁴¹ Some of those academics talked to journalists and to communication and technology companies that hadn't been paying attention.⁴² The tech companies found the notion that they be held strictly liable whenever any individual made infringing use of their equipment to be ridiculous and impractical.⁴³ As the negotiations over the provisions of the statute dragged on, copyright rhetoric grew nastier. That conflict marked the beginning of what many of us called the copyright wars.⁴⁴ Supporters of the legislation that became the DMCA portrayed opponents as anti-copyright and enemies of copyright.⁴⁵ In a widely publicized incident, Bruce Lehman threatened a law professor who spoke out critically of his agenda with both professional ruin and grievous bodily harm.⁴⁶

Ultimately, Congress enacted the broad prohibition on circumventing copy protection, with no exception for fair use, coupled with procedural provisions to encourage service providers to block content on their servers whenever copyright owners identified it as infringing. The DMCA had ballooned from an initial draft that was nine pages long⁴⁷ to a sixty page amendment to the copyright law that contained

41 See, e.g., An Open Letter to Senator Orrin Hatch, Senator Patrick Leahy, Representative Carlos Moorhead, The Honorable Ron Brown, and Vice-President Al Gore, *reprinted in* James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 HARV. J.L. & TECH. 47, 60 (1996) (letter signed by over 100 law professors disputing the White Paper's characterization of copyright law); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 30–32 (1994); Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403 (1994).

42 See, e.g., James Boyle, *Overregulating the Internet*, WASH. TIMES, Nov. 14, 1995, at A17; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134.

43 See DIGITAL COPYRIGHT, *supra* note 12, at 108–09, 115–16.

44 See, e.g., WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009); Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC'Y U.S.A. 1 (2006); Jonathan Zittrain, *How to End the Copyright Wars*, 457 NATURE 264 (2009).

45 See, e.g., I. Fred Koenigsberg, *Humpty Dumpty in Copyrightland*, 51 J. COPYRIGHT SOC'Y U.S.A. 677, 680 (2004); Henry Horbachewski, *Copyright Under Siege: Reflections of an In-House Counsel*, 53 J. COPYRIGHT SOC'Y U.S.A. 387, 394 (2006).

46 See Ruth Larson, *Patent Chief Accused of Furious Threats - Critical Opinion Article Sparked Dispute*, WASH. TIMES, Feb. 20, 1996, at A6; James Boyle, *Letter to the Editor: The One Thing Government Officials Can't Do Is Threaten Their Critics*, WASH. TIMES, Mar. 6, 1996, at A16.

47 See H.R. 2441, 104th Cong. (1995) (9 pages); see also 1995 WHITE PAPER, *supra* note 35, app. A (12 pages).

lots of items that copyright owner groups had added from their wish lists.⁴⁸ The academic opposition to the provisions of the Digital Millennium Copyright Act turned out to be a minor annoyance, about as irritating and ineffective as a large swarm of gnats, that didn't affect the law's enactment and barely even delayed it.

But, even though copyright-owner interests had achieved enactment of much of what they had sought, the DMCA did not end up giving them the protection they expected it to provide. When copyright owners insisted on rules forbidding circumvention of copy or access protection, they had anticipated that technology would soon supply effective tools for preventing unauthorized uses of copyrighted works.⁴⁹ That expectation proved to be unwarranted.⁵⁰ Meanwhile, as they waited for impregnable copy protection to be invented, record labels and motion picture studios withheld their works from licensed digital release and sued any businesses that offered unlicensed access.⁵¹ Shortly after the ink on President Clinton's signature was dry, Napster introduced the world to peer-to-peer file sharing of recorded music.⁵² The drafters of the DMCA had failed to anticipate Napster, and the statute's provisions for quickly identifying and blocking infringing material didn't supply effective tools for responding to file sharing.⁵³ With no authorized option for online music, tens of millions of consumers quickly became Napster adopters.⁵⁴ Record labels and music publishers sued Napster into bankruptcy, but then had to do the same to its many successors.⁵⁵ Finally, while copyright owners were withholding their content from online distribution, internet platforms figured out that they could earn even more money by selling eyeballs

48 Back in 1998, a 60-page amendment seemed crazy-long. The entire 1976 Copyright Act had been only 61 pages long. See Pub. L. No. 94-553, 90 Stat. 2541 (1976).

49 See Jessica Litman, *Imaginary Bottles*, 18 DUKE L. & TECH. REV. 127, 129 (2019).

50 See CORY DOCTOROW, INFORMATION DOESN'T WANT TO BE FREE 14–20 (2014); JOHN ALDERMAN, SONIC BOOM: NAPSTER, MP3, AND THE NEW PIONEERS OF MUSIC 91–94, 109–10 (2001).

51 See Litman, *Imaginary Bottles*, *supra* note 49, at 129; Jessica Litman, *Antibiotic Resistance*, 30 CARDOZO ARTS & ENT. L.J. 53 (2012).

52 See *A&M Recs. v. Napster*, 339 F.3d 1004, 1011 (9th Cir. 2001).

53 See *Recording Indus. Ass'n Am., Inc. v. Verizon*, 351 F.3d 1229, 1235–36 (D.C. Cir. 2003).

54 See JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 133–35 (2003); ALDERMAN, *supra* note 50, at 103–04.

55 See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

to advertisers than they could by selling films to viewers or songs to listeners.⁵⁶ The platforms that adopted that approach then proceeded to earn tons of money. Copyright owners complained that much of that money should rightfully be theirs.⁵⁷

Owners of motion picture and sound recording copyrights went back to Congress seeking a new law that would enable them to block internet sites that hosted infringing files, which they characterized as “rogue websites.”⁵⁸ This time, they embodied the language they wanted in legislation without attempting to persuade any businesses in the technology sector to support it. Register of Copyrights Maria Pallante testified in favor of the Stop Online Piracy Act (SOPA),⁵⁹ and copyright lobbyists had enough influence over members of Congress to pressure House Judiciary Committee Chairman Lamar Smith to power through a marathon two-day markup session in an effort to get the bill to the House floor.⁶⁰ Ultimately, a rare grassroots protest organized a widespread Internet blackout for a day in protest of SOPA, and members of Congress

⁵⁶ See Amanda Parsons & Salome Viljoen, *Valuing Social Data*, 124 COLUM. L. REV. 993, 1025 (2024); see, e.g., Google Public Policy, *How Google Makes Money With Ads*, <https://publicpolicy.google/article/how-google-makes-money-with-ads/> (last visited July 10, 2026); Meta, *Meta Ads*, <https://www.facebook.com/business/ads> (last visited July 10, 2026); TIKTOK, *TikTok for Business*, <https://ads.tiktok.com/business/en> (last visited July 10, 2026).

⁵⁷ See Glenn Peoples, *War of Words: Labels and Trade Groups Target YouTube’s “Value Gap”*, BILLBOARD (Apr. 13, 2016), <https://www.billboard.com/articles/business/7333110/war-of-words-labels-trade-groups-youtube-value-gap>; Cary Sherman, *Medium: Five Stubborn Truths about YouTube and the Value Gap*, RECORDING INDUS. ASS’N AM. (Aug. 18, 2017), <https://riaa.medium.com/five-stubborn-truths-about-youtube-and-value-gap-4faff133271f>.

⁵⁸ See generally *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites (Parts 1 & 2): Hearing Before the Subcomm. on Intellectual Property of the H. Comm. on the Judiciary*, 112th Cong. (2011).

⁵⁹ See *Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 47–49 (2011) (testimony of Maria Pallante, Register of Copyrights).

⁶⁰ See H.R. 3261, 112th Cong., H. Comm. on the Judiciary, Markup (Dec. 15–16, 2011).

backed away from supporting it.⁶¹ Many copyright owners blamed Google,⁶² even though Google had joined the protest only reluctantly and late.⁶³

The copyright bar's notion that it could compel new players to follow rules crafted by old players just by telling them they have to has always been more of a wish than an assurance. Insisting that new players play by the rules written by old players will often fail if the new players decline to go along. After SOPA's failure, Paramount Vice President Alfred Perry launched a university tour to rehabilitate the reputation of rogue-websites legislation. One of his stops was my copyright classroom.⁶⁴ My students asked Mr. Perry why, if the motion picture industry viewed this legislation as essential to its survival, it had supported a draft bill that contained egregiously overreaching provisions sure to spark fierce opposition. Mr. Perry explained that the proponents of SOPA anticipated that opponents would come forward with demands for modifications that would diminish some of the bill's more extreme provisions, and that they planned to accede to some of those demands. They had drafted the bill so expansively and without the input of likely opponents on the theory that such a strategy would put them in the best bargaining position in ensuing negotiations. The strategy backfired.⁶⁵

The unexpected defeat nonetheless inspired some conspiracy-minded copyright lobbyists to imagine a shadowy cabal of anti-copyright scholars commissioned by Darth Google to write and publish anti-copyright screeds. Oracle, which was in the midst of a

61 See CHRISTOPHER S. REED, *THE UNREALIZED PROMISE OF THE NEXT GREAT COPYRIGHT ACT: U.S. COPYRIGHT POLICY FOR THE 21ST CENTURY* 94-97 (2019); see generally *HACKING POLITICS: HOW GEEKS, PROGRESSIVES, THE TEA PARTY, GAMERS, ANARCHISTS AND SUITS TEAMED UP TO DEFEAT SOPA AND SAVE THE INTERNET* (David Moon, Patrick Ruffini & David Segal eds., 2013).

62 See, e.g., Henry Horbaczewski, *No Silver Lining for the Emperor's New Clothes: Golan and the Traditional Contours of Copyright*, 59 J. COPYRIGHT SOC'Y U.S.A. 865, 875-76 (2012); David Newhoff, *EFF, Public Knowledge, et al. Celebrate Defeat of SOPA/PIPA Out of the Blue*, ILLUSION OF MORE (Mar. 18, 2012), <https://illusionofmore.com/eff-public-knowledge-et-al-celebrate-defeat-of-sopa-pipa-out-of-the-blue>.

63 See *HACKING POLITICS*, *supra* note 61, at 51; Kim Hart, *Google Joins SOPA Protest*, POLITICO (Jan. 17, 2012), <https://www.politico.com/story/2012/01/google-joins-sopa-protest-sans-blackout-071545>.

64 See Letter from Alfred Clinton Perry, Vice President Worldwide Content Protection & Outreach, Paramount Pictures, to author, Feb. 2, 2012 (on file with author); email from Alfred Perry, Alfred_Perry@Paramount.com (Mar. 15, 2012 10:01:25 PM EST) (on file with author).

65 See *DIGITAL COPYRIGHT*, *supra* note 12, at 183.

long-running copyright infringement suit against Google,⁶⁶ helped to fund the “Google Transparency Project,”⁶⁷ an astroturf organization that published a study purporting to find direct Google financial support of scholarship advancing positions consistent with its supposed agenda. In 2017, the organization reported that “Google has exercised an increasingly pernicious influence on academic research, paying millions of dollars each year to academics and scholars who produce papers that support its business and policy goals.”⁶⁸ In fact, the list of compromised academics was wildly over-inclusive: It fingered any scholar who had ever worked at any institution that had received funding from Google for any project, or collaborated with such a scholar, as well as some who had not, but whose work had been cited by lawyers for Google in briefs.⁶⁹ The rhetoric grew nastier.⁷⁰

In 2015, the Copyright Office released a study on music licensing.⁷¹ The study concluded that the music licensing market was broken and made sensible suggestions for simplifying and modernizing it.⁷² The Copyright Office’s suggestions, though, were poorly received by entrenched intermediaries, largely because they would have required

66 See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021).

67 See Jeff John Roberts, *Oracle Is Funding a New Anti-Google Group*, *Fortune* (Aug. 19, 2016), <https://fortune.com/2016/08/19/google-transparency-project-2/>.

68 *Google Academics, Inc.*, TECH TRANSPARENCY PROJECT (July 11, 2017), <https://www.techtransparencyproject.org/articles/google-academics-inc>; see Brody Mullins & Jack Nicas, *Paying Professors: Inside Google’s Academic Influence Campaign*, *WALL ST. J.* (July 14, 2017), <https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286>.

69 See Annemarie Bridy & Aaron Perzanowski, *Op-Ed: Has Google Paid Off an Army of Academic Researchers?*, *L.A. TIMES* (July 21, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-bridy-perzanowski-google-tp-20170721-story.html>; Chris Quintana, *Scholars Cry Foul at Their Inclusion on List of Academics Paid by Google*, *CHRON. HIGHER EDUC.* (July 12, 2017), <https://www.chronicle.com/article/Scholars-Cry-Foul-at-Their/240635>; Nathalie Maréchal, *Those Reports on Google Funding Academic Research May Be 99% Nonsense, but We Should Talk About the Other 1%*, *MEDIUM* (July 19, 2017), <https://medium.com/@nathaliemarechal/those-reports-on-google-funding-academic-research-may-be-99-nonsense-but-we-should-talk-about-16917089cb77>; Adam Rogers, *Google’s Academic Influence Campaign: It’s Complicated*, *WIRED* (July 14, 2017), <https://www.wired.com/story/googles-academic-influence-campaign-its-complicated/>.

70 See, e.g., MARK HELPRIN, *DIGITAL BARBARISM: A WRITER’S MANIFESTO* 33, 35 (2009); Horbachewski, *supra* note 45, at 397–99.

71 U.S. COPYRIGHT OFF., *COPYRIGHT AND THE MUSIC MARKETPLACE* (Feb. 2015).

72 *Id.* at 1–11 (executive summary).

them to cede turf to one another.⁷³ Rather than use the Office's recommendations as a template, the major music publishers, major labels, and dominant digital platforms negotiated their own modernization solutions.⁷⁴ Instead of simplifying and rationalizing the many extant licenses, they added a new one, to be administered by a new intermediary, which was defined in terms crafted to ensure that it would be controlled by major music publishers.⁷⁵

The Music Modernization Act is long, complicated, wordy, and studded with unexpected incidents of self-dealing.⁷⁶ For example, tucked into the middle of the long and verbose bill, at page 52 of 155, was a provision directing the new intermediary to distribute royalties for works whose owners it could not identify to the music publishers with the largest market share.⁷⁷

Here's another example: The Copyright Office had suggested that sound recordings fixed before 1972 be brought within the federal copyright system on the same terms as more recent sound recordings.⁷⁸ Record labels found that suggestion untenable. First, labels' title to the many pre-1972 sound recordings they claimed to own was cloudy. Federal copyright protection had since 1790 required that assignments of copyright be made by a written instrument.⁷⁹ In the 1950s and 1960s, many record

73 The Copyright Office recommended that the current system for licensing musical works be replaced by one that enabled one-stop shopping for prospective licensees. The report proposed that mechanical reproduction licensing agencies like the Harry Fox Agency and performing rights organizations like ASCAP would be replaced by or would evolve into collective licensing bodies named music rights organizations, or "MROs." MROs would be able to grant licenses for reproduction, distribution, and public performances. Existing licensing entities, such as ASCAP or the Harry Fox Agency, could become MROs by securing the necessary additional rights from composers and music publishers. In addition, the government would establish a general MRO ("GMRO") to grant licenses for the use of works that were not represented by an MRO, and to collect and coordinate data about which MROs licensed which uses of which songs. *See id.* at 189–97.

74 Major labels and major music publishers are under common ownership, so their interests are often aligned. *See* REBECCA GIBLIN & CORY DOCTOROW, *CHOKEPOINT CAPITALISM* 52–95 (2022).

75 *See* 17 U.S.C. § 115(d)(3)(A)(ii).

76 *See* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519 (2019).

77 *See* H.R. 5447, 115th Cong. §102(d)(3)(J)(II) (2018).

78 COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 71, at 3, 140–42.

79 *See* Copyright Act of 1790, § 2, 1 Stat. 124; Act of Feb. 3, 1831, ch. 16, §§ 6–7, 4 Stat. 436, 437–38; Rev. Stat. §§ 4964–4965 (1875); Act of Mar. 4, 1909, ch. 320, § 42, 35 Stat. 1075, 1084.

labels had acquired rights in sound recordings by means that did not include a written assignment.⁸⁰ Some labels owned such rights as they claimed in pre-1972 sound recordings as a result of parol transfer or adverse possession.⁸¹ Even where the copyright in a sound recording had been assigned in writing, it was unlikely that the current owner could lay hands on a copy of that assignment. Second, extending copyright to sound recordings fixed before 1972 on the same terms as sound recordings fixed later might potentially subject those copyrights to termination of transfer. The major record labels insisted that they preferred no federal copyright in pre-1972 sound recordings to a copyright that might be subject to termination.⁸² The labels proposed instead the very peculiar provisions enacted as section 1401. Section 1401 confers rights, which are not copyright rights, on whoever or whatever was the owner, on October 10, 2018, of state law reproduction rights in a sound recording fixed before 1972.⁸³ The new rights entitle the owner to recover the remedies for copyright infringement as if it owned a copyright, which it doesn't, in the event anyone does anything that would have counted as copyright infringement if the owner owned a copyright, which it does not.⁸⁴ All the obfuscation apparently ensures that the labels get the benefits of something equivalent to copyright without having to worry about either their cloudy title problems or a future termination of their rights. Section 1401 was sold to Congress as something that would redound to the benefit of the recording artists who had made those recordings, rather than as a naked wealth transfer from those artists and their estates to the record labels exploiting their recordings.⁸⁵

80 See, e.g., *Greenfield v. Philles Records*, 98 N.Y.2d 562, 567–68 (2002) (“[D]efendants initially denied the existence of a contract, [but later] stipulated that an unexecuted copy of the contract would determine the parties’ rights.”).

81 See Jessica Litman, *Authorship Nonsense*, 73 J. COPYRIGHT SOC’Y 101, 132 (2026).

82 See Recording Indus. Ass’n Am. & Am. Ass’n Indep. Music, Comment Letter on Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972 (Jan. 31, 2011), <https://www.copyright.gov/docs/sound/comments/reply/041411riaa-aaim.pdf>.

83 See 17 U.S.C. § 1401(l)(2)(A).

84 See 17 U.S.C. § 1401(a)(1).

85 See, e.g., *Protecting and Promoting Music Creation for the 21st Century: Hearing on S.2823 Before the S. Comm. on the Judiciary*, 115th Cong. (May 15, 2018), <https://www.judiciary.senate.gov/imo/media/doc/92781662-5056-A066-60B4-B65206CF6FF9/05-15->

Major record labels and major music publishers report that in the years since the Music Modernization Act took effect, they've been prospering.⁸⁶ Songwriters and recording artists, not so much.⁸⁷

Let's review. Organizations representing copyright owners hoped that the broad rights and narrow exceptions embodied in the 1976 Copyright Act would future-proof the law against technological change. That didn't work out as expected, and copyright owners have repeatedly asked Congress to enhance their rights to enable them to surmount unanticipated technological challenges. Congress has often, if not always, been willing to go along. To the extent that the bills were sold to Congress as measures that would put money into authors' pockets, they haven't delivered. To the extent that copyright owners expected the bills to enable them finally to exercise complete control over the dissemination and enjoyment of copyrighted works, they haven't delivered on that promise, either. Nonetheless, the annual reports of businesses that count themselves members of the "core copyright industries" indicate that they are earning ample and in some cases record profits from their exploitation of copyrighted works.⁸⁸ In their shoes, a business might declare victory and count its money.

18%20Glazier%20Testimony.pdf (statement of Mitch Glazier, President, RIAA) (saying "[i]t's time to modernize music law to assure that the artists who created these works, which are some of the most popular on streaming services, receive the compensation intended").

86 See *Five Years Later: The Music Modernization Act, Hearing Before the H. Comm. on the Judiciary*, 118th Cong. 44 (2023) (testimony of Michael Molinar, President, Big Machine Music). Not everything is jolly and harmonious even for the major players who drafted the MMA for their own benefit. The MLC (the new licensing intermediary) sued Spotify in 2024, claiming that Spotify was misinterpreting the language of rate setting regulations embodying a settlement among music publishers and streaming services, and as a result was underpaying royalties. See *Mech. Licensing Collective v. Spotify USA Inc.*, No. 24 Civ. 3809, 2025 WL 2733228 (S.D.N.Y. Sept. 25, 2025). That litigation is ongoing.

87 See, e.g., *Five Years Later*, *supra* note 87, at 50–51 (testimony of Abby North); *Comments of the Songwriters Guild of America, the Society of Composers and Lyricists, and Music Creators North America Re: Periodic Review of the Designations of the Mechanical Licensing Collective and Digital Licensee Coordinator (Docket # 2024-1)* (May 29, 2024), <https://thescl.com/news/scl-calls-for-protections-amidst-first-re-designation-process-of-mechanical-licensing-collective-and-digital-licensee-coordinator/>. See also CHOKEPOINT CAPITALISM, *supra* note 74, at 66–77.

88 See, e.g., Paul Resnikoff, *DMN Pro Weekly: Core Music Industry Funding Nearly Crossed \$5 Billion in Q1. Now, It Looks Like Q2 Will Be Even Bigger*, Digital Music News Pro (May 11, 2026), <https://www.digitalmusicnews.com/pro/wkly-2026-05-11-core-music-funding-q1-april-2026/>; 2025 Year End Recorded Music Revenue Report, *supra* note 22; Dutra & Stoner, *supra* note 22.

But the habit of name calling and complaining may be too hard to break. The latest target of copyright owner ire is the American Law Institute, which apparently earned copyright lawyer wrath by having the temerity to adopt a Restatement of Copyright Law.⁸⁹

In 2011, the American Law Institute announced to its membership that the ALI was considering beginning a project on copyright law.⁹⁰ The ALI is deliberative, and everything that it does takes a long time. It wasn't until October of 2014 that the organization committed to producing a Restatement of Copyright Law.⁹¹ It appointed five highly respected, senior copyright scholars to act as Reporters.⁹² Given the polarization and mistrust that had grown up among members of the copyright bar, it was understandable that some representatives of copyright owners would view any copyright project conducted on foreign turf as a potential threat to their agenda. Indeed, the ALI leadership had anticipated that the project would attract controversy.⁹³ It invited copyright lawyers from many points on the copyright political spectrum to serve as Advisers on the project or Liaisons from other organizations involved in copyright law.⁹⁴ By involving copyright lawyers holding diverse viewpoints, ALI

89 See A.L.I., *Restatement of the Law, Copyright*, <https://www.ali.org/project/copyright> (last visited May 11, 2026); *Understanding the Restatement of Copyright Law*, ALI ADVISER, <https://www.thealiadviser.org/projects/copyright/> (last visited May 14, 2026). In Jeanne Fromer & Jessica Silbey, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J.L. & ARTS 341 (2021), Professors Fromer and Silbey take the criticisms of the Copyright Restatement seriously and defend the project on its merits.

90 See *Tuesday Morning Session: May 17, 2011*, 88 A.L.I. PROC. 105, 105–23 (2012).

91 See 2013 A.L.I. ANN. REP. 5 (2013–2014).

92 The five Reporters were Christopher Sprigman, currently the Murray and Kathleen Bring Professor of Law at NYU; Molly S. Van Houweling, currently the Harold C. Hohbach Distinguished Professor of Patent Law and Intellectual Property at Berkeley; Daniel Gervais, the Milton R. Underwood Chair in Law at Vanderbilt; R. Anthony Reese, Chancellor's Professor of Law at the University of California-Irvine; and Lydia Loren, the Henry J. Casey Professor of Law at Lewis & Clark. See *Monday Afternoon Session: May 18, 2015*, 92 A.L.I. PROC. 60, 101–11 (2016). Three of the five Reporters were co-authors of widely adopted copyright casebooks. See JEANNE FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* (7th ed. 2025); JULIE COHEN, LYDIA LOREN, RUTH OKEDIJI & MAUREEN O'ROURKE, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* (5th ed. 2020); ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, *COPYRIGHT: CASES AND MATERIALS* (10th ed. 2024).

93 See 92 A.L.I. PROC. at 101 (remarks of Deputy Director Stephanie Middleton).

94 See RESTATEMENT OF THE LAW, COPYRIGHT vii–viii (A.L.I., Tentative Draft No. 1, 2020) (listing Advisers and Liaisons). I served as an Adviser throughout the project and in that capacity read the drafts, read the comments, and attended all of the project meetings. I will describe, in general terms,

leadership both hoped to encourage widespread buy-in to the project and to give the Reporters the benefit of advice and objections from all quarters.⁹⁵ Predictably, some members of the copyright bar launched a preemptive campaign to persuade the ALI to change its mind and cancel the project.⁹⁶

The “Stop ALI” campaign to prevent the ALI from generating a copyright Restatement was so over-the-top that it undermined its own possible effectiveness. Initially, opponents of a Restatement project raised a largely pretextual⁹⁷ objection that a Restatement would be inappropriate for an area of law dominated by a federal statute.⁹⁸ When those objections failed to dissuade the ALI from moving forward, opponents of the project shifted their strategy to attempt to attack and discredit the individual Reporters appointed to work on the project. The Reporters, objectors

what transpired at those meetings but will not quote unpublished comments. Professors Fromer and Silbey, who are ALI members and who participated in the project, have archived at perma.cc copies of some of the comments posted by project participants. *See* Fromer & Silbey, *supra* note 90, at 342–43.

95 *See* Daniel Gervais, Lydia Loren, R. Anthony Reese, Christopher Jon Sprigman & Molly Van Houweling, *Restating Copyright: The ALI’s Landmark Project and What It Means for the Law*, KLUWER COPYRIGHT BLOG (July 29, 2025), <https://legalblogs.wolterskluwer.com/copyright-blog/restating-copyright-the-alis-landmark-project-and-what-it-means-for-the-law/>.

96 *See* Letter from American Photographic Artists and 17 Other Organizations to Roberta Ramos and Other ALI Officers (Oct. 14, 2015) (posted as Exhibit B at <https://authorsguild.org/app/uploads/2022/09/Letter-re-ALI-Council-010918.pdf>); STOP ALI, <https://www.stopali.com> (Aug. 18, 2019) (archived at <https://web.archive.org/web/20200812131203/https://www.stopali.com/>); Fromer & Silbey, *supra* note 90, at 342.

97 The ALI has authored influential Restatements for other legal fields dominated by federal statutes. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION (A.L.I. 1995). Copyright is a field in which the statute is wrapped around a thick core of judge-made law that Congress elected to leave undisturbed. Those judge-made doctrines contain copyright’s most vexing problems; those problems were the parts that the proponents of the Restatement hoped that it would address.

98 Professors Fromer and Silbey quote and then refute these arguments. *See* Fromer & Silbey, *supra* note 90, at 342–61. Opponents of a copyright restatement included scholars as well as practitioners. For a taste of academics’ objections, *see, e.g.*, Shyamkrishna Balganesh & Jane C. Ginsburg, *Preface: The Past, Present, and Future of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 279 (2021); June M. Besek et al., *The ALI Copyright Restatement Project: A Horse of a Different Color?*, Proceedings of the Twenty-Sixth Annual Conference International Intellectual Property Law & Policy, Fordham University School of Law Skadden Conference Center, New York, New York, Apr. 6, 2018, available at <https://ssrn.com/abstract=3200429>.

claimed, were biased.⁹⁹ They were “notoriously anti-creator copyleft irritators.”¹⁰⁰ Google was bribing them to misstate the law.¹⁰¹ The Reporters had conflicts of interest.¹⁰² Reporter Christopher Sprigman had represented too few copyright clients to be qualified to work on the Restatement.¹⁰³ Alternatively, Sprigman had represented clients in copyright cases, but they were the wrong clients¹⁰⁴ (on the theory, I guess, that real copyright lawyers represent plaintiffs but not defendants). Continuing to rely on

99 See David Newhoff, *Ideologues Seek Revision of Copyright Law Without Legislative Process*, ILLUSION OF MORE (Jan. 23, 2018), <https://illusionofmore.com/ideologues-seek-revision-of-copyright-law-without-legislative-process/> (“[F]ive Reporters are known to be highly critical of copyright with particular bias toward the anti-copyright agenda of internet companies.”); Kevin Madigan, *Concerns Over ALI Copyright Restatement Leave Project in Limbo*, MISTER COPYRIGHT (Jan. 31, 2018), <https://mistercopyright.org/concerns-over-ali-copyright-restatement-leave-project-in-limbo/> (“Sprigman has been a persistent supporter of the big tech companies who stand to benefit from a neutering of copyright law.”).

100 See Dina LaPolte, *Beware a Sneak Attack on Creators’ Rights (Guest Op-Ed)*, BILLBOARD PRO (Oct. 15, 2018), <https://www.billboard.com/pro/dina-lapolt-copyright-american-law-institute-creators-rights-op-ed/> (“[M]ost notoriously anti- creator copyleft irritators, many with financial ties to big tech companies[.]”); see also, e.g., Press Release, Nat’l Music Publishers Ass’n, NMPA Denounces ALI’s Copyright Restatement Project (Oct. 17, 2018), <https://www.nmpa.org/nmpa-denounces-alis-copyright-restatement-project/> (“[E]xtremist anti-copyright lawyers[.]”); Artists Rights Alliance, *A New Front in the War on Creators*, MEDIUM (Jan. 19, 2018) <https://artistrightsnow.medium.com/war-against-artists-online-d3946739db42> (“[A]nti-artist, anti-copyright ringers who have spent careers taking extreme positions against creators and their rights.”).

101 See, e.g., Content Creators Coalition, *The American Law Institute’s Biased Restatement of Copyright*, STOP ALI (Dec. 5, 2020), <https://www.stopali.com> (archived at <https://web.archive.org/web/20201205031749/https://www.stopali.com/>)

Google-funded academics have hijacked the process. They aren’t summarizing the law – they are trying to change it to protect Google and take away artists’ rights. It’s no surprise – in the past, these authors (or “Reporters” as the ALI calls them) have called copyright “obsolete” and “a tax on culture”. They say internet piracy is just another form of “promotion” that “spurs innovation.”

See also Chris Castle, *Shocker: Is Spotify Lawyer Leading “Scholarly” Project to Create Fake Treatise?*, MUSIC TECH. POL’Y (Jan. 18, 2018), <https://musicechpolicy.com/2018/01/18/shocker-is-spotify-lawyer-leading-scholarly-project-to-create-fake-treatise/> (suggesting that Google is secretly paying for Restatement project).

102 See, e.g., David Newhoff, *ALI Proceeds Toward Vote on Restatement of Copyright, Critics Ignored*, ILLUSION OF MORE (June 4, 2021), <https://illusionofmore.com/ali-proceeds-toward-vote-on-restatement-of-copyright-critics-ignored/>.

103 See Scott Alan Burroughs, *Intellectual Property: ALI’s Great Copyright Caper: Has The American Law Institute Been Hijacked By Big Tech?*, ABOVE L. (Jan. 24, 2018), <https://abovethelaw.com/2018/01/alis-great-copyright-caper-has-the-american-law-institute-been-hijacked-by-big-tech/>.

104 See, e.g., Newhoff, *supra* note 100.

the Reporters' work, opponents warned, would besmirch the ALI's previously sterling reputation.¹⁰⁵

None of these accusations were well-founded, and the individual Reporters bore them with extraordinary patience and grace for more than a decade. Perhaps recognizing that their grounds for attacking the Reporters' integrity or qualifications were unpersuasive, some opponents broadened their attacks to complain that the entire project was the brainchild of the dreaded Professor Pam Samuelson,¹⁰⁶ a longtime ALI

105 See, e.g., Letter from American Photographic Artists, *supra* note 97 ("The Institute's reputation for objectivity and neutrality is one of its most valuable assets. We are concerned that the ALI will jeopardize this reputation by undertaking an advocacy-oriented project, under the banner of a Restatement, which is designed to recommend extensive changes in existing federal law and is led by a Reporter who has demonstrated a commitment to a particular viewpoint.").

106 See, e.g., Ruth Vitale, *American Law Institute Members: Reject ALI's 'Restatement of Copyright'*, THE HILL (June 2, 2021), <https://thehill.com/blogs/congress-blog/judicial/556421-american-law-institute-members-reject-alis-restatement-of/>.

Pamela Samuelson is the Richard M Sherman Distinguished Professor of Law at Berkeley Law School, and is widely acknowledged to be an exceptionally influential IP scholar. See, e.g., Molly Van Houweling, *Preface: Pamela Samuelson and the Promotion of Progress*, 39 BERKELEY TECH. L.J. 1079 (2024). Because she has been a generous mentor over the course of her long career, she has supported and influenced scores of IP lawyers and IP scholars. Anyone who calls Samuelson "anti-copyright" has clearly not read her scholarship, which is meticulous, moderate, and extremely respectful of copyright law. See, e.g., Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417 (2016); Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17 (2016). Many folks are annoyed with Professor Samuelson for having organized influential conferences at the Berkeley Center for Law & Technology in 1998 on the proposed Article 2B of the Uniform Commercial Code and in 2009 at the Berkeley School of Information on the proposed Google Book Settlement. See Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: Forward to a Symposium*, 87 CAL. L. REV. 1 (1999); *The Google Books Settlement and the Future of Information Access*, UC BERKELEY SCH. INFO (Aug. 28, 2009), <https://www.ischool.berkeley.edu/events/2009/google-books-settlement-and-future-information-access>. Both efforts faced significant headwinds following the conferences. Others are upset with her for donating money to several law schools to fund intellectual property clinics in which students can gain hands-on experience representing real clients involved in intellectual property law disputes. See, e.g., Castle, *supra* note 102 ("The ALI Restatement of Copyright seems to have been the brainchild of one Pamela Samuelson, she of the Samuelson-Glushko technology and policy legal academic centers—Silicon Valley's answer to the Confucious [sic] Institutes."); *5 Reasons the EFF's New Board Chair is Terrifyingly Anti-Copyright*, CREATIVE FUTURE BLOG (Oct. 30, 2019), <https://www.creativefuture.org/pamela-samuelson/> ("In 2001, Samuelson established an entire collegiate law program committed to anti-copyright causes in the digital age[.]"). Among other projects, the clinics have helped to draft briefs on behalf of non-profit clients that have taken positions that some members of the copyright bar disagree with. See, e.g., Brief for Consumers Federation of America and Consumers Union as Amici Curiae Supporting Respondent, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-461) (filed by American University Washington College of Law Glushko-Samuelson Clinic); Brief for Accessibility, Security, and Repair Fair

member who was neither a Reporter nor a member of ALI leadership, but who had publicly expressed support for the idea of the ALI's taking on a copyright project (although not a Restatement).¹⁰⁷

The ALI held periodic meetings to allow Advisers, Liaisons, and interested ALI members to give Reporters comments on their initial drafts.¹⁰⁸ Participants who had objected to the project sought to use these meetings to prevent the project from moving forward and were frustrated when those efforts failed. Some of the same lawyers who had initially complained that a Restatement project was inappropriate given the importance of the underlying statute to the substantive law now demanded that if the project were to proceed, the Reporters should give the statutory language more prominence in the document. Indeed, rather than paraphrasing the statute, the Reporters should transpose the statutory language verbatim into their drafts.¹⁰⁹ For the

Users as Amici Curiae Supporting Appellants, *Green v. U.S. Dep't Just.*, 54 F.4th 738 (D.C. Cir. 2022) (No. 21-05195) (filed by Samuelson-Glushko Tech. Law & Policy Clinic at Colorado Law). Some individuals may secretly resent Samuelson because, in 1997, she received a MacArthur "genius" grant, and, so far, they have not. Maurice M. Krochmal, *Fighting the Copyright War With a 'Genius Grant' in Hand*, N.Y. TIMES (June 28, 1997), <https://archive.nytimes.com/www.nytimes.com/library/cyber/week/062897samuelson.html>. The ALI asked Samuelson to serve as an Adviser to the Restatement project but did not appoint her as a Reporter. See, e.g., RESTATEMENT OF THE LAW, COPYRIGHT vii–viii (A.L.I., Tentative Draft No. 1, 2020) (listing Reporters and Advisers).

107 Samuelson had expressed enthusiasm for a copyright "Principles Project." See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 743 (2013). ALI Principles Projects are more modest efforts than Restatements. Other ALI members, however, supported a Restatement project. See, e.g., Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 498–503 (2014).

108 See Gervais et al., *supra* note 95; American Law Institute, *Understanding the Restatement of Copyright Law* (2021), <https://www.ali.org/project/copyright> (video interview with 2d Circuit Judge Pierre Leval); see generally American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 15–20 (2025), <https://www.ali.org/sites/default/files/2024-09/ali-style-manual.pdf> (describing the Restatement drafting and approval process) [hereinafter ALI STYLE MANUAL].

109 Restatements are divided into "black-letter" provisions, comments, and reporter's notes. The ALI style manual explains:

a black-letter provision normally consists of a single rule, principle, or statement of law or of an integrally related series of rules, principles, or statements. It is called black letter because it is highlighted in boldface type. A completed series of black-letter provisions for a particular subject should constitute a compendium of the essential law of that subject,

most part, the Reporters went along with that request. As the project continued, some members of the copyright community complained that the Reporters, as one might expect given their bias, had ignored important criticisms those members had submitted.¹¹⁰ That wasn't true either, as a careful read of the Reporters' notes following the disputed provisions reveals.¹¹¹ Indeed, because the Reporters had largely acceded to some advisers' requests that they focus on the language of the statute, the overall shape and focus of the project gave primacy to the statutory language throughout, and the Reporters' choices to reject some constructions of the statutory language that were unsupported by judicial decisions were explained in great detail. The projects' opponents were not mollified, and they continued to complain about the biases they perceived in the Reporters' work and continued to urge the ALI to abandon the project through successive drafts.¹¹²

The membership of the American Law Institute voted to approve the full Restatement in May of 2025. A few days before that vote, many of the project's Advisers and Liaisons asked that their names be removed from the list of Restatement participants.¹¹³ Some of the resignations were doubtless sincere, but after 10 years of intransigent opposition, the final concerted resignation of Advisers and Liaisons who had opposed the project all along looked like a stunt, and failed to sway enough of the

to be fleshed out in fuller detail and thereby clarified by the appended Comment and Reporter's Notes.

ALI STYLE MANUAL, *supra* note 108, at 36. Some participants insisted that if the ALI were to continue to pursue a Restatement of Copyright project, the black-letter provisions should reproduce the text of the statute rather than embodying rules phrased in the Reporters' words.

110 See, e.g., Kevin Madigan, *The American Law Institute Proceeds With Its Misstatement of Copyright Project*, COPYRIGHT ALL. (June 2, 2021), <https://copyrightalliance.org/misstatement-copyright-project-proceeds-ali/>.

111 See, e.g., RESTATEMENT OF THE LAW, COPYRIGHT 111-18 (A.L.I., Tentative Draft No. 6, 2025) (Reporters' notes to § 6.12); RESTATEMENT OF THE LAW, COPYRIGHT 176-83 (A.L.I., Tentative Draft 3, Revised, 2022) (Reporters' Notes to § 57.)

112 See, e.g., Chris Eggertson, *Going to Get Ugly: Advocates Sound the Alarm Ahead of Copyright "Restatement" Vote*, BILLBOARD PRO (June 8, 2021), <https://www.billboard.com/pro/copyright-restatement-vote-music-creators-american-law-institute/>.

113 *Copyright Alliance CEO and Others Resign from ALI's Copyright Restatement Project*, COPYRIGHT ALL. (May 16, 2025), <https://copyrightalliance.org/press-releases/resigns-from-copyright-restatement-project/>.

ALI's members to prevent the Restatement's approval.¹¹⁴ The project's opponents pivoted. They organized what they are calling the "Copyright Restatement Transparency Project,"¹¹⁵ devoted to discrediting the Restatement so that courts will be hesitant to rely on it. Yet the substantive complaints they raise with the resulting document are few, and minor.¹¹⁶ Meanwhile, the Restatement's increased focus on the text of the copyright statute reduced the Reporters' opportunities to tackle some of the troublesome judge-made doctrines most in need of clarity. To that degree, the effort to hamstringing the Restatement Reporters at least partially succeeded.

As I write this essay, copyright law is facing two major threats. The first one, which is getting all the attention, is the challenge posed by generative artificial intelligence. Some copyright interests believe that the Music Modernization Act furnishes a good model for solving that problem.¹¹⁷ If you've read this far, it should be no surprise that I think that's a terrible idea. Following the MMA model would likely land us in a world in which current dominant publishers, movie studios, and record labels and the largest of the generative AI platforms would own equity stakes in one another and would have set up a new copyright license that would enable them to exchange money among themselves while failing to pay more than a small dribble of it to the human authors who created the licensed works. I'd expect them to fold in some extra entry barriers that would make it more difficult for newcomers to compete.

The second threat is more fundamental. The copyright system is generating a lot of revenue these days, but very little of it ends up in authors' pockets. Whatever you believe the most important goal of copyright should be, there should be a consensus that at least one of copyright's purposes is to make it possible for authors to earn enough

114 *Restatement of the Law, Copyright Is Approved*, A.L.I. (May 20, 2025), <https://www.ali.org/news/articles/restatement-law-copyright-approved>.

115 *Copyright Restatement Transparency Project*, COPYRIGHT RESTATEMENT TRANSPARENCY PROJECT, <https://copyrightrestatement.org/> (last visited July 8, 2026). ICANN's lookup tool reveals that the domain name was registered on September 30, 2025. See *Registration Data Lookup Tool*, INT'L CORP. ASSIGNED NAMES & NOS., <https://lookup.icann.org/en/> (last visited July 8, 2026).

116 See *Restatement Flaws*, COPYRIGHT RESTATEMENT TRANSPARENCY PROJECT, <https://copyrightrestatement.org/restatement-flaws/> (last visited May 11, 2026).

117 See, e.g., Dave Davis et al., *My Blanket and Me: Blanket Licensing for Generative AI*, 71 J. COPYRIGHT SOC'Y 374 (2024).

money from creating works of authorship that it is economically feasible for them to continue to do it. In the 21st century, our copyright system is failing on that front. Nor is it just us. Studies of how the copyright law is working in the EU and the UK reveal similar failures.¹¹⁸ Several writers have offered potential remedies,¹¹⁹ but none of them seems likely to catch the fancy of the current members of the copyright bar.

Solving that problem would be difficult. It might involve fundamental rethinking. It would almost certainly require entrenched intermediaries to cede some of the turf that they currently control. It would probably require the sort of neutral arbiter that members of the copyright bar demonstrated, in their campaign against the Restatement,¹²⁰ that they won't tolerate. Any approach that is likely to work would leave little room for the sort of unabashed self-dealing that characterized the drafting of the Music Modernization Act. I think it's impossible to make a plausible beginning in the current atmosphere of entrenched grievance and mistrust. The exploitation and enjoyment of copyrighted works generate vast sums of money. If the politics of reforming copyright law to pay more attention to whether and how much of that money finds its way into authors' pockets seems too daunting to try, that says a great deal about the health of the current copyright law, and of the copyright bar.

118 See, e.g., LUCIE GUIBAULT, OLIVIA SALAMANCA & STEF VAN GOMPEL, REMUNERATION OF AUTHORS AND PERFORMERS FOR THE USE OF THEIR WORKS AND THE FIXATIONS OF THEIR PERFORMANCES – FINAL REPORT 8–9 (Eur. Comm'n 2015); Andrew White, The DCMS Committee's Inquiry on the Economics of Music Streaming and its Implications for Artists, 32 *Cultural Trends* 325 (2023), at <https://doi.org/10.1080/09548963.2022.2156267>.

119 See, e.g., CHOKEPOINT CAPITALISM, *supra* note 74, at 142–259; Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 *COLUM. J.L. & ARTS* 369 (2018).

120 I don't mean to suggest that the ALI should have taken worrying whether authors get paid as any part of the Restatement of Copyrights' task. As the project's participants and opponents agreed, a Restatement's task is to explain what the law is rather than what it should be. A copyright law that's attentive to whether the dollars it generates end up in authors' pockets is decidedly not what the current law is.