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SPEECH

THE COPYRIGHT CLAUSE: "A CHARTER FOR A LIVING PEOPLE"

Ralph Oman†

Mr. Oman has chosen the 200th anniversary of the adoption of the Constitution to deliver the following paean to the copyright clause.

Set aside September 17, 1987, as a day for thoughtful celebration. On that day 200 years ago, the American people, acting through their representatives in Philadelphia, adopted the copyright and patent clause of the Constitution. That spare clause would advance as much as any other in the Constitution the noble purposes that resonate in the preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Under this glorious banner, from the thirteen coastal toe-holds of European civilization that we'd carved out of the wilderness, we would launch the westward drive of a uniquely American civilization. We crossed mountains, bridged rivers, and marched through deserts to reach this Golden Gate on the Pacific, and we carried with us the protections of the Constitution.

Our history explodes a myth — one that persists today in the developing world — that copyright, like the Episcopal Church, comes puffing and wheezing onto the scene only at the final stage of a country's development. First, the story goes, the people have to clear the land and build the muscle and sinew of industry. Only then do they turn to life's finer frills and build opera houses, compose music, paint pictures, write poetry, and, at last, start thinking about copyright laws.

In the United States, we made copyright a part of the organic law of the land, and it has been with us every step of the way. In many ways, copyright helped us conquer the vast tracts and people the interior. Books, newspapers, engravings, maps and charts fired the imagination of the pioneers and gave them courage. They read the diaries of the pathfinders; they saw the engravings of Audubon; they plotted their journey overland on the maps of Lewis and Clark; they navigated around the

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Horn on the charts of Yankee sea captains. Once they reached their promised land, "how-to" books on popular mechanics and science supplemented their own ingenuity and taught them how to tame the land, nurse the sick, and give some comfort to their families, and textbooks for their schools educated their children.

In that perilous 200 year journey we have grown from an economic and cultural backwater to an economic powerhouse and the world's leading creator and exporter of scientific and popular culture. Tens of thousands of authors have bloomed in the strong sun of the copyright clause, to the greater joy of us all.

Of course, the copyright clause protects not only works of fiction and the imagination. As I mentioned, the first Copyright Act of 1790 protected some very useful items: school textbooks, maps and charts, and books on science, agriculture and medicine. So in this survey I strike two themes— first, that in many important ways the copyright clause helped us build a great nation out of the wilderness, and second, that, like the Constitution itself, the copyright clause has changed and expanded as our country changed and expanded from a small, agrarian nation to a high-tech, industrial workhorse. I begin my overview with the colonial experience.

But, first, I apologize. I alone have no slides. How to explain? Just before the Cuban missile crisis broke into the headlines, back in 1962, President Kennedy sent Dean Acheson to Paris on a secret mission to try to convince Charles de Gaulle to support the United States blockade. Under cover of darkness, Acheson was driven into a basement garage at the Elysee Palace. With a portfolio of photographs under his arm, he was led up a dimly-lit, winding stone staircase into de Gaulle's private study. De Gaulle was seated behind his desk and after a respectful welcome and exchange of pleasantries, Acheson laid all the photographs of the missile emplacements out on de Gaulle's desk. With a sweep of his arm, de Gaulle brushed them aside and said "Great powers do not need photographs." Well, I wanted to say that the Copyright Office does not need photographs, but I expect that someone will come up to me after my talk and say "Ralph, you should have had photographs."

Let me begin my unillustrated journey. I will follow the sage advice that Dorothy got in the Wizard of Oz. "It is always best to begin at the beginning."

We all know that the English Statute of Anne¹ was the first published copyright statute. It required the consent of authors and proprietors for the publication of their books and other writings. It gave authors a fourteen year term of copyright protection and a fourteen year renewal term.

The Statute of Anne, at a time when relations were strained between England and the Colonies, gave marginal protection to American au-

1. 8 Anne ch. 19 (1709).

thors. It could take more than the fourteen year term of protection to travel to London to register a work at Stationer's Hall or to exercise your appeal rights before the Archbishop of Canterbury. Let me use music as an example.

At first, Colonial music was purely imitative. The great majority of works produced consisted of collections and editions of English hymns. A few of them are notable for their historic value — "The Bay Psalm Book," was the first book to be printed in the colonies, 1640, and the "Collection of Psalm Tunes" by Josiah Flagg, was notable because it was the first book printed on paper made in the colonies, and also because the engravings were done by Paul Revere (1764).

The composer who declared American Musical Independence was William Billings of Boston. He did to English church music what Walt Whitman did to poetry. His rugged, inspiring music was a rallying cry around campfires, in homes, in churches alike. Let me quote a few lines of "Chester" so you can see why his hymns were so popular.

Let tyrants shake their ironrod/And slav'ry clank her galling
chains/We fear them not we trust in god/New england's god
forever reigns.

His music had a virile, sonorous and natural quality not weighed down by formal rules of composition. He was a self-taught man, a tanner by trade, and he was the most prolific and popular composer of Colonial times.

Billings was also the first American author to seek legal protection for his work. He petitioned the Massachusetts House of Representatives shortly before he published "The New England Psalm Singer" in 1770. The House considered his bill almost immediately, but no action was taken. Billings revived his petition in 1772, this time with greater urgency. By this time, Billings' reputation had become established, and he offered to appear in person before the Committee if anyone doubted his authorship.

After hearing his prediction of impending harm (written with the help of his friend Samuel Adams, Speaker of the Massachusetts House), both Houses passed a private copyright bill protecting his works for seven years. Anyone publishing, vending or bartering Billings' works under this bill was subject to a ten pound fine for each offense. Unfortunately, he got caught in a political whipsaw. The same influence that prompted speedy action on his bill in the nationalistic Massachusetts Congress made it suspect in the eyes of the Governor, Thomas Hutchinson, a staunch Loyalist. He was locked in a life and death struggle with the Massachusetts legislature, and Samuel Adams, Billings' friend, was a leader of the patriots. So the Governor vetoed the bill. Billings' third petition, in 1778, fared badly also, and he did not attempt to secure copyright protection further. By then, he was the most popular composer in the colonies, by then in the middle of the War for Independence.

Billings was not known for his humility. He shunned musical education in favor of inspiration, saying "Art is subservient to genius." History also tells us that a wag once wrote Billings and asked if Billings could answer a tough question on music. Billings wrote back, "Whatever your question may be, I pledge myself to answer it, as there is nothing connected with the Science that I have not mastered." When they met at Lamb's Tavern in Boston at the appointed time, the gentlemen said "The question is one which affects the whole world, and has never been settled." "Let me hear it!" said Billings. "Well it is this: When a man snores in his sleep through at least two octaves, and so loud as to be heard throughout the whole house, do you consider these sounds *vocal* or *instrumental* music?" Billings' response has not been preserved. But whether or not it is copyrightable is another tough question.

After the war, Billings finally won some copyright protection. In 1783, under the Articles of Confederation, the Massachusetts legislature passed a copyright act, giving authors protection for 21 years and providing penalties up to \$3,000. Copyright was granted to a work upon deposit of two copies in the Harvard College Library. So, in 1786, Billings was finally able to get a copyright.

Although the Massachusetts Act provided for reciprocity between states, the lack of a federal copyright made his protection next to worthless. Wholesale copying of his works went on in neighboring states. By 1790, when the federal statute was passed, it was too late for Billings and his family of nine. Despite heavy advertising and several benefit concerts, Billings fell on hard times. His best works were already out and everyone knew them by heart. His meteoric rise was equalled only by his rapid fall. A year after writing his last work, a hymn on the death of George Washington, Billings died, in poverty.

So in the United States, copyright got off to a slow start. The Articles of Confederation did not have a copyright clause. It relied instead on a recommendation by the Continental Congress that states provide their own copyright protection.² Twelve states — all except Delaware — passed copyright laws prior to the Constitutional Convention: eight states protected writings in the literal sense; four protected books and pamphlets. Three states gave protection for maps and charts as well as books. Two statutes did not use the word "writings," so the extension to maps and charts couldn't be implied. The statutes had no effect outside the territorial jurisdiction of particular states, and the lack of national uniform copyright protection did great harm to authors like Billings. It gave the Constitutional Convention in Philadelphia a great incentive to write in a federal copyright provision.³

Because Congress approved the final version of the copyright clause

2. 24 JOURNALS, CONTINENTAL CONGRESS 326-27 (1783).

3. Committee on Judiciary SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, STUDY NO. 4, THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 69

without debate in a secret proceeding, the breadth of the term "writings" is not clear.⁴ During the Convention, four clauses were suggested, but none contained the term "writings." Professor Derenberg drew two possible conclusions from the fact that the final version contains only the term "writings": first, that Congress used the word as a limitation upon the broad scope of all the possible proposals; or second, that the Committee on Style preferred the sound of the word, that the change was one of style, not substance.

In *The Federalist*, James Madison noted that "an author's copyright was granted at common law in Great Britain, but that the states in the new nation were ineffectual in providing similar protection."⁵

Madison wanted to harmonize federal and common law copyright protection.⁶ The clause does not define the scope of protection, but, instead it suggests that Congress can expand the common law to protect whatever it wants.⁷ Likewise, the clause is not intended to deal with subjects of copyright but to assure uniform protection through nationwide laws,⁸ and Congress may expand the scope of the clause by changing the common law by statute. It has even been argued that the copyright clause was intended only as a limitation on the perpetual copyright (at least for the life of the author) granted at common law.⁹ The counter to this argument is that use of the term "author" in relation to "writing" demonstrates that statutory protection is limited to written matter.¹⁰ This is so because written matter was the only thing in existence at the time and it is the literal and common sense meaning of the term.¹¹ Professor Derenberg could find no direct evidence on the intent of the clause.¹²

The legislative histories to the various copyright acts from 1790 to the present similarly do not shed any light on the scope of the clause. The House Report to the 1976 Act says that the scope of "writings" under the 1909 and 1976 Acts is narrower than the range of constitutional authority, but does not delineate the breadth of the term.¹³

The experts have settled on three theories as to the development of present statutory copyright protection.¹⁴ The first is that the term "writings" in the copyright clause refers literally to books and periodicals —

(Comm. Print 1961) (reprinted in 1 FISCHER'S STUDIES ON COPYRIGHT 43)) [hereinafter REVISION STUDY].

4. *Id.* at 70.

5. *The Federalist*, No. 43, at 278 (Modern Library ed. 1937).

6. REVISION STUDY, *supra* note 3, at 70.

7. *Id.*

8. *Id.* (citation omitted).

9. 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 486 (1953).

10. REVISION STUDY, *supra* note 3, at 71.

11. *Id.*

12. *Id.*

13. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 51 (1976) [hereinafter the "1976 HOUSE REPORT"].

14. REVISION STUDY, *supra* note 3, at 71-72.

"words written in a form intelligible to all who can read."¹⁵ Congress in its reports does not recognize this construction, and all acts from 1790 to the present have gone beyond this narrow definition. The second is that the clause reflects the desire to protect the commercial value of the fruits of intellectual labor.¹⁶ Under this reading, all intellectual property capable of extensive reproduction is protected, and the clause may be expanded to include these works, like music and engravings.¹⁷ This theory views the Constitution as a living document, and the term "writings" expands with technological progress.¹⁸ If the document is living, so are its component parts.¹⁹ The third and final theory is that the first part of the clause defines the entire clause, so that whatever promotes science and useful arts falls within the definition of "writings."²⁰

In fact, the courts have only rarely been called upon to construe the patent and copyright clause, so we have little judicial gloss on its meaning.²¹

The introductory phrase, "to promote the progress of science and useful arts," is mainly explanatory of the purpose of copyright. It suggests, at most, certain minimal elements to be contained in copyright legislation.²² But the experts disagree on whether the term "science" refers to the work of authors and "useful arts" to the product of inventors, or vice-versa.²³

Richard C. DeWolf, the Acting Register of Copyrights during World War II, first proposed a strictly disjunctive interpretation of the clause.

He divided the Clause into two distinct propositions: first, Congress shall have power to promote the progress of *science* by securing to *authors* the exclusive right to their *writings* and, second, Congress shall have the power to promote the progress of the *useful arts* by securing to *inventors* the exclusive right to their *discoveries*. The first proposition contains authority for copyright legislation, the second for patent legislation.

At the time of the adoption of the Constitution, the word "science" meant learning in general, while the term "useful arts" referred to arts that were used in manufacture or the design of machinery.

Whatever the case, we all agree that Congress acted, not simply to

15. *Id.* at 71.

16. *Id.* at 71-72.

17. *Id.* at 72.

18. *Id.* at 72 n.45.

19. *Id.*

20. *Id.* at 72.

21. 1 M. NIMMER, NIMMER ON COPYRIGHTS § 1.02 (1987).

22. *Id.* § 1.03.

23. *Compare* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) ("useful arts" are subject of copyright legislation under Constitution) *with* Graham v. John Deere Co., 383 U.S. 1 (1966) ("useful arts" applies to patents).

reward the author,²⁴ but to benefit the public.²⁵ In 1954, the Supreme Court in *Mazer v. Stein*²⁶ said that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ ”²⁷ The copyright law provides this incentive “by granting a right to exclude others from certain uses of the copyrighted work.”²⁸ So copyright protection is based on the dual premise of protecting authors’ works and the interest of the public in the widespread dissemination of information.

The courts have held that the phrase “to promote” is the same as the terms “to stimulate,” “to encourage,” and “to induce,”²⁹ but the entire phrase “To promote the progress of science and useful arts . . .” must be read as a preamble indicating the *purpose* of the power, not as a limitation on its exercise.³⁰

In fact, the introductory phrase has tended to expand rather than limit Congressional authority.³¹ Since the drafters joined the phrase “promote the progress” with the term “writings,” we should not confine the latter to a narrow definition.³² The promotion of progress requires a broad construction of the clause. Congress should look at several factors before expanding copyright protection: the nature of a new technology, the asserted interests justifying protection, and the constitutional and societal significance of interests adversely affected by protection.³³ The introductory phrase — as expressive of the purpose of copyright — could in some ways clarify the meaning of otherwise ambiguous statutory provisions.³⁴

The significance of the term “by securing” was decided in *Wheaton v. Peters*,³⁵ but is mostly only of historical significance now.³⁶ In *Wheaton*, the Supreme Court held that the term referred to the securing of a future, rather than an existing, right.

However, the phrase “by securing *for limited times*” is a very real

24. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

25. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

26. 347 U.S. 201, 219 (1954).

27. *Id.* at 219.

28. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression* 67 CALIF. L. REV. 283, 285 (1979).

29. *Goldstein v. California*, 412 U.S. 546 (1973).

30. *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670 (Ct. Cl.), *rev'd on other grounds*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975).

31. *Ladd v. Law & Technology Press*, 762 F.2d 809, 812 (9th Cir. 1985); *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981).

32. 1 M. NIMMER, *supra* note 21, § 1.03[B] at 1-32.3.

33. Richards, *The Value of the Copyright Clause in Construction of Copyright Law*, 2 HASTINGS CONST. L.Q. 21, 226-27 (1975).

34. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

35. 33 U.S. (8 Pet.) 591 (1834).

36. 1 M. NIMMER, *supra* note 21, § 1.04 at 1-33.

limitation on congressional power. For a federal copyright statute to grant perpetual protection, for example, would be unconstitutional.³⁷ But within very broad limits, the period of protection is discretionary with Congress.³⁸

In *Graham v. John Deere Co.*,³⁹ the Supreme Court held unconstitutional, under the 1976 Act, the extension of protection to works previously protected by copyright. Professor Nimmer agreed that the extension of the term of protection for a work already protected by copyright would probably exceed Congressional power under the copyright clause as well as the first amendment.⁴⁰

Professor Nimmer says the provision strikes a balance between the competing interests of authors in protecting their efforts and the public in having access to information essential to the development of society.⁴¹

The essence of authorship is originality. In the words of the Court, the author is "he [or she] to whom anything owes its origin. . . ."⁴² So one must create, rather than copy from another, to be an author.⁴³ The originality must involve some intellectual labor to be the product of an author,⁴⁴ but the labor need be only minimal.⁴⁵

Let me give you some minimalist examples. Elbert Hubbard published his profound *Essay on Silence* in 1898. It consisted only of blank pages. He never received widespread acclaim, or sales, for his deeply inscrutable book. In 1974 Bruce Harris registered for copyright *The Nothing Book*. Apparently, the Cleveland Press reviewed the book with a four inch by eight inch blank space. The New York Times said, simply, "We have nothing to add." The Philadelphia Bulletin called the book "a profound masterpiece." The only bad news for Mr. Harris came when the Belgian publishers of a blank book called *The Memoirs of an Amnesiac* sued him for plagiarism. Mr. Harris beat a hasty retreat and countered that blankness is in the public domain. So, no copyright infringement. He won.

Also, uncopyrightable under the minimalist standard would be Samuel Beckett's play *Breath*, written in 1970. It is only 30 seconds long, and has no words and no actors. Normally Beckett wrote in french, but whether he did so in *Breath* is unclear. As that renowned copyright law-

37. See *Twentieth Century Music Corp.*, 422 U.S. at 156; *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

38. See *Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 11, 16 (1829).

39. 383 U.S. 1 (1966).

40. 1 M. NIMMER, *supra* note 21, § 1.05[A] at 1-34 to 1-35.

41. *Id.* § 1.05[D] at 1-36.

42. *Goldstein v. California*, 412 U.S. 546 (1973); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

43. *Sherry Mfg. Co. v. Towel King of Florida, Inc.*, 753 F.2d 1565 (11th Cir. 1985); *L. Batlin & Son v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

44. *International News Serv. v. Associated Press*, 248 U.S. 215 (1918).

45. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

yer, Fulton Brylawski Senior, said many years ago, "I didn't say it wasn't art; I just said it wasn't copyrightable."

Originality is different from intellectual labor: the former stems from the copyright clause's use of the term "authors" and refers to independent creation,⁴⁶ while the latter suggests an absolute, although minimal, standard of creativity.⁴⁷ Intellectual labor, for example, includes "[n]on-objective art, stream of consciousness writing, poetry consisting of meaningless but aesthetically pleasing sounds, and coined or code words without established meanings. . . ."⁴⁸

The phrase "exclusive right" provides constitutional authority for Congress to grant to authors property rights to the fruits of their intellectual labors. But, the Congress has whittled away at the exclusivity of the right. Both the 1909 Act and, with a vengeance, the 1976 Act, provide for broad compulsory licenses. The copyright owners lose exclusivity under these laws because they must grant licenses to users who comply with the statutory requirements for the license.⁴⁹

Professor Nimmer justifies this apparent inconsistency as a middle ground that Congress has steered within its discretion under the copyright clause. The Constitution gives Congress the authority, but does not require it, to enact copyright legislation in the first instance and to determine its scope. So a compromise between copyright owners and users is a reasonable accommodation of competing interests. The phrase "the exclusive right" indicates words of *authority*, but not *limitation*.⁵⁰

At least until the 1930's legal opinion remained unsettled as to whether the single compulsory license — the mechanical recording license — of the 1909 Act was constitutional. In fact, the drafters of that compulsory license were careful to provide that the right to record *is* exclusive — that is until the copyright owner authorizes or makes a recording. Only then does the right become non-exclusive. No litigant seriously challenged the constitutionality of the mechanical music compulsory license. It was modified and re-enacted in the 1976 Act, along with three new compulsory licenses. Again, no one has challenged their constitutionality in court, even though the three new licenses do not even adopt the fiction that the right is exclusive until exercised.

The term "writing" has been construed broadly, and not accorded the literal definition of a layperson.⁵¹ In fact, if every copyright law passed since 1790 were read literally they would all be partially invalidated, and works such as photographs, motion pictures, paintings, and cartoons would not be extended protection.⁵²

46. 1 M. NIMMER, *supra* note 21, § 1.06[A] at 1-37 to 1-38.

47. *Id.*

48. *Id.* at 1-49.

49. *See generally id.* § 1.07 at 1-42 to 1-43.

50. *Id.* (citations omitted).

51. *Columbia Broadcasting Sys. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967).

52. REVISION STUDY, *supra* note 3, at 67.

Judge Learned Hand made the classic statement on the scope of the copyright clause: in denying that the "constitution embalms inflexibly the habits of 1789," he said that

Its grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise, thereafter. Of course, the new subject-matter must have some relation to the grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.⁵³

For almost a century the Supreme Court did not directly question the general scope of the clause. Finally, in 1973, in *Goldstein v. California*,⁵⁴ it held that "writings . . . include any physical renderings of the fruits of creative intellectual or aesthetic labor."⁵⁵ So a work constitutes a writing if it contains some intellectual labor, is embodied in tangible form, and is perceptible to any of the five senses.⁵⁶

In the 1909 Act, "all the writings of an author" were protected.⁵⁷ The legislative history to that Act states only that the clause is "declaratory of existing law,"⁵⁸ but does not indicate the scope of copyright protection.

The legislative history to the 1976 Act⁵⁹ establishes, though, that Congress did not intend to exhaust the scope of constitutional power.⁶⁰ In the 1976 Act, the term "writings" includes "any fixation of a work in tangible form,"⁶¹ and does not limit copyright protection to existing technology or to forms of expression presently deemed worthy of protection.⁶²

Before a landmark 1903 Supreme Court decision, the courts held that materials designed only for advertising, regardless of their form, were not copyrightable.⁶³ In *Bleistein*, the Supreme Court held that chromolithographs representing actual persons and things designed as posters to advertise a circus were copyrightable as pictorial illustrations. Justice Holmes wrote for the majority and analyzed the question of

53. *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 719 (S.D.N.Y. 1921).

54. *See Goldstein v. California*, 412 U.S. 546, 561 (1973).

55. *Id.*

56. 1 M. NIMMER, *supra* note 21, § 1.08[B] at 1-47.

57. Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1076, 17 U.S.C. § 4 (1928) (amended 1982).

58. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 10 (1909) [hereinafter "1909 HOUSE REPORT"].

59. 17 U.S.C. § 101-810 (1976).

60. *See* 1976 HOUSE REPORT *supra* note 13, at 51.

61. Note, *Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity*, 34 U. MIAMI L. REV. 1043, 1045 n.5 (1980).

62. *See* 1976 HOUSE REPORT *supra* note 13, at 51.

63. *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891) (label on ink bottle denied protection because it served no purpose "other than as a mere advertisement or designation of the subject to which it is attached.")

whether the work was indeed a "writing" in terms of originality and authorship. Advertisements are not writings in the literal sense, and are only considered so because of the original thought or labor entailed in their creation.⁶⁴

Photographs were first protected in 1865, around the time of the invention of modern photography,⁶⁵ and the Supreme Court ruled in *Burrow-Giles Lithographic Co. v. Sarony*,⁶⁶ that the copyright law protected photographs embodying the photographer's artistic conception. The photograph in question, a poetic rendering of Oscar Wilde, was protected on the basis of originality in the selection and arrangement of costumes, other accessories, the subject of the photograph, and deployment of light and shade.⁶⁷

Prior to the Act of 1912,⁶⁸ motion pictures were registered as photographs. Thomas Edison sought copyright in a series of 4,500 pictures showing the launching of Kaiser Wilhelm's yacht. In protecting the motion picture as a photograph, the court reasoned that Congress in passing the 1865 Act anticipated technological advancements in photography, as in other cases, and that motion pictures were one such advancement.⁶⁹ The court also found that Edison's work had enough creativity and originality in that the motion picture embodied artistic conception and expression and required a study of lights, shadows, and general surroundings.⁷⁰

Motion pictures and photographs are considered copyrightable because their production "requires the arranging, selecting, and utilizing of light, shadows, general surroundings, and vantage point to secure the entire effect."⁷¹ Dramatic motion pictures also are protected for the same reasons as dramas: they relate a story by means of plot, incident, dialogue, and character development.

Paintings were not included by the congressional framers in the original copyright law. This omission probably occurred because extensive reproduction and copying of paintings was not possible then and it was believed that common law protection was adequate. Also hand-copying does not produce an exact copy, and the need for statutory protection did not arise until the advent of new methods of reproduction, such as photography and lithographs.⁷² As with other media that are not literally "writings," the analysis of copyrightability focused on the presence of originality and creativity.⁷³

64. REVISION STUDY *supra* note 3, at 94.

65. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

66. 111 U.S. 53 (1884).

67. *Id.* at 60.

68. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.

69. *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903).

70. *Id.*

71. REVISION STUDY *supra* note 3, at 95.

72. *Id.* at 96.

73. *Id.*

In the seminal case, *American Tobacco Co. v. Werckmeister*,⁷⁴ the Supreme Court simply assumed the copyrightability of paintings. In a 1951 case, the Second Circuit implied further that a hand-copied painting would always involve some variation entitling the subsequent picture to copyright.⁷⁵

Maps have been protected since the first U.S. copyright statute.⁷⁶ Their copyrightability, since mapmakers inevitably use preexisting works of others, is based on original labor consisting of "selection, arrangement, and presentation of component parts."⁷⁷ But the collation of features from earlier maps is not sufficiently original, unless there is independent effort on the part of the creator.⁷⁸

Characters are most readily protectible where the original and the copied work consist of graphic rather than word representations.⁷⁹ Once protected, a cartoon character are [sic] protected by reproduction in another medium.⁸⁰ Court cases assume that cartoons — even without words or a connected story — are protectible "writings," and the form and concept of humor are the essential creative thought and labor that warrant copyright protection.⁸¹

The protection of three-dimensional objects pushes the boundaries of copyright protection to its out limits, and we can constitutionally justify protection only on a copyright-principles rather than form analysis of the terms "writings" and "authors."⁸² Courts granting protection to these objects generally assume their copyrightability, although the issue of protecting three-dimensional objects as "writings" was raised but not addressed in *Mazer v. Stein*.⁸³ In *Mazer*, the Supreme Court extended protection to the artistic elements of a statuette shaped as a female Balinese dancer used as a lamp base.

Since that landmark case, courts have granted copyright protection to stuffed toy bears,⁸⁴ fabric designs,⁸⁵ decorative belt buckles,⁸⁶ and toy airplanes.⁸⁷ For protection of the artistic features of a three-dimensional useful article, an author must contribute some originality to distinguish it

74. 207 U.S. 284 (1907).

75. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951).

76. Act of May 31, 1790, ch. 15, 1 Stat. 124.

77. *General Drafting Co. v. Andrews*, 37 F.2d 54, 55 (2d Cir. 1930).

78. *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104 (3d Cir. 1951).

79. *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir. 1983).

80. *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934); *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924).

81. REVISION STUDY, *supra* note 3, at 97-98.

82. *Id.* at 98-101.

83. 347 U.S. 201, 206 n. 5 (1954).

84. *American Greetings Corp. v. Easter Unlimited, Inc.*, 579 F. Supp. 607 (S.D.N.Y. 1983).

85. *Hedaya Bros., Inc. v. Capital Plastics, Inc.*, 493 F. Supp. 1021 (S.D.N.Y. 1980).

86. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

87. *Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970 (2d Cir. 1983).

from prior art,⁸⁸ and the artistic elements must be conceptually separable from any utilitarian function of the article.

The copyright law has protected musical compositions since 1831.⁸⁹ Viewed as notations on sheet music, it is not conceptually difficult to conceive of them as "writings." However, unlike literary works, the arrangement of musical sounds rather than the notations are the essence of musical compositions.⁹⁰ Early on, sound recordings were not protected as copyrightable subject matter because the Supreme Court held in 1908 in the *White-Smith* case that a piano roll was not a copy of the underlying musical composition. Although the decision dealt with the term "copy" as applied to musical works, it came to be accepted for the general principle that the term "copy" under the 1909 Act required visibly perceptible reproductions. The corollary to this principle was that if something was not capable of reproduction in visually perceptible form, it could not constitute copyrightable subject matter under the 1909 Act.

The year after the *White-Smith* decision, Congress gave the composer the right, subject to a compulsory license, to reproduce or to license others to reproduce the composition on phonorecords, but did not otherwise reverse *White-Smith* until the 1976 Act. But the courts later retreated from the position that a "writing" required visible expression, and in *Goldstein v. California*, the Supreme Court held that sound recordings constitute "writings" under the Constitution.⁹¹

Computer programs and databases are examples of a relatively new technology protected under the 1976 Act as "literary works." The 1976 House Report states that computer programs and databases are "literary works" to the "extent that they incorporate authorship in the programmer's expression of original ideas."⁹² With the passage of the Computer Software Copyright Act of 1980,⁹³ there was no longer any doubt that computer programs were protected. The 1980 Act also added a definition of the term "computer program" to section 101. But we have yet to see a computer programmer get the Nobel Prize for Literature.

The courts have also said that computer programs are works of authorship protected by copyright⁹⁴ whether they are in human-readable source code or machine-readable object code.⁹⁵ To reach this conclusion, the courts once more assumed that a new technology, by no stretch of the imagination a literal "writing," was protected under the Constitution.

The courts have also accepted databases as copyrightable subject matter, generally on the ground that they are "compilations" within the

88. REVISION STUDY, *supra* note 3, at 100.

89. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

90. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

91. 412 U.S. 546 (1973).

92. 1976 HOUSE REPORT, *supra* note 13, at 54.

93. Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3018 (1980).

94. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

95. *Williams Elec. Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

meaning of section 101 of the Act. Again, they expanded the Constitution to protect subject matter that exists primarily in ephemeral, electronic form, and may be more or less constantly revised, updated, or otherwise changed, never really "fixed." The statute requires fixation in a tangible form, but the courts have just ignored that requirement.

Finally, in 1984 Congress could be pushed no further and created a new form of intellectual property protection for "mask works" fixed in semiconductor chip products. Does this *sui generis* form of protection signal the end of the expansion of the copyright clause of the Constitution? Chairman Kastenmeier, of the House Copyright Subcommittee, has dropped several very broad hints that suggest he will look at *sui generis* protection for a long list of new technologies — artificial intelligence, molecular and genetic engineering, information processing, computer software, and telecommunications. Some early proposals for mask work protection, although not enacted, were predicated on the commerce clause as well as the patent-copyright clause. Obviously, many proponents found the patent-copyright clause a shaky premise for chip protection. Mr. Kastenmeier quoted John Hersey in stating Congress' desire to avoid "distortion by shoehorn." Congress probably put those qualms to rest by striking a new course, not bound by established precedents. But the new technologies will continue to challenge Congress and the courts, and continue to test the flexibility of the patent-copyright clause. Are human-created life forms copyrightable? The patent law has waded chest-deep into that Serbonian bog. Having absorbed computer programs, databases, and semiconductor chip products under either the copyright law or copyright-like principles, perhaps we should leave life-forms to the patent side of the clause.

Three years ago, at a symposium on copyright and new technologies, Senator Mathias likened Congress to Balboa, who had climbed the slopes of the Isthmus of Panama from the Caribbean side. From the summit, spread out before him, he saw the vast southern sea. In the words of Keats:

He stared at the Pacific
And all his men
Looked at each other with a wild surmise
Silent upon a peak in Darien.⁹⁶

Balboa didn't know what great sea he was looking at, and didn't know what distant shores it washed, but he was aware that he had made a momentous discovery.

So, when September 17th, 1987, dawns, think about the copyright and patent clause. And think about Balboa, silent on that peak in Darien. We look out across a sea of new technologies of unknown dimension. The copyright and patent clause has served us well, and it will

96. J. KEATS, SELECTED POETRY AND LETTERS 6 (1969).

guide the new Balboas — the new pioneers — the new discoverers — who will lead this country into the unknown of the 21st century. We hope that our example will inspire them, and inspire our friends in the developing world, and convince them that social and economic progress and strong intellectual property protection go hand-in-hand.

With the Constitution under our arm, we have traveled through two hundred years of history, and the clause has dogged our every step, changing as we changed. And it will dog us for another two hundred years, as “the charter of a living people.”