

COPYRIGHT IN THE TWENTY-FIRST CENTURY: INTRODUCTION

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The Copyright Act of 1976 was intended to be a comprehensive solution to our copyright dilemmas.¹ The Act was preceded by twenty-two years of studies commissioned by Congress as well as a myriad of drafting sessions attended by many of the interests in the copyright world—publishers, motion picture houses, and authors, just to name a few.² The 1976 Act went into effect January 1, 1978, only sixteen years ago. Despite the massive effort involved in its creation, it has not been adequate to solve many of this nation's copyright conundrums. As a result, it has been frequently amended.³ Yet, even with amendment, a host of issues challenges it today: from the internationalization of copyright protection and copyright systems to the quicksilver increase in the sophistication of transmittal and copying technology.

“Explosion” is the oft-repeated metaphor for the emerging technologies. We are undergoing an “information explosion” and a “technology explosion.”⁴ The choice of that metaphor tells us

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¹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (codified as amended in scattered sections of 17 U.S.C.).

² See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) (analyzing the legislative history of the Copyright Act of 1976 and noting that this history is comprised of “more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.”).

³ See, e.g., Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010 (Supp. 1992)); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5134 (codified as amended at 17 U.S.C. § 109 (1988)); Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990) (codified as amended at 17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990)); Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990); Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (1988); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-904 (1988)); Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984); Computer Software Copyright Act of 1980, Pub. L. No. 96-517, §§ 10, 101, 117, 94 Stat. 3015, 3028 (codified as amended at 17 U.S.C. §§ 101, 117 (1988)).

⁴ See, e.g., Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 2 (1988) (discussing the copyright problems posed by the “explosion of new technologies”); Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169, 1175 (1992) (exploring the “explosion of information technology” and the power it provides to the

something: explosives are awe-inspiring, tend to throw us off-balance even when predicted, and destructive. Such is where we stand on the brink of a new copyright era.

To hazard a not very risky prediction: copyright protection in the twenty-first century may not look much like either of the two systems that the United States has attempted in the twentieth century: the 1909 Act⁵ and the 1976 Act. But what sorts of changes are likely to occur and why will they occur? Will we see changes in the scope of subject matter protected by copyright law? Will there be pressure to increase or to decrease the term of protection arising from the many problems posed by the Information Superhighway? Will there arise a felt need for a more active Copyright Office, or will the Office become a relic of the past? Will the copyright statute disaggregate into its separate subject matters, for example, sound recordings, written publications, wire transmittals, choreography, and graphic art? And will these changes occur, not necessarily because the American market requires them to, but rather because we must accommodate the growing world market in copyrighted works?

Even more interesting is the question: What is going to be viewed as the driving force for all of this change? Will we be justified in having put the pieces of copyright together following the explosion in ways significantly different from the old ways? The marriage of the twin historical facts of the technology explosion coupled to the arrival of a world market may explain the changes crafted. But it may not justify them.

The people gathered together for this symposium have specialized expertise in the three arenas needed to be able to begin to answer these questions: the government (Capitol Hill and the Copyright Office); the copyright industries and their representatives; and academics. Too often, copyright scholarship has gone forward without the benefit of the insights of those closest to its

information holders); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6 (1991) (noting that the "information explosion" increases the government's ability to sanction disfavored activities by public disclosure); Meg Greenfield, *Misled by the 'Facts'*, NEWSWEEK, June 26, 1989, at 76 (noting that one of the "information explosion['s]" ironies is that society believes it knows more than it does); Mark Potts, *Future Fixtures, or Flops? Some Educated Guesses About Which of the New Consumer Technologies Will Survive*, WASH. POST, Dec. 27, 1992, at H1 (stating that corporations, marketers, and investors are attempting to anticipate and interpret the "technological explosion"); Sandra Torrey, *'Niche Practices' Answer the Call of Technology*, WASH. POST, Mar. 28, 1994, at F7 (noting that specialties have arisen in every area of the "technology explosion").

⁵ Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, *repealed by* the Copyright Act of 1976, Pub. Law. No. 94-553, 90 Stat. 2451 (codified as amended in scattered sections of 17 U.S.C.).

real-world battlefield. It is my hope that that error will begin to be redressed with this symposium, which intentionally brings together the variety of extremely gifted individuals who contribute to the copyright universe. We, as academics, are here today as much to learn, as to contribute.

Despite the accumulation of talent found in this symposium, we will not be able to predict the future with certainty. None of us, after all, are soothsayers. We are not here so much to predict the future of copyright law as we are to sidle up to it, to wheedle some insight into the future standing from within this rather chaotic, confusing, and fascinating present. The following essays go far on this score.

Because of the number of participants and fine papers produced, the symposium will be divided into two issues of the *Cardozo Arts and Entertainment Law Journal*. In this issue are articles on "The Role of the Copyright Office" and a roundtable discussion entitled "Virtual Reality, Appropriation, and Property Rights in Art," which is accompanied by two essays exploring the future of art and copyright.

A succeeding issue will contain two sets of articles, one on "The Information Superhighway: The Challenge of Multimedia Technology" and a second on "Formalities and the Future: The Fate of Sections 411 and 412." The range of views is impressive as well as the range of talent and expertise exhibited by this collection of papers.

No symposium goes forward without the help of many industrious individuals. This symposium is no exception. I would like to express my heartfelt gratitude to Dean Frank Macchiarola for his enthusiastic support from the moment I mentioned the idea for this symposium to him. Thanks also go to the staff of the *Cardozo Arts and Entertainment Law Journal* as well as Cynthia Church, Harvey Marks, and my secretary, Bettye Knight.