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## Understanding Copyright's First Encounter With the Fine Arts: A Look at the Legislative History of the Copyright Act of 1870

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UNDERSTANDING COPYRIGHT’S FIRST  
ENCOUNTER WITH THE FINE ARTS:  
A LOOK AT THE LEGISLATIVE  
HISTORY OF THE  
COPYRIGHT ACT OF 1870

*Robert Brauneis*<sup>†</sup>

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INTRODUCTION

In 1870, Congress expanded federal copyright law to reach a variety of previously uncovered categories: “painting[s], drawing[s], chromo[s], statue[s], statuary, and . . . models or designs intended to be perfected as works of the fine arts.”<sup>1</sup> That expansion was remarkable for at least

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† Michael J. McKeon Professor of Intellectual Property Law and Co-Director of the Intellectual Property Law Program, The George Washington University Law School. For comments and sources, I would like to thank Isabella Alexander, Lionel Bently, Oren Bracha, Sarah Burstein, Marie-Stéphanie Delamaire, Tomás Gómez-Arostegui, Karen Lemmey, Adam Mossoff, Zvi Rosen, Will Slauter, Bhamati Viswanathan, and the participants in the NYU CLI IP History Symposium. Images of all petitions mentioned in this article, except for the William Morris Hunt petition, and of all historical newspaper articles cited in this article, are available at <http://www.robertbrauneis.net/1870fineartscopyright.htm>. The same page will provide updates to this article should I find additional pertinent documents once archives reopen after the pandemic closings.

1. See Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212. It is virtually certain that chromos—color lithographs—were already protectable as

three reasons. First, in sheer length and number of categories, it stands as the largest single expansion of copyrightable subject matter in American copyright law. Second, the works created in some of these new categories—paintings and drawings in particular—were not designed or intended to be created and distributed in multiple copies. That represented a marked departure from all previous categories of copyrightable subject matter, which were concerned with works typically intended to be printed in multiple copies: first maps, charts, and books, and later prints, musical compositions, dramatic compositions, and photographs.<sup>2</sup> Third, the 1870 Act introduced the term “fine arts” into copyright law, and the new categories—at least paintings, drawings, and statues and statuary—were thought to represent the fine arts. The term “fine arts” was understood to contrast with “mechanical arts.”<sup>3</sup> The implicit identification of copyright with the “fine arts” side of that line portended a shift in understanding of its nature, and of its relationship with patent law, as set against an earlier understanding of the constitutional designation of copyright’s domain as “Science”—theoretical knowledge—in contrast to the domain of patents as “Useful Arts”—practical knowledge.<sup>4</sup>

Copyright law could not incorporate such new and different material without being changed itself, and its 1870 expansion had ripple effects across many doctrines and principles, ranging from immediate adjustments to quandaries that have persisted to this day. For example, the original exclusive rights under the Copyright Act of 1790—to “print, reprint, publish[,] or vend”<sup>5</sup>—continued to be sufficient for all categories subsequently added before 1870, with one addition—a performance right for dramatic works to cover an important part of

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prints, but only if the claimant was the person who created the design for the print. *See infra* text accompanying notes 69–91.

2. Not all photographic technologies enabled the printing of multiple copies. The daguerreotype process, dominant during the 1840s, resulted in singular positive images. *See* Marcy J. Dinius, *Daguerreotype*, in *ENCYCLOPEDIA OF NINETEENTH-CENTURY PHOTOGRAPHY* 366, 370 (John Hannavy ed., 2008). That process, however, developed in parallel with processes that first produced a negative image, from which multiple positives could be printed. By the 1850s, and certainly by 1865, when Congress added “photographs” as federally copyrightable subject matter, negative multiple positive technologies became dominant. *See id.* at 370, 372.
3. *See, e.g., The Fine Arts*, in *ENCYCLOPEDIA BRITANNICA* VOL. IX 194, 194 (9th ed., 1879).
4. *See* U.S. CONST. art I, § 8, cl. 8; WILLIAM STANLEY JEVONS, *ELEMENTARY LESSONS IN LOGIC* 7 (1870) (“A science teaches us to know and an art to do, and all the more perfect sciences lead to the creation of corresponding useful arts.”).
5. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124.

theater's business model.<sup>6</sup> When copyright added paintings, drawings, and statues, it added for the first time a right to “copy”—what is now the bedrock § 106(1) right of reproduction<sup>7</sup>—since the embodiments of the works in the new categories were not printed. A second example involves the requirement of deposit of a copy upon publication. The 1870 Act had to adjust that requirement, since paintings and drawings, and many statues, were not made and distributed in copies. It provided for deposit of photographs of works in the new categories, and the Library of Congress had to issue further clarifying instructions about when those photographs should be submitted.<sup>8</sup> More broadly, copyright in works that existed as unique originals raised the issue of whether and under what conditions “publication” could mean display rather than distribution of copies. That issue continued to be litigated a century later.<sup>9</sup>

Why did Congress undertake such a momentous expansion of copyright, and why in 1870? No one has attempted to answer this question in light of the full available record of legislative and lobbying activity leading up to the 1870 Act. In his wide-ranging account of the development of intellectual property in the United States during the nineteenth century, Oren Bracha cites two petitions seeking copyright for fine art, and argues that Congress's affirmative response stemmed from the increasing social status and organized lobbying power of artists, and the conceptual move towards “universalization” of authorship—from writers in particular to creatives of all kinds.<sup>10</sup> Most

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6. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139.
  7. See 17 U.S.C. § 106(1) (2018).
  8. See Act of July 8, 1870, ch. 230, §§ 90, 93, 16 Stat. 198, 213 (providing for deposit of photographs). That same section requires deposit upon “publication,” and yet works like paintings might never be published—they were not going to be distributed in multiple copies and might never even be publicly displayed. The Library of Congress issued guidance that the deposit should be made with ten days of the completion of the work—a creative interpretation, but of somewhat dubious validity. See LIBRARIAN OF CONGRESS, DIRECTIONS FOR SECURING COPYRIGHTS UNDER THE REVISED ACT OF CONGRESS WHICH TOOK EFFECT AUGUST 1, 1874, § 11, <https://archive.org/stream/1905DirectionsForRegisteringCopyrights6thEd/1874%20Directions%20for%20Securing%20Copyrights%20-%20Color#page/n3/mode/2up> [<https://perma.cc/Y5PT-25NR>].
  9. Compare, e.g., *Acad. of Motion Picture Arts and Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1452 (9th Cir. 1991) (noting that public display of copies of a work does not amount to publication divesting common-law copyright), with *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chi.*, 320 F. Supp. 1303, 1310–11 (N.D. Ill. 1970) (holding that public display of a copy of a work without restrictions on copying and guards preventing copying is publication divesting common-law copyright).
  10. OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909*, at 121–22 (2016).

of the other attention to copyright and art has focused on English law, and in particular on the passage of an 1862 Act that extended copyright protection to paintings, drawings, and photographs. It is difficult to summarize that entire discussion, which includes contributions by Lionel Bently, Ronan Deazley, Stina Teilmann-Lock, and Elena Cooper.<sup>11</sup> Bently, like Bracha, implicates a move towards abstraction of authorship, but locates it specifically in romantic aesthetics, and its account of the origin of both literature and visual arts in the imaginations of individual creators.<sup>12</sup> Bently cites two other principal influences. He argues that the choice to frame an area of law as copyright law (rather than, say, separate areas of printing law, fine art law, and industrial art law) tended to group literature and art together even before the latter was protected.<sup>13</sup> He also contends that the demand for protection grew from a variety of concerns, but particularly from the way the introduction of photography challenged existing relationships between artists and the market for engravings, since engravings could be copied relatively easily, and relatively well, using photography.<sup>14</sup>

As will be detailed below, the record of activity leading up to the provisions respecting art in the 1870 Act includes five petitions presented to Congress in early 1869, cumulatively signed by several hundred artists, lithographers, publishers, and others; one ultimately unsuccessful effort to organize a group of artists and to draft a bill establishing a sui generis art registration scheme adapted from design patent law, widely reported in New York newspapers; and two bills that were introduced in Congress in 1869 specifically for the purpose of adding fine art as copyrightable subject matter. An examination of that history leads to the following principal conclusions:

First, a significant part of the impetus for protecting paintings and drawings was actually to ensure enforceable exclusive rights for prints—

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11. See Lionel Bently, *Art and the Making of Modern Copyright Law*, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE 331–32 (Daniel McClean & Karsten Schubert eds., 2002); Ronan Deazley, *Breaking the Mould? The Radical Nature of the Fine Arts Copyright Bill 1862*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 289 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010); STINA TEILMANN-LOCK, THE OBJECT OF COPYRIGHT: A CONCEPTUAL HISTORY OF ORIGINALS AND COPIES IN LITERATURE, ART AND DESIGN 85–100 (2016); ELENA COOPER, ART AND MODERN COPYRIGHT: THE CONTESTED IMAGE 12–48 (2018).
  12. See Bently, *supra* note 11, at 332–34.
  13. *Id.* at 334–36. In this regard, Bently and Deazley both cite a development that was particular to England, the passage of the International Copyright Act of 1844, which empowered the Queen to offer to protect foreign works of both literature and art in negotiations of bilateral treaties based on reciprocity. See Deazley, *supra* note 11, at 289–91.
  14. See Bently, *supra* note 11, at 336–43.

engravings, etchings, and particularly, lithographs—as printmaking became industrialized and print publishers became centers of investment, risk, and control. Prints had been protected under federal copyright law since 1802, but the phrasing of the 1802 Act assumed that the painter or drawer of the design for the print would be creating or commissioning the plate (whether engraved, etched, cut, or lithographic) from which the prints would be made. As the nineteenth century progressed, prints were more and more often created by print publishers who would acquire designs from painters and drawers and make entrepreneurial investments in plates and printing. Those publishers wanted to obtain exclusive rights in those designs, but the 1802 Act would not let them do that, and no American precedent supported extra-statutory common-law protection.

Second, the drive for protection of paintings and drawings was also motivated by developments in reprographic technology that enabled inexpensive mechanical reproductions to resemble more closely painted or drawn originals. Although the technological development that may most readily spring to mind today is photography, color lithography—a technology that is now less prominent in the public mind—was as important as or more important than photography to the 1870 Act.

Third, it is politically easier to expand an existing scheme of protection, with many provisions and institutional structures already in place, than it is to create a new one, which requires negotiating all of the dimensions of protection from scratch. Early in 1869, a group of artists drafted and attempted to promote a bill for *sui generis* protection of paintings, drawings, and sculpture, based more on design patent law than on copyright law. It had different requirements for protection and a different term, and was arguably better tailored to works of those types. However, that effort failed, and what prevailed was the simpler expedient of adding new categories of subject matter to the existing scheme of copyright protection. In that respect, the debate over protection for art, and its eventual resolution, prefigures the debate over protection of computer programs and its resolution.<sup>15</sup>

Fourth, in confirmation of what Bracha, Bently, and others have observed, artists and art publishers had undoubtedly more fully developed both their self-identity and their political power by the end of the Civil War. Artists were better organized in associations like the National Academy of Design, founded in 1825, the year after a previous bill to protect paintings under copyright law failed in the Senate.<sup>16</sup> The larger publishers of engravings and lithographs became substantial industrial ventures that employed dozens of workers in large factories

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15. For one survey of the debate over how computer programs should be protected, see Pamela Samuelson, *The Uneasy Case for Software Copyrights Revisited*, 79 GEO. WASH. L. REV. 1746 (2011).

16. See *infra* text accompanying notes 144–147.

and developed the kind of economic importance that could attract the attention of legislators.

Fifth, I found no evidence of opposition in 1869 and 1870 to the proposed extension of federal copyright protection to paintings, drawings, and sculpture. This provides a marked contrast with some other proposed extensions. The history of federal copyright protection for sound recordings, for example, has been halting and partial, at least in part because there was a developed industry, radio broadcasting, which had enjoyed royalty-free performances of sound recordings for some time.<sup>17</sup> No similar interests vocalized their objections to copyright protection for fine art.

Sixth, the 1870 Act's expansion of copyright to include paintings, drawings, and sculpture was linked less closely to English legislative developments than one might assume. English law had extended protection against copying to sculpture in 1789 and 1814, and to paintings, drawings, and photographs in 1862.<sup>18</sup> One might think that proponents of such extension in the United States would point to English precedent, and that any American legislation would be modelled on that precedent. That would be consistent with much of previous American copyright legislation, which had borrowed heavily from English legislation. Yet the petitions presented to Congress in 1869, and newspaper accounts of the drafting of those petitions, contain no mention of English precedent, and no wording of either the petitions or the 1870 Act's provisions can be traced to that precedent.

This essay will first trace the basic chronology of the efforts to induce Congress to protect paintings, drawings, statues, and similar creations, and of the paths of legislation in Congress. It will then focus on each of three separate streams of legislative effort—the first and third involving petitions, and the second involving organization and bill drafting by artists.

#### I. THE ADDITIONS TO COPYRIGHTABLE SUBJECT MATTER IN THE 1870 ACT: A BASIC CHRONOLOGY

The Copyright Act of 1870's subject matter additions were the subject of lobbying by three organizations of artists; by a variety of companies; and by many individuals who identified themselves as artists, painters, sculptors, lithographers, engravers, foundrymen, printers, publishers, and editors. That lobbying was channeled through five petitions that reached the Senate and the House in early 1869, spanning the last days of the 40th Congress and the first days of the

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17. See, e.g., Brian Day, *The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 MICH. TELECOMMS. TECH. L. REV. 179, 184 (2009).

18. See Models and Busts Act 1798, 38 Geo. 3 c. 71; Sculpture Copyright Act 1814, 54 Geo. 3 c. 56; Fine Arts Copyright Act 1862, 25 & 26 Vict. c. 68.

41st, as well as through one effort to draft and promote a bill that was never introduced in Congress. Four of the five petitions used the same text, because the National Academy of Design drafted one petition and then was able to induce institutions and individuals based in Philadelphia, Cincinnati, and Boston to submit identical petitions. As a result, there were three distinct streams of legislative effort:

- The “Prang petition”: a petition written by lithographer Louis Prang in early 1868, circulated in Boston and New York for many months thereafter, gathering 104 signatures of individuals and six representing companies, and presented to the Senate by Senator Charles Sumner of Massachusetts on January 18, 1869;<sup>19</sup>
- The “MacDonald draft bill”: an organizing effort of a group of New York artists led by sculptor James Wilson MacDonald that took place in December of 1868 and January and February of 1869, and that culminated in the draft of a bill for a sui generis registration scheme to protect art, which was unveiled on February 1, 1869 but never reached Congress;<sup>20</sup>
- The “National Academy of Design petition”: a petition drafted by the National Academy of Design, gathering forty-one signatures from members of the National Academy and seventy-four signatures of other New York artists, and presented to the Senate by Senator Edwin Morgan of New York on February 6, 1869.<sup>21</sup> The National Academy also sent the text of that petition and a letter soliciting support to institutions and artists in Philadelphia, Boston, Cincinnati, and Chicago.<sup>22</sup> As a result,

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19. *See* Petition of Memorialists, Artists, Chromo-Lithographers, Engravers, Print-publishers, Journalists, Authors, and Others Interested in the Progress of American Art, Praying the Passage of a Law Declaring that the Purchase of a Painting or Work of Art does not Convey the Copyright thereof [hereinafter Prang petition]; S. JOURNAL, 40th Cong., 3d Sess. 110 (1869) (noting presentation of the petition to the Senate by Senator Sumner); CONG. GLOBE, 40th Cong. 3d Sess. 407 (1869) (transcribing Senator Sumner’s statement upon presentation of the petition to the Senate).
20. *Copyrights of Artists*, THE SUN (N.Y.C), Dec. 31, 1868, at 2; *Copyright for Works of Art*, N.Y. TRIB., Feb. 1, 1869, at 4; *Copyright in Works of Art*, N.Y. WKLY. J. COMMERCE, Jan. 7, 1869, at 3.
21. *See* The Petition of the Undersigned, Members of the National Academy of Design, and other Artists [hereinafter National Academy petition]; S. JOURNAL, 40th Cong., 3d Sess. 208 (1869) (noting that Senator Morgan presented to the Senate the memorial of the National Academy of Design and others).
22. *See* ELIOT CLARK, HISTORY OF THE NATIONAL ACADEMY OF DESIGN, 1825 - 1953, at 86 (1954). There may be documents relating to the National Academy’s outreach available in its archives, now held at the Smithsonian

petitions were submitted by the Pennsylvania Academy of Fine Arts,<sup>23</sup> the Academy of Fine Arts of Cincinnati,<sup>24</sup> and a group of Boston artists led by William Morris Hunt.<sup>25</sup> The text of those petitions was identical to that of the National Academy petition.

There is very little duplication of signatures on the petitions. As far as I can tell, there was one painter, Eastman Johnson, who signed both the Prang petition and the National Academy petition, and otherwise there was no overlap between signers of petitions.<sup>26</sup> There was a little more overlap between signers of the National Academy petition and those specifically mentioned in newspaper accounts as being involved with the MacDonald legislative effort; five signers of the petition are mentioned in the newspaper accounts.<sup>27</sup>

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Institution. Unfortunately, as of this writing, the Smithsonian has been closed to researchers for over fourteen months due to the pandemic. If I find new material once the Smithsonian reopens, I will post it at <http://www.robertbrauneis.net/1870fineartscopyright.htm>.

23. Petition of the Pennsylvania Academy of the Fine Arts, Asking for the Protection of Copyright for Works of Art, SEN 40A-H11.1; *see* J. House of Representatives, 40th Cong., 3d Sess. 373–74 (1869) (noting that Representative O'Neill presented the petition to the House).
24. Petition of the Officers of the Academy of Fine Arts of Cincinnati Praying that Protection be Granted to Authors of Fine Arts in the Nature of a Copyright, H.R. 41A-H.8.1 (Committee on Patents); *see* J. House of Representatives, 40th Cong., 3d Sess. 434 (1869) (“By Mr. Eggleston: The petition of the officers of the Academy of Fine Arts of Cincinnati, Ohio, praying for the passage of a copyright [law . . .]”); J. House of Representatives, 41st Cong., 1st Sess. 68 (1869) (“By Mr. Jenckes: . . . the petition of officers of the Academy of Fine Arts of Cincinnati, heretofore referred February 24, 1869, praying for protection to authors of fine arts in the nature of copyright[.]”).
25. I do not have a copy of this petition, but the description in the Congressional Globe of its presentation to the Senate by Senator Sumner suggests that it used identical language. *See* CONG. GLOBE, 41st Cong, 1st Sess. 28 (1869) (“Mr. Sumner . . . also presented a petition of artists of Boston, setting forth that the existing laws do not afford to authors of paintings, drawings, statuary, and models, being works of the fine arts, protection in the nature of copyright, and praying for the passage of a law that shall give to them that protection . . .”) *see also* J. SENATE, 41st Cong., 1st Sess. 17 (1869) (recording Senator Sumner’s presentation of “a petition of William M. Hunt and others, artists, of Boston”). If I am able to retrieve the petition once the National Archives reopen after the pandemic, I will post images and a description of it at <http://www.robertbrauneis.net/1870fineartscopyright.htm>.
26. As stated above in footnote 25, I do not have a copy of the William Morris Hunt petition, and so cannot compare signatures on that petition with others.
27. Those individuals are James Hope, C.H. Marshall, Constant Mayer, E.N. Perry, and Oregon Wilson. *See* National Academy petition, *supra* note 21,

Legislation was introduced in Congress very close on the heels of these efforts—just two days after the National Academy of Arts petition was presented to Congress, and three weeks after the Prang petition was presented. On February 8, 1869, in the waning days of the 40th Congress, Senator Morgan introduced S. 914, a bill “[t]o secure the copyright of paintings, drawings, statuary, and models.”<sup>28</sup> A month later, at the beginning of the 41st Congress, Senator Sumner introduced S. 61, with the exact same language as S. 914.<sup>29</sup> Neither of those bills, which I will refer to collectively as “the 1869 bills,” reached the floor of Congress as separate legislation. However, Congress had already started to consider the comprehensive revision of patent and copyright law. When a comprehensive revision bill was presented to Congress later in the 41st Congress as H.R. 1714, it had incorporated language from S. 914 and S. 61, with some revisions.<sup>30</sup> When the bill reached the House floor, Representative Jenckes, who had introduced it, noted:

We have extended the privileges of [the law of copyrights] from time to time to other subjects than those originally embraced in it. For instance, by a law passed some four or five years ago they were extended to photographs and negatives thereof. We now propose to extend them to paintings and works of art, believing that an artist has as much right to the exclusive reproduction of his own works as an author or engraver.<sup>31</sup>

H.R. 1714 eventually passed both houses, and was signed into law as “An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights.”<sup>32</sup>

As Table 1 below shows, the descriptions of new copyrightable subject matter in the National Academy petition, the 1869 bills, and H.R. 1714 are similar enough to suggest direct lineage. The 1869 bills change “being works of the fine arts” to “designed and executed as works of the fine arts,” but they are otherwise identical. H.R. 1714 adds three additional categories, likely out of an excess of drafting caution: “statue,” duplicative of statuary; “chromo,” a reference to color lithographs, which will be discussed further below, but which were almost certainly already protected as “prints”; and “designs,” which seems to denote preliminary sketches or studies in two dimensions, and which would already be protected as “drawings” or “paintings.”

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at 3 (displaying these signatures); *Copyright in Works of Art*, *supra* note 20, at 3 (mentioning Mayer and Wilson); *Copyrights of Artists*, *supra* note 20, at 2 (mentioning Hope, Marshall, Perry and Wilson).

28. S. 914, 40th Cong., 3d Sess. (1869).

29. *See* S. 61, 41st Cong., 1st Sess. (1869).

30. *See* H.R. 1714, 41st Cong., 2d Sess. (1870).

31. CONG. GLOBE, 41st Cong., 2d Sess. 2854 (1870).

32. Act of July 8, 1870, ch. 230, 16 Stat. 198.

<b>Table 1: Comparison of Copyrightable Subject Matter Language</b>	
<b>Document</b>	<b>Description of Additions to Copyrightable Subject Matter</b>
National Academy of Arts Petition (and the three petitions that copied it)	“paintings, drawings, statuary, and models, being works of the fine arts”
S. 914 and S. 61	“paintings, drawings, statuary, and models, designed and executed as works of the fine arts”
H.R. 1714 as originally introduced in the House, April 7, 1870, and also as eventually passed as the Copyright Act of 1870	[an author, inventor or proprietor of] “a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts”

H.R. 1714 also makes changes at the end of the phrase that modify the relation of “works of the fine arts” to categories other than “models and designs.” By placing a comma after “models,” the National Academy petition and the 1869 bills seem to use the term “works of the fine arts” to modify and summarize all four of the specific added categories—“paintings, drawings, statuary, and models.” H.R. 1714 removes that comma and adds “intended to be perfected by” in between “models and designs” and “works of the fine arts,” adding very strong pointers that “works of the fine arts” now only directly modifies “models and designs.” The alteration weakens the sense that the group of added categories are collectively “the fine arts,” and for dedicated textualists, that could possibly make a difference. However, the judges who interpreted that language, most prominently the majority and dissenters in *Bleistein v. Donaldson Lithographing Co.*,<sup>33</sup> were not quite so dedicated textualists, and so that adjustment did not become significant.<sup>34</sup>

Thus, we can already see that the language of the National Academy petition seems to have been quite influential in prompting the language of the 1870 Act itself. To explore other influences, we will have to get deeper into each legislative effort and its background.

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33. 188 U.S. 239 (1903).

34. *Id.* at 250, 253 (1903).

## II. THE PRANG PETITION AND THE PROTECTION OF PRINTS IN INDUSTRIAL PRODUCTION

The first petition presented to Congress was drafted and circulated by Louis Prang, the founder and owner of Louis Prang and Company, a printing and publishing firm that specialized in color lithography.<sup>35</sup> One lesson of Prang's petition is that a substantial part of the impetus for obtaining protection for paintings and drawings was actually to guarantee protection for prints that were produced in the context of new industrial business relationships. Prints—graphics printed in multiple copies on paper through a variety of processes—had been protected under federal copyright law since 1802. However, the language of the 1802 Act, modelled on a 1735 English Act, protected only those prints that were made in the context of pre-industrial business relations, in which it was the “inventor” of the print—the individual artist who drew or painted the design from which the printing plate or surface was made—who either produced that plate himself and made prints from it, or who commissioned someone to do so, thus retaining entrepreneurial control.<sup>36</sup> By the 1860s, many graphic printers—Louis Prang and Company included—were industrial firms that became the loci of control. Those firms entrepreneurially gathered images from individual painters and drawers as graphic content for prints that they made and distributed at their own speculative risk. The 1802 Act did not protect those prints.<sup>37</sup>

Providing full support for that argument requires filling in many details about the Prang petition; the technology of color lithography; Louis Prang and Company's business model; and the existing protection for paintings and prints. In early 1868, Prang drafted his petition with a very specific prayer: “We ask . . . that an Act be passed declaring that the purchase of a painting or work of art does not convey the copyright thereof, which inheres, and shall inhere in the Artist, unless specially conveyed to the purchaser.”<sup>38</sup> Prang first circulated the petition in Boston, and then sent it to another lithographic publisher in New York to gather further signatures.<sup>39</sup> In April 1868, the *New York*

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35. See generally KATHERINE M. MCCLINTON, *THE CHROMOLITHOGRAPHS OF LOUIS PRANG* (1973); LARRY FREEMAN, *LOUIS PRANG: COLOR LITHOGRAPHER, GIANT OF A MAN* (1971).

36. See *infra* text accompanying notes 69–82.

37. Of course, Prang solicited and obtained signatures, not just from other lithographers, but from painters and drawers and sculptors as well; I will consider their position and interests below in conjunction with the National Academy of Design petition.

38. See Prang petition, *supra* note 19.

39. See Prang petition, *supra* note 19 (showing that the first signers are located in Boston); *Important to Artists, Art-Publishers, Etc.*, N.Y. TRIB., Apr. 11,

*Tribune* and the *New York Evening Post* both announced that a copy of the Prang petition was available for signing “at the office of the American Photo-Lithographic Company, [in the] . . . Herald Building.”<sup>40</sup> After describing the act for which the petition prayed, the *Evening Post* commented that “[s]uch an act will secure to the artist part of the profits to be reaped by reproduction of his works, either by chromo-lithography, engraving, or otherwise.”<sup>41</sup> As noted above, the petition eventually gathered 110 signatures.<sup>42</sup> When Senator Charles Sumner presented the petition to the Senate, he stated that “[t]his petition is headed by Louis Prang, of Boston, the eminent chromolithographer, who has done so much to introduce that beautiful art into our country, and I find by looking over the names those of many eminent artists, sculptors, painters, engravers, and authors.”<sup>43</sup> Prang had cultivated a relationship with Sumner by, among other things, publishing a chromolithograph portrait of him earlier in the 1860s, and sending him copies of other chromolithographs printed by Louis Prang and Company.<sup>44</sup>

As a legal matter, the prayer of the Prang petition is incomplete, and likely reveals both Prang’s lack of legal training and the particular problem that Louis Prang and Company faced. To achieve what Prang wanted, Congress would have had to do more than declare that the sale of the physical painting does not convey copyright, because paintings did not yet have federal copyright protection or recognized common-law protection. Yet it also seems clear that Prang’s petition had an impact on legislation. If Section 1 of the 1869 bills began by adding paintings, drawings, statuary, and models as copyrightable subject matter, it ended by providing that “on the sale of any such work of art the copyright shall remain the property of the vender, unless transferred therewith by writing.”<sup>45</sup> It seems reasonable to conclude that that language was added to address the Prang petition’s concern. As regards

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1868, at 4 (noting that many artists and publishers had signed the petition and those wanting to join could do so at the American Photo Lithographic Company).

40. See *Important to Artists*, *supra* note 39, at 4; *Copyright of Works of Art*, N.Y. EVENING POST, Apr. 4, 1868, at 2; see also *Copyright of Works of Art*, BUFFALO COURIER, Apr. 7, 1868, at 1 (announcing the petition).
41. *Copyright of Works of Art*, N.Y. EVENING POST, *supra* note 40, at 2.
42. See *supra* text accompanying note 19.
43. CONG. GLOBE, 40th Cong. 3d Sess. 407 (1869).
44. See MCCLINTON, *supra* note 35, at 36 (noting publication of the portrait of Sumner, executed by Thure de Thulstrup); *Notes from Eminent Persons*, 1 PRANG’S CHROMO 5, 5 (1869) (printing an excerpt from a letter by Sumner thanking Prang for several chromos and praising their quality).
45. See S. 914, 40th Cong. § 1 (1869); S. 61, 41st Cong. § 1 (1869).

statutory copyright, the desire to separate transfer of copyright from transfer of the copy was also addressed by the 1870 Act as ultimately enacted. That Act contained a general requirement of written assignments of copyright that had the same effect as the more specific language in the 1869 bills.<sup>46</sup> As we will see, a contrary rule was later introduced with respect to common-law copyright—ironically also to favor Louis Prang.<sup>47</sup>

Perhaps just as impressively, the 1870 Act introduced “chromo” as a specifically enumerated category of copyrightable subject matter. Louis Prang and Company specialized in producing “chromos”—color lithographs, or chromolithographs—and Prang liked calling them by just that abbreviated term.<sup>48</sup> As will be detailed below, chromos were undoubtedly already given limited protection as “prints” under the Copyright Act of 1802.<sup>49</sup> Yet to have “chromos” explicitly mentioned on a par with other “fine arts” categories was an enormously desirable status signal. Though we have no paper trail to prove it, one can easily imagine that Prang and other chromolithographers, whose petition stated that it was triggered by “the rapid perfection of the process of Chromo-Lithography in the United States,”<sup>50</sup> sought such separate mention.

Color lithographers very likely saw themselves as participating in the greatest breakthrough in printing technology in centuries, and with some justification. Lithography, invented in 1797 in Bavaria by Alois Senefelder,<sup>51</sup> was the first new printmaking technology to emerge in 300 years.<sup>52</sup> It originally used limestone as the printing surface, hence the “lith” in “lithography.” However, the technology of lithography is not defined by its use of stone—most lithography now uses metal or plastic,

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46. See Act of July 8, 1870, ch. 230, § 89, 16 Stat. 198, 213 (providing that assignments must be in writing); *id.* § 100 at 214 (providing for penalties for infringement if the defendant did not have “the consent of the proprietor of the copyright first obtaining in writing, signed in the presence of two or more witnesses”).

47. See *infra* text accompanying notes 97–104.

48. Prang claimed that he coined the term “chromo” for color lithographic reproductions of paintings, but that was not in fact the case. See PETER C. MARZIO, *THE DEMOCRATIC ART: PICTURES FOR A 19TH-CENTURY AMERICA* 11 (1979).

49. See *infra* text accompanying notes 69–91.

50. Prang petition, *supra* note 19.

51. See 10 WILLIAM M. IVINS, JR., *PRINTS AND VISUAL COMMUNICATION* 87, 108 (A. Hyatt Mayor ed., 1953).

52. See Erika Piola, *The Rise of Early American Lithography and Antebellum Visual Culture*, 48 WINTERTHUR PORTFOLIO 125, 125 (2014).

and even by the early 1870s, Louis Prang was using zinc plates.<sup>53</sup> Rather, it is defined by its employment of a basic chemical phenomenon, the mutual repulsion of oil and water, which is why Senefelder originally called it “*chemische Druckerei*,” or “chemical printing.”<sup>54</sup> To make a lithograph, an image is created on a flat stone or other appropriate surface with an oil-based material. The simplest way is to draw on a stone with a special grease-based crayon, and then to seal those marks. The stone is then moistened, and that water is retained in the areas of the surface where the oil-based material was not applied. An oil-based ink is then applied to the surface. The ink is repelled by the areas covered by water, and attracted to the areas where the oil-based material was applied, thus distributing itself in the desired image pattern. A sheet of paper is placed on or under the surface, and the two are pressed together in a printing press. The ink is transferred to the paper, forming the same image as was created on the stone with the oil-based material.<sup>55</sup>

Lithography was introduced to the United States in the mid-1810s, and gained significant commercial use in the 1820s.<sup>56</sup> The first lithographic prints were monochrome, made by a single impression with one ink. Monochrome prints would have been quite familiar to members of the public at the beginning of the nineteenth century, because most of the printed images that people encountered in their everyday lives were monochrome, produced by processes such as engraving, etching, or cutting.<sup>57</sup> Those monochrome prints could be found hanging in frames in parlors, inserted in books or magazines, or printed as maps or charts or visiting cards or advertising posters.

Some printmakers, perhaps most famously Currier and Ives, introduced color by having a staff of colorists hand-color monochrome prints.<sup>58</sup> A key advance, however, was the mechanization of printing in color—color lithography—which began in the 1840s, and became

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53. See Michael Clapper, *Art, Industry, and Education in Prang's Chromolithograph Company*, in *THE CULTIVATION OF ARTISTS IN NINETEENTH-CENTURY AMERICA* 121, 125 n.11 (Georgia Brady Barnhill, Diana Korzenik & Caroline F. Sloat eds., 1997).

54. See *Lithography*, *THE GROVE ENCYCLOPEDIA OF MATERIALS AND TECHNIQUES IN ART* (Gerald W.R. Ward ed., 2008) [hereinafter *THE GROVE ENCYCLOPEDIA*].

55. See, e.g., Piola, *supra* note 52, at 126.

56. See *id.* at 127.

57. See generally *id.*

58. See Georgia B. Barnhill, *Business Practices of Commercial Nineteenth-Century American Lithographers*, 48 *WINTERTHUR PORTFOLIO* 213, 220–22 (2014).

widespread in the 1860s.<sup>59</sup> Color lithographs are made by creating coordinated images on several stones, inking each of those stones with a different colored ink, and printing a single sheet of paper sequentially with all of the stones, thus creating a multi-colored image on that sheet of paper. Color lithography became “the first cost-effective method for printing in color,” and “facilitated more versatile and innovative design styles than engraving.”<sup>60</sup> As the title of one book about nineteenth-century American lithography puts it, color lithography was at the center of a “color explosion” in American popular culture.<sup>61</sup>

Louis Prang and a partner founded a firm to create lithographs in 1858. Although Prang himself had learned the craft of lithography, by the time he drafted and circulated the copyright petition in 1868 he had become a businessman who owned and ran a large lithographic publishing company, Louis Prang and Company. In the previous year, 1867, Prang had constructed a new factory building in the Boston neighborhood of Roxbury that housed forty printing presses and seventy workers.<sup>62</sup> By 1870, those presses were producing 5000 color lithographs a day.<sup>63</sup> Prang’s firm became one of the larger firms in the American lithographic printing industry, but the industry as a whole also experienced huge growth. By one count, it grew from three firms using eight hand presses in 1825 to fifty-five firms using about 450 hand presses and thirty steam presses in 1870.<sup>64</sup>

In the late 1860s, Louis Prang and Company specialized in publishing high-quality facsimiles of paintings, and it used the term “chromo” to refer specifically to color lithographic reproductions of paintings.<sup>65</sup> Those chromos were produced with twenty or more stones, each inked with a different color to contribute to the final print.<sup>66</sup> Prang’s first real success in selling chromos was with a series of facsimiles of three paintings by Arthur Fitzwilliam Tait. (These were of sentimental popular subjects—“Group of Chickens,” “Group of

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59. *See id.* at 220, 222.

60. Piola, *supra* note 52, at 125.

61. *See* JAY T. LAST, *THE COLOR EXPLOSION: NINETEENTH-CENTURY AMERICAN LITHOGRAPHY* (2005). For other prominent histories of chromo-lithography, see MARZIO, *supra* note 48 and MICHAEL TWYMAN, *A HISTORY OF CHROMOLITHOGRAPHY: PRINTED COLOUR FOR ALL* (2013).

62. *See* McCLINTON, *supra* note 35, at 11.

63. *See* FREEMAN, *supra* note 35, at 49.

64. *See* Barnhill, *supra* note 58, at 214.

65. *See* LAST, *supra* note 61, at 25–26.

66. *See* James Parton, *James Parton on Popularizing Art*, 1 PRANG’S CHROMO 1, 1 (1869) (explaining that twenty-six stones were used to print a lithographic facsimile of the painting “Barefoot Boy” by Eastman Johnson).

Ducklings,” and “Group of Quails”—which, like many of Prang and Company’s other chromos, earned some critical disdain).<sup>67</sup> In September 1868, the Providence Evening Press reported that Prang and Company had sold about 50,000 copies of the Tait chromos, at a price of \$5 each, which by one calculation is about \$90 in 2020 dollars.<sup>68</sup>

Because Prang and Company specialized in facsimiles of pictures painted by independent painters, it wanted some form of protection against competitors copying directly from its lithographs, and also some form of protection against competitors copying from the paintings of which it was producing facsimiles. I will consider the second kind of protection—protection against copying of paintings—below with the National Academy’s petition. Here, I want to explore how the federal and common-law protection existing in 1869 was unlikely to prevent others from directly copying Prang and Company lithographs.

Consider, first, statutory protection. The Copyright Act of 1802 undoubtedly protected some lithographs. That Act, largely patterned on the English Engraving Copyright Act of 1735,<sup>69</sup> protected “historical or other . . . prints” that were “engraved, etched, or worked.”<sup>70</sup> Lithographs are not “engraved”—they do not involve cutting grooves on a plate to which ink would be applied before it was pressed onto paper.<sup>71</sup> Nor are they “etched”—they don’t involve selectively applying a corrosive chemical to the plate to create grooves or pits.<sup>72</sup> However, lithographic stones were almost certainly “worked,” an adjective and associated verb that seem to refer rather generally to the manual preparation of a surface to receive ink differentially for printing. Moreover, while Congress modeled the 1802 Act on the 1735 Engraving Copyright Act, the 1802 Act omitted some pertinent limiting language. The 1735 Act protected prints that were “engrave[d], etch[ed], or

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67. After receiving a copy of “The Chickens,” among others, E.L. Godkin wrote that “[a]t whatever price, [chromos] would be nearly valueless as art, or as things of beauty and of truthful suggestion of nature.” *Color Printing from Wood and from Stone*, NATION (N.Y.), Jan. 10, 1867, at 36.

68. See *The Art of Chromo-Lithography: Sketch of Louis Prang*, PROVIDENCE EVENING PRESS, Sept. 23, 1868, at 1. For the calculation of inflation, see Ian Webster, *\$5 in 1868 is worth \$91.65 today*, CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1868?amount=5> [<https://perma.cc/J4B6-H3GV>] (last visited Oct. 18, 2020).

69. English Engraving Copyright Act 1735, 8 Geo. 2 c. 13 (Eng.).

70. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171.

71. See RAYMOND LISTER, PRINTS AND PRINTMAKING: A DICTIONARY AND HANDBOOK OF THE ART IN NINETEENTH-CENTURY BRITAIN 83–84 (1984) (defining “line-engraving”).

72. See *id.* at 82 (defining “etching”).

work[ed] in *Mezzotinto* or *Chiaro Oscuro*.<sup>73</sup> Those last two terms refer to two much more specific printmaking processes that are different from lithography.<sup>74</sup> In the 1802 Act, Congress omitted “in *Mezzotinto* or *Chiaro Oscuro*,” broadening protection to prints made by all processes that involved “working.”<sup>75</sup> Lithography certainly involved manual preparation and alteration of a surface before inking and printing from it, and so there is every reason to think that it involved “working,” and that the resulting prints could be protected.<sup>76</sup>

That is not the end of the story, however, because the 1802 Act had other peculiar limitations on protection, again derived from the 1735 Engraving Copyright Act. The 1802 Act protected any person “*who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints.*”<sup>77</sup> Thus, the creative act that is protected is the “invention” of an image. That invented image is then “designed and engraved, etched or worked” into a plate that is inked and pressed on paper to make a print.<sup>78</sup> The first clause

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73. English Engraving Copyright Act 1735, 8 Geo. 2 c. 13, § 1 (Eng.).

74. The mezzotint process involves creating a multitude of tiny pits in a metal plate with a small-toothed metal tool called a “rocking tool.” See LISTER, *supra* note 71, at 84. The pits will then hold ink just as pits created by engraving or etching would, and they can be further modified to achieve the desired result. *Id.* In this context, “chiaroscuro” likely means printing with two or more woodcuts using different colors, often printing with black and white inks on a medium-toned paper. See *Woodcut, chiaroscuro*, THE GROVE ENCYCLOPEDIA, *supra* note 54.

75. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171. It is worth mentioning that the Engraving Copyright Act of 1735, and hence also the Copyright Act of 1802, contained the first statutory recognition of what would now be called the “substantial similarity” test. Language in both Acts prohibited not just copying protected engravings as such, but copying “in the whole or in part, by varying, adding to, or diminishing from, the main design.” See English Engraving Copyright Act 1735, 8 Geo. 2 c. 13, § 1 (Eng.); Act of Apr. 29, 1802, ch. 36, § 3, 2 Stat. 171, 172.

76. See, e.g., Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171. Many lithographers took the acts needed to obtain federal copyright protection for their lithographs, recording their titles before publication, placing proper copyright notice on them, and submitting deposit copies. See *infra* note 83. Since at the time there was no process of examined registration, however, that practice does not provide evidence that any governmental official believed that lithographs were protected. Examined registration began only with the Copyright Act of 1909. See Act of Mar. 4, 1909, ch. 320, § 10, 35 Stat. 1075, 1078 (providing for registration of copyright claims); *id.* § 55 35 Stat. 1086 (detailing the contents and legal effect of a registration certificate).

77. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171.

78. Notice that “design” is treated as a step that is separate from “invent” and “engrave, etch or work,” and that “design” seems to be grouped with the

of the italicized passage addresses the situation in which the inventor of the image and the person who prepares the plate are the same person. In that case, that person can claim copyright in the print. The second clause addresses the situation in which the inventor and the preparer of the plate are not the same person, and the inventor of the image has commissioned the preparation of the plate. In that case, the inventor is again the one who can claim copyright in the print. As Mark Rose has commented, that seems to designate creation of the image as an act of authorship, worthy of copyright, while designating the engraving, etching or working of the plate as mere craftsmanship, unworthy of copyright.<sup>79</sup> It is not clear, however, that the phrasing of the 1735 Act actually represented any such abstract distinction between authorship and craft. Rather, that phrasing may have stemmed from the fact that it was passed largely at the instigation of William Hogarth, the preeminent illustrator and printmaker of that time. That was apparently the way Hogarth worked—always drawing the illustration from which an engraving was made, and sometimes doing the engraving himself, while sometimes engaging another engraver—and the 1735 Act may simply have mirrored his practice.<sup>80</sup>

England itself expanded protection through the Engraver's Copyright Act of 1766, which granted copyright to any person who engraved, etched, or worked a print "taken from any Picture, Drawing,

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latter, not the former. Marie-Stéphanie Delamaire notes that the production of an engraving often involved three artists—"the painter, the engraver, and often another artist charged with drawing a copy of the painting to scale . . . and adapt[ing it] to a grayscale." Marie-Stéphanie Delamaire, *Copy-Right Secured: Gilbert Stuart, Painting, and Intellectual Property in the Early American Republic*, in CIRCULATION AND CONTROL: ART AND INTELLECTUAL PROPERTY IN THE NINETEENTH CENTURY 16 (Marie-Stéphanie Delamaire & Will Slauter eds.) (forthcoming) (copy on file with author). The most elegant reading of "design" is that it referred to that intermediate step. However, by 1821, a court seemed to suggest that "design" involves the fixation of expression that was "invented" in the mind of a painter or drawer. *See Binns v. Woodruff*, 3 F. Cas. 421 (C.C.D. Penn. 1821) (No. 1,424) (noting that when a painter paints a painting and then commissions someone else to create an engraving of that painting, "the invention is designed or embodied by the person in whom the right is vested, and the form and completion of the work are executed by another"). For further discussion of *Binns*, see *infra* text accompanying notes 86–91.

79. *See* Mark Rose, *Technology and Copyright in 1735: The Engraver's Act*, 21 INFO. SOC'Y 63, 64 (2005).

80. *See* D. ROBERTON BLAINE, ON THE LAWS OF ARTISTIC COPYRIGHT AND THEIR DEFECTS 12 (1853) (noting that Hogarth procured the 1735 Engravers' Copyright Act); WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT 169 (1st ed. 1870) (explaining that the limitations of the 1735 Act stemmed from Hogarth's own practice); Ronan Deazley, *Commentary on the Engravers' Act (1735)*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds., 2008).

Model or Sculpture, either ancient or modern,” or who commissioned such a print.<sup>81</sup> Granting copyright to the engraver erased any rigid distinction between the authorship of drawing and the craft of engraving. The 1766 expansion could conceivably have protected chromolithographic facsimiles of existing paintings against copying (though it would have not stopped others from directly observing those paintings and independently preparing lithographic facsimiles). The Engraver’s Copyright Act of 1766, however, never became law in the United States. Whether out of choice, or more likely out of oversight, when Congress passed the Copyright Act of 1802, it looked only to the 1735 Act, and stuck with its grant of copyright only to the person who invented the image and either engraved it himself or commissioned the engraving. That left entrepreneurial printmakers—whether engravers, etchers, or lithographers—without statutory protection.

What about common-law protection? In the world of book publishing, there was a robust tradition of developing common-law copyright side-by-side with statutory copyright.<sup>82</sup> Even if a writer had not obtained statutory copyright in a manuscript she had written, she held common-law copyright in that manuscript as long as it remained unpublished, and she could assign her rights to someone else. Federal copyright law had always acknowledged the possibility that the person obtaining statutory copyright protection for a book might be not the author of the manuscript, but the “proprietor,” who had obtained common-law copyright from that author.<sup>83</sup> Yet there was no similar tradition of transferable common-law protection for the “manuscripts” from which prints were made. That is because those “manuscripts” would in fact be drawings or paintings, over which courts were more reluctant to grant exclusive rights. That reluctance is evident in the leading English case, the 1819 decision in *De Berenger v. Wheble*,<sup>84</sup> which took a clear stance against enforceable engraving rights in a painting. *De Berenger* held that someone who had purportedly acquired such rights, and had then commissioned such an engraving from an engraver, could not stop the engraver from making another engraving of the painting for his own use. “It would destroy all competition in the art to extend the monopoly to the painting itself,” opined Lord Chief

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81. 1767, 7 Geo. 3 c. 38, § 2 (Eng.).

82. See, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834).

83. See Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 124 (1790) (noting that federal copyright required recording of title “in the clerk’s office of the district court where the author *or proprietor* shall reside”) (emphasis added); *id.* § 4 (noting that federal copyright also requires “the author *or proprietor*” to deposit a copy of the work with the Secretary of State within six months of publication) (emphasis added).

84. (1819) 171 Eng. Rep. 732; 2 Stark. 548 (KB).

Justice Abbott, “[and] in this case the defendant’s engraving was made from the original picture, and not from the plaintiff’s print.”<sup>85</sup>

Back in the United States, *Binns v. Woodruff*,<sup>86</sup> a case decided in 1821 by Justice Bushrod Washington while riding circuit, also seems to suggest that common-law copyright could not be used to achieve the flexibility that the statutory process did not allow. John Binns published an elaborate, large-format engraved print of the Declaration of Independence, featuring facsimiles of the handwritten text and each of the signatures, and surrounded by scenes from the thirteen original states and portraits of John Hancock, George Washington, and Thomas Jefferson.<sup>87</sup> He engaged at least three artists to draw and paint images from which portions of the engraving would be made, and two engravers to engrave the plate itself.<sup>88</sup> However, Binns did not do any of the drawing or engraving himself. When Binns sued Woodruff for publishing a similar print, Woodruff argued in defense that although Binns had satisfied all of the formalities for obtaining federal copyright protection in his print, he was not the “proprietor” of the print because he did not “invent” the print within the meaning of the 1802 Act.<sup>89</sup> Justice Washington agreed, providing an early articulation of the doctrine that authorship requires fixed expression, and not just ideas.

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85. *Id.*, 2 Stark. at 549. In *Turner v. Robinson*, 10 Ir. Ch. R. 121 (1860), the Master of the Rolls delivered a lengthy opinion in favor of common-law copyright in a painting in a case involving copying of the painting by means of stereoscopic photographs of a tableau vivant recreation of the scene in the painting. *Id.* at 125, 147–48. On appeal, the Court of Appeals in Chancery decided the case on grounds of breach of confidence, avoiding copyright. See *Turner v. Robinson*, 10 Ir. Ch. R. 510, 519 (1860). When U.S. courts began to recognize common-law copyright in paintings, they started to cite the lower court decision in *Turner*. See, e.g., *Oertel v. Wood*, 40 How. Pr. 10, 21 (N.Y. Sup. Ct. 1870); *Parton v. Prang*, 18 F. Cas. 1273, 1274 (C.C.D. Mass. 1872) (No. 10,784). For a detailed study of *Turner*, see Will Slauter, *The Death of a Reproduction: Painting, Stereoscopic Photography, and Artists’ Rights in the British Isles circa 1860*, in *CIRCULATION AND CONTROL: ART AND INTELLECTUAL PROPERTY IN THE NINETEENTH CENTURY* (Marie-Stéphanie Delamaire & Will Slauter eds.) (forthcoming) (copy on file with author).

86. 3 F. Cas. 421 (C.C.D. Penn. 1821) (No. 1,424).

87. *Online Prints & Photographs Catalog: Declaration of Independence*, LIBRARY OF CONGRESS, <https://www.loc.gov/pictures/item/2003690785/> [<https://perma.cc/D5E7-8EKY>] (displaying images of the print).

88. See *Binns*, 3 F. Cas. at 422–23 (listing artists included as Mssrs. Bridport, Bird, and Sully; and engravers included as Mssrs. Valance and Murray); *Online Prints & Photographs Catalog: Declaration of Independence*, LIBRARY OF CONGRESS, <https://www.loc.gov/pictures/item/2003690785/> [<https://perma.cc/WY9Q-KANA>] (last visited Dec. 19, 2020) (listing Charles H. Parker and James Barton Longacre as additional engravers).

89. *Binns*, 3 F. Cas. at 423–24.

A person cannot “claim a copyright for . . . the work of his imagination locked up in his own mind, or existing in a form not visible to others.”<sup>90</sup> Rather, stated Justice Washington, he must have “designed or represented the subject in some visible form.”<sup>91</sup>

For our purposes, the crucial issue is not why Binns could not have been an author of the print. (In modern times, one wonders whether, with sufficient marshalling of the facts of Binns’s involvement in coordinating all of the contributions, he could claim compilation authorship.) Rather, the issue is why Binns could not have been an assignee of the common-law copyright interests of the artists and engravers, and as assignee have obtained federal protection as a “proprietor.” Perhaps when recording the title or bringing the lawsuit Binns made the mistake of claiming to be the “inventor or designer” of the print himself, and if only he had instead claimed to be the “proprietor” of the print, he would have prevailed.<sup>92</sup> That seems unlikely, however, because Justice Washington describes the 1802 Act’s requirements as applying, not to the author or authors of a print, who could then transfer their interests to another for purposes of obtaining federal copyright, but to the proprietor:

The person then who is intended and described as the *proprietor* of a copyright, is one who shall not only invent and design, but who shall also engrave, etch, or work the print to which the right is claimed; or who, from his own works and inventions, shall cause the print to be designed and engraved, etched or worked.<sup>93</sup>

Louis Prang likely had firsthand experience with copying of his chromos against which he could not protect. For example, in 1866, Prang bought a painting by Eastman Johnson called “The Barefoot Boy,” which illustrated a character in a poem by John Greenleaf Whittier.<sup>94</sup> In 1867, he produced and published a chromo of the

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90. *Id.*

91. *Id.* at 423.

92. I cannot locate the recorded title page of Binns’s engraving among the scanned title pages available at the Library of Congress. However, the title page of Woodruff’s engraving is available, and the recorder’s note indicates that Woodruff was claiming copyright as the “author” of the engraving. See *Book/Printed Material Collection: Image 555 of Copyright Title*, LIBR. OF CONG., <https://www.loc.gov/resource/rbccpmat.copy0003/?sp=555> [<https://perma.cc/7QT9-NGU2>] (last visited Dec. 19, 2020); *Book/Printed Material Collection: Image 556 of Copyright Title*, LIBR. OF CONG., <https://www.loc.gov/resource/rbccpmat.copy0003/?sp=556> [<https://perma.cc/P58Z-KUFL>] (last visited Dec. 19, 2020).

93. *Binns*, 3 F. Cas. at 423 (emphasis added).

94. Eastman Johnson had painted the picture in 1860 to serve as the basis for an engraved illustration accompanying Whittier’s poem in an anthology.

painting, which became one of his most popular.<sup>95</sup> In 1873, Whittier himself wrote Prang, complaining that a low-quality chromo of “The Barefoot Boy” was being offered by a Rhode Island newspaper as a subscription premium.<sup>96</sup> The Rhode Island chromo was more likely copied from the widely-distributed Prang chromo than from the original painting. Yet because “The Barefoot Boy” chromo was published before 1870, it was almost certainly not protected, and there is no record of Prang ever having pursued legal action against the Rhode Island newspaper.

There is a postscript here, covering courts’ increasing recognition of common-law copyright in paintings after Prang presented his petition. In 1870, a New York trial court ruled that Johannes Oertel had common-law copyright in his popular painting “Rock of Ages,” after he made a mistake in his application to record the title of the painting that resulted in him failing to obtain federal copyright protection.<sup>97</sup> That decision, however, was delivered with minimal reasoning, as was the decision of another judge in that court two years later that Oertel had lost his common-law copyright through publication.<sup>98</sup> The first fully reasoned opinion recognizing common-law copyright in paintings was the 1872 decision in *Parton v. Prang*,<sup>99</sup> delivered by Supreme Court Justice Nathan Clifford riding circuit in Massachusetts. Ironically, the defendant was none other than Louis Prang himself. Arthur Parton had sold a landscape painting that he had painted to the DeVries Art Gallery in Boston, which sold the painting to Louis Prang in March 1870.<sup>100</sup> Prang then created a version

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See Michael Clapper, “*I Once Was a Barefoot Boy!*”: *Cultural Tensions in a Popular Chromo*, 16 AM. ART 17, 25, 27 (2002). He had first sold the painting to a Boston lawyer named Wilder Dwight, and Prang then bought the painting from Dwight or a subsequent owner in 1866. See *id.* at 29.

95. *Id.* at 17.

96. See Letter from John G. Whittier to Louis Prang (Jan. 25, 1873), [https://edan.si.edu/slideshow/viewer/?damspath=/CollectionsOnline/pranlou/Box\\_0001/Folder\\_006](https://edan.si.edu/slideshow/viewer/?damspath=/CollectionsOnline/pranlou/Box_0001/Folder_006) [<https://perma.cc/A35X-JPP9>].

97. See *Oertel v. Wood*, 40 How. Pr. 10, 10, 21–22, 24 (N.Y. Sup. Ct. 1870). Oertel’s mistake was apparently that, while a resident of Rhode Island, he recorded the title of his work with the district court in New York, contravening the Copyright Act of 1831’s requirement that the title must be recorded in the district court where the author or proprietor resides. See J.F. OERTEL, *A VISION REALIZED: A LIFE STORY OF REV. J.A. OERTEL, D.D. ARTIST, PRIEST MISSIONARY* 70 (1917).

98. See *Oertel v. Jacoby*, 44 How. Pr. 179, 181, 184, 188 (N.Y. Sup Ct. 1872).

99. 18 F. Cas. 1273 (C.C.D. Mass. 1872) (No. 10,784).

100. The initial purchaser of the painting is not named in the opinion, but it is named in an article in the *Boston Daily Advertiser* about the case. See *Is a Painting a Manuscript?*, BOS. DAILY ADVERTISER, May 27, 1872, at 2.

of that painting as a chromolithograph, and made and sold lithographic prints under the title “Close of Day.” Parton sued, claiming that Prang had not acquired sufficient rights in his painting to make the chromolithographic version. Justice Clifford held that Parton had common-law copyright in the painting:

Undoubtedly, the author of a book or of an unpublished manuscript, or of any work of art, has at common law and independently of any statute, a property in his work until he publishes it or it is published by his consent or allowance, and that property unquestionably exists in pictures as well as in any other work of art.<sup>101</sup>

However, stated Clifford, an absolute, unconditional sale of a painting will transfer the common-law copyright in that painting. Because Parton did not reserve any rights in the painting, his sale of the painting transferred the common-law copyright in it as well, and Prang acquired that copyright when he acquired the painting.<sup>102</sup>

That rule was, of course, exactly the reverse of the rule that Prang’s petition sought and obtained in the 1870 Act. Thus, although the 1870 Act incorporated a requirement of written assignments of copyright, after *Parton* that requirement applied only to transfers of federal, statutory copyright. Common-law copyright in works of art was recognized in the shadow of the 1870 Act, but transfers of that copyright could be implied from the unconditional sale of the originals. That approach was reaffirmed in the 1940s in *Pushman v. New York Graphic Society*<sup>103</sup>—which looked directly to *Parton*—and remained unchanged until the Copyright Act of 1976 abolished common-law copyright in fixed works and instituted an across-the-board requirement of written transfers of exclusive rights.<sup>104</sup>

In 1868 and 1869, however, as Louis Prang was drafting and circulating his petition, those developments were in the future. Prints produced by entrepreneurial publishers from designs by independent painters were unlikely to be protected under either federal statute or the common law, and those entrepreneurial publishers—Louis Prang and Company prominent among them—wanted that protection. Prang drafted and circulated his petition, and it was duly presented to Congress and influenced statutory copyright in the 1870 Act.

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101. *Parton*, 18 F. Cas. at 1277.

102. *See id.* at 1278.

103. 39 N.E.2d 249, 251 (N.Y. 1942).

104. *See* 17 U.S.C. § 202 (2018); H.R. REP. No. 94-1476, at 124 (1976) (noting that the intention of section 202 is to reverse the presumption in the *New York Graphic Society* case).

### III. THE MACDONALD GROUP OF NEW YORK ARTISTS AND THE SUI GENERIS PATH NOT TAKEN

On December 30, 1868, a group of artists, including “painters, sculptors, engravers, architects, photographers, chromo-lithographers and others,”<sup>105</sup> met in New York City “to initiate a movement for the protection of their rights, designs, and inventions.”<sup>106</sup> The group appointed forty-five year-old sculptor James Wilson MacDonald as its chair.<sup>107</sup> In his comments to those assembled, MacDonald acknowledged that design patent protection was available for sculpture, as it had been since 1842, but argued that such protection was too costly:

The expense of obtaining a patent for a large work of art is very great . . . The patent laws appear to be mainly intended for protecting trade marks, to the neglect of the producer. What are needed are more economical and simple means for having pictures registered, and increased facilities for enforcing the right of artists when infringed.<sup>108</sup>

Although we may think of the typical sculpture as an article handcrafted from stone or wood, and hence as unique as a painting or a drawing, in fact many sculptures were designed to be cast in multiple copies, in bronze, plaster, or other materials. Even if the original was a

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105. *Copyright in Works of Art*, *supra* note 20, at 3; see *The Law of Copyright, Meeting of Artists*, N.Y. DAILY HERALD, Dec. 31, 1868, at 6. The group, which met “in the studios of MacDonald, Marshall and Wilson,” included among its number, “Constant Mayer, Wm. Hart, C. Rosenberg, Wm. Terry, Gilbert Burling, Oregon Wilson, and others.” *Copyright in Works of Art*, *supra* note 20.

106. *Copyrights of Artists*, *supra* note 20, at 2.

107. *Id.* MacDonald’s sculptures can still be found in locations such as Central Park in New York, Prospect Park in Brooklyn, and Forest Park in St. Louis. See LAURETTA DIMMICK, DONNA J. HASSLER, PHILIPPE DE MONTEBELLO & JOHN K. HOWAT, AMERICAN SCULPTURE IN THE METROPOLITAN MUSEUM OF ART: A CATALOGUE OF WORKS BY ARTISTS BORN BEFORE 1865, at 103 (1999). MacDonald was born in 1824. See *id.*

108. *Copyrights of Artists*, *supra* note 20. In a report in *The Brooklyn Daily Eagle*, MacDonald’s comment is rendered as, “the present law was made in the interest of trade-marks, not in the interest of the artists.” BROOKLYN DAILY EAGLE, Thursday, Dec. 31, 1868, at 2. The assertion that design patent law was made “in the interest of trade-marks” may seem odd to modern ears. At the time, however, there was no federal protection for trademarks as such. That led hundreds of companies to seek design patent protection for their logos, and the Patent Office encouraged the practice. See Jason J. Du Mont & Mark D. Janis, *U.S. Design Patent Law: A Historical Look at the Design Patent/Copyright Interface*, in THE COPYRIGHT/DESIGN INTERFACE: PAST, PRESENT & FUTURE 355 (Estelle Derclaye ed. 2018).

unique, handcrafted item, a mold could be made from that original that enabled casting of copies. Thus, it may be fitting that in a mixed group of artists, a sculptor was among those most committed to secure improved protection against copying.<sup>109</sup> As MacDonald commented, “[a] sculptor may construct a statue or bust at great expense of time and money, and then have no security against his work being photographed and innumerable copies sold without yielding him any return . . . .”<sup>110</sup> Those gathered on December 30 adopted a resolution “to secure such amendments and alterations to the existing laws as shall afford full protection to all,”<sup>111</sup> and appointed a committee to prepare a report.

Several days later, *The Philadelphia Daily Evening Telegraph* reported on the New York meeting with approval. It commented that “[t]he copying of pictures and statues by means of photography and chromo-lithography is getting to be an extensive and important business, and the artists certainly ought to share in the profits.”<sup>112</sup> *The Brooklyn Daily Eagle* also reported on the meeting. It noted that “[t]he law does not prevent the photographing of a work of art,” and then commented: “Since the Courts have decided that the brilliant idea of introducing a train of cars on the stage may be copyrighted certainly the brain-work of the artists is deserving of some protection.”<sup>113</sup>

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109. On the copying problems encountered by nineteenth-century sculptors, and their use of design patents to protect sculptures, see Karen Lemmey, *Nineteenth-Century American Sculpture and United States Design Patents*, in *CIRCULATION AND CONTROL: ART AND INTELLECTUAL PROPERTY IN THE NINETEENTH CENTURY* (Marie-Stéphanie Delamaire & Will Slauter eds.) (forthcoming) (copy on file with author).

110. *Copyrights of Artists*, *supra* note 20.

111. *The Law of Copyright, Meeting of Artists*, *supra* note 105.

112. *Copyright of Works of Art*, PHILA. DAILY EVENING TEL., Jan. 2, 1869, at 4.

113. BROOKLYN DAILY EAGLE, Dec. 31, 1868, at 2. The comment about “introducing a train of cars on the stage” is a reference to the case of *Daly v. Palmer*, which Judge (later Justice) Samuel Blatchford had decided in the Southern District of New York two weeks earlier on December 17th. *See Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552); *The Railroad Scene Controversy*, THE BROOKLYN UNION, Dec. 17, 1868, at 4 (reporting on the decision in *Daly*). Judge Blatchford held that dramatic works, to which Congress had extended copyright protection in 1856, included protection of stage directions or actions, such as the movement of a train across a stage and the movement of actors in relation to the train. *Daly*, 6 F. Cas. at 1133, 1137–38. The anonymous reporter’s comment is fascinating, as it recognizes that copyrightable subject matter has now expanded far afield from maps, charts, and books, and suggests that painting and sculpture are as close or closer to the historical core of copyright than stage directions. *The Railroad Scene Controversy*, *supra*.

The New York group met again a little over a week later, on January 9, 1869.<sup>114</sup> The committee appointed at the December 30th meeting—James Wilson MacDonald, James Hope, and Byron M. Pickett, as it turns out—presented its report, which the *New York Tribune* apparently reprinted in full.<sup>115</sup> The report reiterated that current law was insufficient to protect art: “There can be but one opinion as to the inefficiency of the Patent and Copyright laws, as far as they refer to works of artists, and artistic productions.”<sup>116</sup> The report then proceeds to propose a scheme of protection for art that takes design patent law, rather than copyright law, as its point of departure—perhaps not surprising for a committee chaired by a sculptor, since as noted above statues could at that time be protected under design patents, but could not be copyrighted.<sup>117</sup>

At the January 9th meeting, a larger committee of five persons was appointed to draft the language of a bill that the group would then endeavor to have introduced in Congress.<sup>118</sup> That draft bill would be presented to the group at a meeting on February 1st.<sup>119</sup> On February 1st, the *New York Tribune* printed the full text of the bill that had been drafted, and announced the meeting at which it would be introduced and discussed that evening.<sup>120</sup> A number of features of the draft are particularly interesting:

- *Invention, Production, Design—not Authorship.* First, the draft bill refers to the act of creation that will give rise to protection as “invent[ing] or produc[ing] . . . any new and original design.”<sup>121</sup> That language is clearly copied from the 1842 Design Patent Act.<sup>122</sup> However, it is also a good reminder that the Copyright Act of 1802, the Copyright Act of 1831, and eventually the Copyright Act of 1870 also use the terms “invent,” “design,” or “invention” and “designer,” in connection with engravings or prints, and in the 1870 Act, paintings,

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114. *Protection of Works of Art*, N.Y. TRIB., Jan. 11, 1869, at 8.

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Copyright for Works of Art*, *supra* note 20, at 8.

121. *Id.*

122. Act of Aug. 29, 1842, ch. 263, § 3, 5 Stat. 543, 544.

drawings, and statues.<sup>123</sup> In nineteenth-century American law, visual artists are not yet “authors.”

- *Examined Registration Scheme.* Second, the draft bill contemplates the creation of a registration scheme for any eligible design that is created as a “painting, statue, bust, medallion, basso-relievo, intaglio, engraving, etching, photograph, lithograph, or other artistic design.”<sup>124</sup> The bill designates every federal District Court clerk a “Register of Fine Arts,” who would “receive and examine all artistic works, designs, or artistic productions,” and “grant certificates of registry according to the provisions of this Act.”<sup>125</sup>
- *Variable Length, Extendable Term with Graduated Fees.* Third, the draft bill provides that applicants can choose a term of five, ten, or twenty years of protection, for which the fees would be \$1.50, \$2.50, and \$3.50 respectively, and that any applicant who initially chose less than the maximum term could later pay for term extension.<sup>126</sup> This is also a modification of the design patent scheme, which at the time (from 1861 to 1982) provided for an election of term of three-and-a-half, seven, or fourteen years for \$10, \$15, and \$30 respectively, and a possibility of renewing for another seven years.<sup>127</sup> Though the proposed terms were thus longer than the terms for design patents, and the fees lower, the terms were shorter than the maximum copyright term of forty-two years (a twenty-eight-year initial term and a fourteen-year renewal term), and the fees higher than the copyright recording fee of 50 cents.<sup>128</sup>
- *No Notice or Marking Requirement.* Fourth, unlike either the existing Design Patent Act or Copyright Act at the time, the

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123. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (referring to persons “who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints”); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (“invent, design”); *id.* § 2 (“inventor, designer”); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (“inventor, designer”).

124. *Copyright for Works of Art*, *supra* note 20, at 8.

125. *Id.*

126. *Id.*

127. Act of Mar. 2, 1861, ch. 88, § 11, 12 Stat. 246, 248. In 1982, the term of design patents was changed to seventeen years from the date of grant. *See* Patent Act of 1982, Pub. L. No. 97-247, § 16, 96 Stat. 317, 321.

128. *See* Act of Feb. 3, 1831, ch. 16, §§ 1, 2, 4 Stat. 436, 436 (explaining twenty-eight-year initial term for copyrights in § 1, fourteen-year renewal term in § 2); Act of Feb. 3, 1831, ch. 16, § 4, 4 Stat. 436, 437 (explaining fifty-cent fee for recording title of a work).

draft bill has no requirement of placing copyright notice on or otherwise “marking” copies of the protected designs.<sup>129</sup>

In a number of respects, this tailored scheme might have been better suited for the protection of visual artists than the scheme that was in place for the protection of books, charts, maps, and the like—the existing federal copyright law. For example, many artists may not have felt that they needed the forty-two-year maximum term of copyright, and may have appreciated the ability to imitate other artworks less than forty-two years after they were created without fear of provoking infringement suits. Artists would also almost certainly have appreciated the lack of a notice or marking requirement. The Copyright Act of 1831 required a phrase of over twenty words long to be placed “on the face” of a map, chart, musical composition, print, cut, or engraving.<sup>130</sup> The 1870 Act required a phrase of similar length to be placed on “the face or front [of copies of copyrighted works,] or on the face of the substance on which the same shall be mounted.”<sup>131</sup> The practical and aesthetic difficulties of placing such a lengthy notice on the face of a painting or drawing led a group of Boston artists to petition Congress in early 1873 to streamline the notice requirement, to include only the word “Copyright,” the year that copyright was obtained, and the name of the claimant.<sup>132</sup> Congress did eventually act on that suggestion—but not until over thirty-five years later, in the Copyright Act of 1909.<sup>133</sup>

In spite of its potential advantages, however, the legislative effort of James Wilson MacDonald and his fellow New York artists failed. I can find no record of what happened at or after the February 1st meeting at which the draft bill was supposed to be discussed. On that very same day, officers and members of the National Academy of Design signed and dated their petition to add new categories of copyrightable subject matter to the existing copyright scheme.<sup>134</sup> Within the next few

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129. See Act of Aug. 29, 1842, ch. 263, § 6, 5 Stat. 543, 544–45 (providing for penalty for failure to mark patented articles); Act of Feb. 3, 1831, ch. 16, § 5, 4 Stat. 436, 437 (requiring copyright notice on each published copy of a work).

130. Act of Feb. 3, 1831, ch. 16, § 5, 4 Stat. 436, 437.

131. Act of July 8, 1870, ch. 230, § 97, 16 Stat. 198, 214.

132. See Petition of Artists and Members of the Boston Art Club for an Amendment of the Law of Copyright to Protect Their Works of Design and Painting, presented to the Senate by Sen. Samuel Hooper (Dec. 31, 1872) [hereinafter Boston Art Club petition], <http://www.robertbrauneis.net/1870copyrightfinearts/petitions/bacpetition.pdf> [<https://perma.cc/MN6E-VM27>].

133. Act of Mar. 4, 1909, ch. 320, § 18, 35 Stat. 1075, 1079.

134. See National Academy petition, *supra* note 21.

days, they gathered additional signatures—at least five of them from members of the MacDonald group, so there was some overlap or defection<sup>135</sup>—and all activity in Congress after that was organized around the goal of assimilating fine art into copyright. Yet there are lessons to be learned from the failure of the effort to draft and present legislation creating sui generis protection for art.

First, protection of paintings, drawings, and sculpture under copyright law, and assimilation of artists to authors, was not inevitable, even after the Civil War. Design patent law, and the broader concept of registering designs as separate from protecting authors, provided starting points for an alternative, separate path. (Indeed, it is not until the Copyright Act of 1909 that “invent” stops being used to describe what visual artists do, and all copyrightable subject matter becomes “the writings of an author.”<sup>136</sup>)

Second, there were some basic realities of political action that weighed in favor of the ultimate choice to assimilate paintings, drawings and statues into the protection scheme originally created for authors and publishers of books, maps, and charts. To create an entirely new, independent scheme meant having to negotiate dozens of details among different groups of painters, drawers, sculptors, printers, publishers, and other participants in the art market. The report of the committee created by the New York artists' group to begin investigating legislation admitted that it “ha[d] not attempted to take up all those questions which have a bearing upon and are in favor of or even opposed to a registry law,”<sup>137</sup> and recommended that the next step was to appoint “a committee of ten persons . . . by those immediately representing the different branches of art.”<sup>138</sup> That could only lead to a tortured process of reconciling the different desires of all interested. How much easier it would be to join an existing scheme, where the issues of formalities, term, scope of protection, and the like had already been decided, and to make a few adjustments around the edges. Thus, although it may well be the case that many painters and sculptors came to see themselves as expressing themselves in the same way that writers did,<sup>139</sup> they also may have ended up looking to the law that already protected the copying of books because adding categories to that law was the most expedient political path to protection for them.

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135. *See supra* note 27.

136. Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076.

137. *Meeting of Artists to Consider the Importance of Protection to Their Works*, N.Y. HERALD, Jan. 10, 1869, at 3.

138. *Id.*

139. *See Bently, supra* note 11, at 332–34.

#### IV. THE INTERESTS OF ARTIST ORGANIZATIONS AND THE PROTECTION OF PAINTINGS, DRAWINGS, AND SCULPTURE

If the effort of the group led by James Wilson MacDonald failed, it was the effort led by the National Academy of Design that most clearly succeeded. Language from its petition, with a few alterations, made it straight into the text of the 1870 Act. Why did this effort succeed, and why in 1870?

One of the answers to that question must start with the National Academy as an institution, and its ability to organize a group of people who self-identified as “artists.” For the first few decades of the nineteenth century, contends Rachel Klein, most “artists” in New York and in the United States generally “remained closely connected to the work of the crafts,” and did not see themselves as participating in “a distinctive realm of activity superior to artisanal production.”<sup>140</sup> In 1801, no one listed their occupation in the City Directory of New York as “artist”; there were four men and one woman who were either “portrait painters” or “miniaturists.”<sup>141</sup> By 1830, there were two listings in that City Directory for “artist”—both apparently for people involved in theatrical set painting—while 123 people listed themselves as portraitists or miniaturists.<sup>142</sup> The American Academy of Fine Art, created in 1803 as the New York Academy of Fine Art and renamed in 1808, was founded, not by artists or artisans, but by “merchants, professionals, and political leaders” to promote culture and create “a community of taste.”<sup>143</sup>

The only previous time that a bill extending federal copyright protection to paintings and drawings had made it to the floor of the Senate was in 1824.<sup>144</sup> Senator Walter Lowrie of Pennsylvania remarked that he had introduced the bill because painter Rembrandt Peale had stated that he would be unwilling to sell one of his portraits of George Washington without protection against copying.<sup>145</sup> The bill failed. That only delayed the sale of the portrait; Peale sold it to Congress in 1832, and it has been on display at the Capitol ever since.<sup>146</sup> However, the failure did indicate the weakness of any drive for protection of paintings

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140. RACHEL N. KLEIN, *ART WARS: THE POLITICS OF TASTE IN NINETEENTH-CENTURY NEW YORK*, 18 (2020).

141. *See id.*

142. *See id.*

143. *See id.*

144. *See* 42 ANNALS OF CONG. 417 (1824).

145. *See* 42 ANNALS OF CONG. 512 (1824); BRACHA, *supra* note 10, at 121.

146. *See George Washington (Patriæ Pater)*, UNITED STATES SENATE, [https://www.senate.gov/artandhistory/art/artifact/Painting\\_31\\_00001.htm](https://www.senate.gov/artandhistory/art/artifact/Painting_31_00001.htm) [https://perma.cc/SUB4-MQF9] (last visited Dec. 19, 2020).

and art at the time. The issue came to Congress at the request of a single painter, and it could not have been supported by the National Academy because that organization was not founded until the following year, in 1825.<sup>147</sup>

The National Academy was founded by painters and drawers who were disgruntled with the American Academy, and who wanted an organization that was run by artists alone, rather than merchants and others who were not practicing artists.<sup>148</sup> It was modelled on the Royal Academy of Arts in London, in part because National Academy co-founder and first president Samuel F.B. Morse (yes, that Morse, of the telegraph and the code) had spent nearly four years attending the Royal Academy, from 1811 to 1815.<sup>149</sup> Morse and his colleagues founded the National Academy as an invitation-only, self-electing organization, composed of successful, recognized artists who were supposed to represent the artistic elite.<sup>150</sup> By 1869, over four decades later, it was the established “old guard” organization, criticized and resented by many younger artists.<sup>151</sup> Although there was at least one member of the National Academy present at the first meeting of the New York artists group led by James Wilson MacDonald, and at least five people present at the MacDonald group’s meetings signed the National Academy petition, there was clearly tension between them. At one of the MacDonald group’s meetings, the painter James Fairman “spoke of the inadequate nature of the Academy of Design. Such a body could not act as the proxy of artists. The need in New York was a simple society of artists.”<sup>152</sup> That new society could “embrace all professional artists willing to be thus associated and also students of art,”<sup>153</sup> and could “discuss and forward the interests of art in all its departments.”<sup>154</sup>

As an established organization with a thirty-five year history, however, the closed-membership National Academy had power that the

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147. See CLARK, *supra* note 22, at 10, 13.

148. See SARAH BURNS & JOHN DAVIS, *AMERICAN ART: A DOCUMENTARY HISTORY* 209–10 (2009).

149. See SAMUEL IRENAEUS PRIME, *THE LIFE OF SAMUEL F.B. MORSE* 35–81 (1875).

150. See *id.* at 150–53.

151. See CLARK, *supra* note 22, at 171.

152. *Meeting of Artists to Consider the Importance of Protection to Their Works*, *supra* note 137, at 3.

153. *Id.*

154. *Id.* James Wilson MacDonald, president of the group, had also “replied with some earnestness to a gentleman who was present [at the first meeting] as the representative of the Academy of Design.” At the second meeting, MacDonald apologized, “simply wish[ing] to disclaim any ill feeling towards any gentleman connected with the Academy.” *Id.*

ad-hoc open group lacked. It could call on its members, representing the artistic elite, to join together and sign a petition. And it had relations with other established art organizations and artists elsewhere in the country. As mentioned above, the National Academy sent copies of its petition, along with a circular letter, to art organizations and artists in Philadelphia, Cincinnati, Boston, and Chicago.<sup>155</sup> That action prompted responses from three of those cities, namely, the petitions of the Pennsylvania Academy of Fine Arts, of the Academy of Fine Arts of Cincinnati, and of painter William Morris Hunt and other Boston artists, all containing text identical to that of the National Academy petition.<sup>156</sup> The common text of those petitions contains two sentences. Each petition:

Respectfully shows,

That the existing laws do not afford to the authors of paintings, drawings, statuary, and models, being works of the fine arts, protection in the nature of copy-right; and that the passage of an Act giving to artists the same exclusive copy-right which is conferred on authors of books, charts, engravings, prints and photographs, would furnish a just and needful protection and reward to meritorious artists, and prevent injuries which they suffer from the unlicensed publication of copies, prints and photographs of their productions.

Your petitioners therefore pray that the laws in respect of copy-right may be so amended as to include such works of art.<sup>157</sup>

Though the petitions thus do not detail the particular concerns of the artists, even those two sentences contain some interesting hints. While the existing law described the acts of creating the images in engravings and prints as acts of “invent[ing] and design[ing],” the petition refers to the creators of paintings, drawings and statuary as “authors,” thus using a language that unifies the activity of writers and visual artists.<sup>158</sup> On the other hand, the petition does not yet speak of “copyright law” as an obviously unitary field of law—it is rather

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155. National Academy petition, *supra* note 21.

156. Petition of the Pennsylvania Academy of Fine Arts, *supra* note 23; Petition of the Officers of the Academy of Fine Arts of Cincinnati, *supra* note 24; Boston Art Club Petition, *supra* note 132; *cf.* National Academy petition, *supra* note 21. Hunt, the leading painter of his era in Boston, would be elected to the National Academy in 1871. *See* CLARK, *supra* note 22, at 259.

157. *See* National Academy petition, *supra* note 21.

158. National Academy petition, *supra* note 21; *See supra* notes 10–12 and accompanying text (discussing Bracha and Bently on the universalization of authorship).

“protection in the nature of copy-right” and “laws in respect of copy-right.”<sup>159</sup>

As mentioned above, paintings and drawings seem to be different from all other categories previously protected by U.S. copyright law; they are not made to be printed, or cast, or otherwise mechanically reproduced. Does that render them a misfit for copyright law? More recent commentators have spoken of the difference between a “single copy business model” and a “multi-copies business model,” and have suggested that painters and drawers use the former, creating unique originals or limited editions the scarcity of which is controlled by the difficulty of making perfect copies and the taste for authenticity.<sup>160</sup> The normative import of the use of a single-copy business model is that copyright protection likely should not be available, since such protection provides no incentive for creation of single-copy works, yet limits access to them, including access by follow-on artists who want to create variations incorporating their own inspirations.<sup>161</sup>

It is undoubtedly the case that many less well-known nineteenth-century portraitists and painters made money solely or primarily from single-copy originals that never served as the basis for engravings or other copies. Yet the elite painters and drawers who were likely to be National Academicians were quite familiar with a “multi-copies” business model. As Lionel Bently and Ronan Deazley have detailed, elite painters in England often planned to have engravings of their paintings made and distributed in multiple copies, and frequently realized more from the sales of the engravings or the engraving rights than from the sale of the original painting.<sup>162</sup> That was no different in the United States. Take, for example, the case of painter Gilbert Stuart, whose “Athenaeum Head” portrait of George Washington has been used

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159. National Academy petition, *supra* note 21; *see supra* note 13 and accompanying text (discussing Bently on the emergence of copyright as a unified, distinct field of law).

160. *See generally* Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J.F. 1, 4 (2014); Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 330–31 (2018).

161. *See* Rub, *supra* note 160, at 5 (“Because copies are a poor substitute for original visual artworks, free copying does not significantly harm the commercial value of the work. Therefore, nothing prevents the seller of a visual artwork from capturing the full expected value of her work in the initial sale.”); Adler, *supra* note 160, at 332 (“[C]opies almost never provide a source of income for visual artists. Instead, artists are able to realize the economic value (if any) of their unique or limited-edition artworks only from the first sale of those works.”).

162. *See* Bently, *supra* note 11, at 337–38 (chronicling cases in which painters made substantial sums from engravings or engraving rights, often more than the sales price of the original painting); Deazley, *supra* note 11, at 293–94 (same).

as the basis for the engraving that has graced the one-dollar bill for a century.<sup>163</sup> Stuart was born in 1755 in Rhode Island, but moved to England in 1775. In 1793, he decided to return to the United States. He was going to get George Washington to sit for him; paint several portraits; have engravers make engravings of those portraits; and provide for his family by selling prints made from the engravings.<sup>164</sup> That is exactly what he did. However, when hundreds of copies of an unauthorized engraving of one of his Washington portraits were sold, Stuart could only complain about the sale in an advertisement taken out in a newspaper; he took no legal action.<sup>165</sup> Similarly, when William Winstanley painted a half-dozen copies of a Stuart portrait of Washington, and asked Stuart to declare them authentic in exchange for a portion of the sales proceeds, Stuart could only throw Winstanley out of his house; he took no legal action.<sup>166</sup> Without copyright protection for paintings, he had no legal recourse. Only when Stuart sold one of his Washington portraits on the express condition that it not be copied could he obtain an order on a contract theory against the purchaser, John Sword, who had commissioned and was selling copies.<sup>167</sup>

The familiarity of elite painters with a business model that included selling large numbers of copies of engravings based on the paintings had at least three consequences. First, if sculptors like James Wilson MacDonald were more familiar with design patent law, painters with an eye on the engraving market were more familiar with copyright law, which had protected engravings and other prints since 1802. Indeed, the failed 1824 bill to protect paintings and drawings does so by declaring that “the copy right of original paintings and drawings shall be secured to their authors, inventors, or proprietors, in the same

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163. See HARVEY RACHLIN, SCANDALS, VANDALS, AND DA VINCIS 139–40 (2007).

164. See John Hill Morgan, *A Sketch of the Life of Gilbert Stuart*, in GILBERT STUART: AN ILLUSTRATED DESCRIPTIVE LIST OF HIS WORKS 26, 44 (Lawrence Park et al. eds., 1926); Delamaire, *supra* note 78, at 6.

165. See CARRIE REBORA BARRATT & ELLEN G. MILES, GILBERT STUART 173–75 (2004) (describing Stuart’s problems with an unauthorized engraving of his Lansdowne portrait of George Washington); D. Chadwick, E. P. Richardson, Claude R. Flory & Edward R. Black, *China Trade Portraits of Washington After Stuart*, 94 PA. MAG. HIST. & BIOGRAPHY 95, 99 (1970) (noting an advertisement for the sale of 500 copies of an unauthorized engraving of Stuart’s portrait); Delamaire, *supra* note 78, at 18–19 (describing Stuart’s press campaign against the sale of the engravings).

166. See James Thomas Flexner, *George Washington as an Art Collector*, 4 AM. ART J. 24, 33 n.20 (1972).

167. See Delamaire, *supra* note 78, 9–11, 22–23 (describing the lawsuit); Chadwick et al., *supra* note 165, at 96–98 (presenting the complaint and the order in Stuart’s litigation against Sword).

manner, and with the same privileges, which are extended by law to the authors or publishers of engravings.”<sup>168</sup> Likewise, the 1865 extension of copyright to photographs was accomplished by providing that the authors of photographs shall be protected “in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings.”<sup>169</sup> Thus, it was more natural for painters to look to copyright as a model for protecting their creations.

Second, at least some elite painters may have been familiar with the narrow path to copyright for engravings under the 1802 Act, and the resulting problem with conveying engraving rights to a publisher rather than financing an engraving oneself. As print publishing became more industrialized, that problem loomed larger. Rather than commission and manage the production and sale of engravings themselves, painters were more likely to want to sell the print rights.

Third, elite painters were familiar with the lack of copyright protection for their paintings, and the difficulties that that caused in enforcing and transferring engraving rights. Although, as noted above, courts began to recognize common-law copyright in paintings in the wake of the 1870 Act’s extension of statutory copyright, there was no American precedent recognizing common-law copyright in paintings before 1870, and dicta pointed in the opposite direction. The 1828 opinion of Justice Thompson in *Blunt v. Patten*<sup>170</sup> and the 1845 opinion of Justice Story in *Emerson v. Davies*<sup>171</sup> quoted the same passage from the English case of *Sayre v. Moore*,<sup>172</sup> which stated that it was permissible for “different men [to] take engravings from the same picture.”<sup>173</sup> The attitude of Lord Chief Justice Abbott in the English case of *De Berenger v. Wheble*<sup>174</sup> that “[i]t would destroy all competition in the art to extend [copyright] to the painting itself”<sup>175</sup> was echoed by Senator Elijah Mills in opposing the unsuccessful 1824 bill to confer statutory protection: “[A]n act of Congress would have a great tendency to retard the progress of the art of painting, as it would do away the right of imitating and attempting to excel paintings already in existence.”<sup>176</sup>

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168. S. 77, 18th Cong. (as introduced in Senate, Mar. 23, 1824).

169. Act of March 3, 1865, ch. 126, § 1, 13 Stat. 540, 540.

170. 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1,580).

171. 8 F. Cas. 615 (C.C. Mass. 1845) (No. 4,436).

172. (1785) 102 Eng. Rep. 139; 1 East 361 (KB).

173. See *Blunt*, 3 F. Cas. at 765 n.2 (quoting *Sayre*, 102 Eng. Rep. at 140); *Emerson*, 8 F. Cas. at 624 (quoting *Sayre*, 102 Eng. Rep. at 140).

174. (1819) 171 Eng. Rep. 732; 2 Stark. 548 (KB).

175. *Id.* at 732.

176. 42 ANNALS OF CONG. 512 (1824).

Painters did still sell engraving rights, but their only means of enforcing them was through physical control of their paintings. In the pre-photography era, engravers needed weeks, months, or even years of possession of a painting to painstakingly translate its shapes, lines, and shading into grooves and pits on a metal plate that would produce reasonably faithful prints.<sup>177</sup> Thus, engravers or print publishers who wanted to produce an engraving based on a painting could be forced to bargain with the painter, even in the absence of copyright protection, if the painter retained control over possession of the painting and understood the use to which it would be put. If, however, the painter had sold the painting, or had otherwise relinquished control over possession of it, the ability to bargain over printmaking rights was lost. That meant that print publishers like Louis Prang sometimes paid substantial amounts for paintings that reflected their value as designs for prints, and sometimes paid lesser amounts that did not. When Prang approached a painter directly to negotiate the purchase or commission of a painting, the painter understood that Prang was a print publisher, and bargained accordingly. For example, Prang bought the painting “Group of Chickens” directly from painter Arthur Fitzwilliam Tait, and commissioned him to paint “Group of Ducklings” and “Group of Quails.” Tait bargained for a royalty—ten percent of gross sales of chromos of his paintings—rather than a fixed sum.<sup>178</sup> By contrast, when Prang purchased a painting from a collector or a gallery, as he did with Eastman Johnson’s “The Barefoot Boy” and Arthur Parton’s “Close of Day,” he paid a single fixed sum, which likely did not reflect the profits to be made from selling chromos of the painting.<sup>179</sup>

Prang’s chromos often bore labels proclaiming “Original in possession of the Publishers.”<sup>180</sup> Those labels may have been partly directed toward establishing the authenticity of the chromos, but also suggested to purchasers that the paintings were protected against copying by other lithographers or engravers, and served as a warning

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177. For example, the grant of engraving rights to the Henry Wallis painting “The Death of Chatterton” was accompanied by an agreement to lend the painting for up to two years for purposes of preparing the engraving. See *Turner v. Robinson*, 10 Ir. Ch. R. 121, 123 (1860) (MR).

178. See Michael Clapper, *Art, Industry and Education in Prang's Chromolithograph Company*, in *THE CULTIVATION OF ARTISTS IN NINETEENTH-CENTURY AMERICA* 121, 129–30, 130 n.18 (Georgia Brady Barnhill, Diana Korzenik & Caroline F. Scott eds., 1997). Painters sometimes refused to sell to Prang altogether. See *id.* at 129.

179. For Prang’s purchases from Johnson and Parton, see *supra* text accompanying notes 94, 99–100.

180. See, e.g., Photograph of Label for “Prang’s American Chromos—Whittier’s Barefooted Boy,” in *Archive*, ROBERT BRAUNEIS, <http://www.robertbrauneis.net/1870copyrightfinearts/images/barefootedboylabel.pdf> [<https://perma.cc/T55R-UUDC>] (last visited Dec. 19, 2020).

to copiers that there would be good evidence that they copied from Prang's chromos, not the original paintings. More broadly, however, cultural and technological developments over the decades leading up to 1870 increased the difficulty of maintaining control over paintings to prevent copying. As Lionel Bently and Elena Cooper have commented, public exhibition of paintings in museums and galleries became more common,<sup>181</sup> and hence a painter couldn't rely on a painting remaining in the private home of a collector. And it began to be possible to take photographs of paintings—not color photographs that would substitute for chromos, but at least monochrome photographs that could serve as a guide or substitute for monochrome engravings.<sup>182</sup>

Monochrome photographs of paintings may not have been a serious threat to painters, but monochrome photographs of engravings, etchings, and cuts—themselves monochrome—were.<sup>183</sup> In the 1866 case of *Rossiter v. Hall*,<sup>184</sup> for example, “the defendant, by the photographic process, . . . produced a negative representation of [the plaintiffs'] engraving [entitled ‘The Home of Washington’], from which he prints photographs of it in various sizes, and is disposing of the same without the consent of the plaintiffs.”<sup>185</sup> In that case, the plaintiffs, Thomas P. Rossiter and Louis R. Mignot, were successful in stopping Hall from making and distributing photographs of the engraving.<sup>186</sup> They had followed the narrow path to copyright under the 1802 Act. They painted a painting (now in the collection of the Metropolitan Museum of Art);<sup>187</sup> they commissioned an engraver, Thomas Oldham Barlow, to

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181. See Bently, *supra* note 11, at 340; COOPER, *supra* note 11, at 208.

182. To increase their appeal, photographic prints could be hand-colored, and could also incorporate stereoscopy. See the discussion of *Turner v. Robinson*, *supra* note 85 and accompanying text.

183. See, e.g., *The Little Passion of Albert Durer*, N.Y. TRIB., Dec. 11, 1868, at 6 (reviewing favorably a book of facsimiles of Albrecht Durer woodcuts produced by heliotype, a photographic process). For a discussion of photography's role in connection with the 1862 Act in England, see Bently, *supra* note 11, at 341–43.

184. 20 F. Cas 1253 (C.C.E.D.N.Y. 1866) (No. 12,082).

185. *Id.*

186. *Id.* at 1254.

187. See *Washington and Lafayette at Mount Vernon, 1784 (The Home of Washington after the War)*, THE METRO. MUSEUM OF ART, <https://www.metmuseum.org/art/collection/search/11957> [<https://perma.cc/2TK3-MBFR>] (last visited Oct. 17, 2020). To promote the painting, Rossiter published a fifty-two-page book describing it. See T.P. ROSSITER, A DESCRIPTION OF THE PICTURE OF THE HOME OF WASHINGTON AFTER THE WAR (New York, D. Appleton & Co. 1859) <https://archive.org/details/descriptionofpic00ross/page/n5/mode/2up> [<https://perma.cc/WE G3-SPS8>].

create an engraving;<sup>188</sup> and they satisfied the necessary formalities to obtain federal copyright in the engraving as the “inventors” of the image.

For those who had not followed or did not want to follow that narrow path, however, copyright was not available to protect against unauthorized copying, and photography made the risk of production and distribution of such copies much greater, because it drastically lowered the initial investment of time and money in producing them. Rather than invest in having another engraver produce an engraving—a process that could take many months, and required paying the engraver for his services during that time—a photograph and prints could be produced in a day or two from a copy of an engraving purchased from a print-seller. That gave painters, drawers, and engravers an increased incentive to seek a broadened path to copyright in engravings, and to seek the extension of copyright to paintings and drawings.

It should also be acknowledged, however, that artists were facing threats against which copyright law could not protect them, and so their quest for copyright protection may have been in part symbolic rather than practical. Photography and color lithography undoubtedly depressed and shifted the market for paintings, drawings, and engravings in ways that copyright protection for the latter would not remedy. Portraits formed a very large percentage of the work of journeyman painters in the nineteenth century.<sup>189</sup> Portraits also formed a very large percentage of the work of journeyman photographers, and no doubt some people who would have had their portrait painted decided to get photographed instead. Many middle-class homeowners, when faced with the choice of decorating their parlors with a relatively crude original painting by an unknown painter, or a less expensive chromolithograph of a famous painting by a famous painter, undoubtedly chose the latter. Those choices pushed the market for pictorial decorations in the direction of “winner takes all.”<sup>190</sup> In their 1873

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188. A copy of the engraving is in the collection of the Library of Congress. *See The home of Washington / painted by T.P. Rossiter & L.R. Mignot; engraved by Thos. Oldham Barlow*, LIBR. OF CONG., <https://www.loc.gov/resource/pga.00130/> [<https://perma.cc/PP6W-RVDC>] (last visited Oct. 17, 2020).

189. *See, e.g., supra* note 142 and accompanying text (noting that the number of listings for “portraitists” in the New York City Directory vastly outnumbered those for “painters”).

190. That is not unlike the choice made by many middle-class homeowners decades later to furnish music for their special events by playing sound recordings of famous recording artists, rather than hiring journeyman musicians to play live. On copyright and “winner-takes-all” markets, see, for example, Kristelia A. Garcia & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351, 386–87 (2019).

petition for simplifying copyright notice, Boston painters seem to be complaining of such a trend: “It is the fact, that the engraving or chromoing a subject, particularly by the latter, prevents, by rendering it common and cheap, its repetition as a subject for oil painting.”<sup>191</sup> In other words, if you can buy a chromo portrait of Abraham Lincoln to hang on your parlor wall, there is likely to be less work for painters to paint Lincoln portraits. While that is a problem for painters, it is not a problem that simplifying copyright notice can cure. Chromos and engravings can have that effect even if they have been produced with the full cooperation and authorization of the person who created the portrait. Thus, at least part of the demand for copyright protection for paintings and drawings may have come from a general sense of the need to do something about losing ground to mechanically produced images, and a not-very-well-thought-through conviction that gaining copyright protection might help.

One last mystery concerns the relationship of American developments in this area to English developments. England bestowed copyright protection on paintings, drawings, and photographs in 1862, three years before Congress extended copyright to cover photographs, and eight years before the extension to paintings, drawings, statuary, and the other “fine arts” categories.<sup>192</sup> Thus, the English Fine Arts Copyright Act could have been cited as precedent by proponents of the extension in the United States, and language from the English act could have provided a starting point for American bills. After all, the Statute of Anne provided the inspiration for and most of the language in the Copyright Act of 1790, and as we have seen, the Engraving Copyright Act provided inspiration and language for the Copyright Act of 1802.<sup>193</sup> Yet there are no such connections in the case of the Fine Arts Copyright Act and the Copyright Act of 1870. None of the petitions or newspaper accounts of legislative activities leading up to the 1870 Act have the slightest mention of the Fine Arts Copyright Act, and but for single words like “painting” and “drawing,” none of the Fine Arts Act’s language appears in the 1870 Act.

It is difficult to believe that no one in the National Academy of Design knew of English developments. However, the National Academicians may not have believed that members of Congress would be convinced to extend copyright protection to fine arts categories in

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191. See Boston Art Club petition, *supra* note 132.

192. See Fine Arts Copyright Act 1862, 25 & 26 Vict. c. 68, § 1; Act of March 3, 1865, ch. 126, 13 Stat. 540 (adding photographs); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (adding paintings, drawings, etc.).

193. Compare Act for the Encouragement of Learning, 8 Ann., c. 19 (1710) (popularly known as the Statute of Anne) with Act of May 31, 1790, ch. 15, 1 Stat. 124; see *supra* note 69 and accompanying text (describing the influence of the Engraving Copyright Act on the Copyright Act of 1802).

the United States just because England had done so. And the National Academy's proposal—to add some new categories as copyrightable subject matter, but otherwise to retain the substance of existing copyright law—was far more minimalist than the Fine Arts Copyright Act. The latter was more self-contained legislation, with some basic substantive provisions that varied from existing copyright law. For example, it had a different term of copyright (life of the author plus seven years) than that for books and engravings, and differently phrased exclusive rights, including a nascent right of integrity.<sup>194</sup> Thus, the National Academy may not have believed that the Fine Arts Act was useful either as precedent or as a model. Two other things, however, kept England and the United States on roughly parallel tracks. The first was legacy law—the Engraving Act and the Copyright Act of 1802 did have language in common, and therefore had the same limitations against which painters, lithographers, and others were grating.<sup>195</sup> Perhaps more importantly, even if literal legal transmission was flagging, cultural and technological transmission had been proceeding apace. The concept of “fine arts” and the power of organized associations of artists was in ascendance in both countries, and developments in technologies like photography and lithography spread quickly between them. Thus, it should not be surprising that legal developments, germinating in similar cultural and technological fields, would sprout on both sides of the Atlantic.

#### CONCLUSION

The available documentary records of the activity leading to the addition of painting, drawing, statues, and other “fine arts” categories to copyright law reveal three separate streams of effort, and a variety of motives and factors. Entrepreneurial print publishers like Louis Prang could not obtain exclusive rights to make prints of paintings and drawings under existing law. They wanted those exclusive rights to be clearly conveyable separately from the physical objects, so that they could assess the market for prints of particular subjects, invest in acquiring the designs and producing the plates and stones, and create, promote, and distribute the prints. Some painters and drawers wanted to be able to sell enforceable rights to entrepreneurial publishers, rather than take on the effort and risk of publishing themselves. Painters, drawers, and sculptors were also concerned about new reprographic

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194. Fine Arts Copyright Act 1862, 25 & 26 Vict. c. 68, § 1 (term of life of the author plus seven years); *id.* at § 7 (cannot make or knowingly sell an altered version of a work as an unaltered version); *cf.* Copyright Act 1842, 5 & 6 Vict. c. 45, § 3 (term of the longer of life of the author plus seven years or forty-two years from publication, and forty-two years from publication for posthumously published works).

195. *See supra* notes 69–76 and accompanying text (analyzing the similarities between the 1735 Engraving Act and the Copyright Act of 1802).

technologies like color lithography and photography, which could provide lower-cost, higher-quality reproductions of their works. They were also concerned about competition from color lithographs and photographs even when those products were not reproducing their works, and they may have thought that protection against copying of their works would provide more help than it actually would.

Not all artists assumed that assimilating fine art into the existing protection scheme for books, engravings, and the like was the path to protection. Sculptors, in particular, were familiar with design patents, and protection for fine art might have taken a *sui generis* turn. Established, elite painters, however, were already quite familiar with the market for engravings, and engravings had been protected by the same law as books, charts, and maps since the beginning of the century. Moreover, adding a few new categories to an existing law would be politically far easier than negotiating a new form of protection from scratch. Those considerations, and no doubt others, led the National Academy of Design and its allies to favor the incorporation of protection for paintings, drawings, and sculpture into existing copyright law. Congress followed that lead, and copyright gained a set of new categories of subject matter in the 1870 Act. That is of course not the end of the story, because the addition of substantially different subject matter affected copyright theory, principles, and doctrines, and raised quandaries that remain with us today.