

## Copyright in Perpetuity

Samuel L. Clemens

In 1906, Samuel Clemens testified before Congress on the legislation that eventually became the Copyright Act of 1909. The 1909 act stood, relatively unchanged, for the next 67 years – years that saw “the discovery or full commercial development of radio, television, the phonograph, the photograph, the motion picture, the computer, [and] the photocopy machine.” Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856 (1976). Clemens’ views did not prevail in 1909, and it took Congress several decades to come around. His prescient early vision of modern copyright is one good reason to revisit that testimony now. Another reason is his colorful presentation of the classic author’s perspective on copyright, and of several arguments that have been debated among copyright lawyers for as long as there have been copyright lawyers. But perhaps the best reason for returning to the Clemens testimony is that it shows Mark Twain at his finest, useful and entertaining.

– The Editors

MR. CLEMENS. I have read the bill. At least I have read such portion of it as I could understand; and indeed I think no one but a practiced legislator can read the bill and thoroughly understand it, and I am not a practiced legislator. I have had no practice at all in unraveling confused

propositions or bills. Not that this is more confused than any other bill. I suppose they are all confused. It is natural that they should be, in a legal paper of that kind, as I understand it. Nobody can understand a legal paper, merely on account of the language that is in it. It is on account of the language that is in it

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*Samuel Clemens, aka Mark Twain, was a bestselling author during the late 19th and early 20th centuries. This article is a complete reproduction of his 1906 testimony before the Committee on Patents. See Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on S. 6330 and H.R. 19853, 59th Cong. 116-21 (1906). Clemens did not speak in footnotes. They are courtesy of the Green Bag.*

that no one can understand it except an expert.

Necessarily I am interested particularly and especially in the part of the bill which concerns my trade. I like that bill, and I like that extension from the present limit of copyright life of forty-two years to the author's life and fifty years after.<sup>1</sup> I think that will satisfy any reasonable author, because it will take care of his children. Let the grandchildren take care of themselves. "Sufficient unto the day." That would satisfy me very well. That would take care of my daughters, and after that I am not particular. I shall then long have been out of this struggle and independent of it. Indeed, I like the whole bill. It is not objectionable to me. Like all the trades and occupations of the United States, ours is represented and protected in that bill. I like it. I want them to be represented and protected and encouraged. They are all worthy, all important, and if we can take them under our wing by copyright, I would like to see it done. I should like to have you encourage oyster culture and anything else. I have no illiberal feeling toward the bill. I like it. I think it is just. I think it is righteous, and I hope it will pass without reduction or amendment of any kind.

I understand, I am aware, that copyright must have a term, must have a limit, because that is required by the Constitution of the United States, which sets aside the earlier constitution, which we call the Decalogue. The Decalogue says that you shall not take away from any man his property. I do not like to use

the harsher term, "Thou shalt not steal." But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land. Always talk handsomely about the literature of the land. Always say what a fine, a great monumental thing a great literature is. In the midst of their enthusiasm they turn around and do what they can to crush it, discourage it, and put it out of existence. I know that we must have that limit. But forty-two years is too much of a limit. I do not know why there should be a limit at all. I am quite unable to guess why there should be a limit to the possession of the product of a man's labor. There is no limit to real estate. As Doctor Hale has just suggested, you might just as well, after you have discovered a coal mine and worked it twenty-eight years, have the Government step in and take it away – under what pretext?<sup>2</sup>

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of

1 Section 18 of S. 6330 and H.R. 19853 provided for a term of the life of the author plus fifty years for original books, lectures, dramatic works, musical works, or work of art. Works copyrighted by corporations, or collective works, abridgements, compilations, dramatizations, translations, new arrangements of musical works, photographs, periodicals, or annotations were to be protected for fifty years from the date of publication. A third term of twenty-eight years, existed for "any print or label relating to articles of manufacture." The final bill provided for universal initial and renewal terms of twenty-eight years each. Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

2 See *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on S. 6330 and H.R. 19853*, 59th Cong. 114 (1906) (Statement of Rev. Edward Everett Hale). Edward Everett Hale was a Unitarian minister, author, and, at the time of his testimony, chaplain of the Senate. See 9 AMERICAN NATIONAL BIOGRAPHY at 816-17 (John A. Garraty & Mark C. Carnes, eds. 1995).

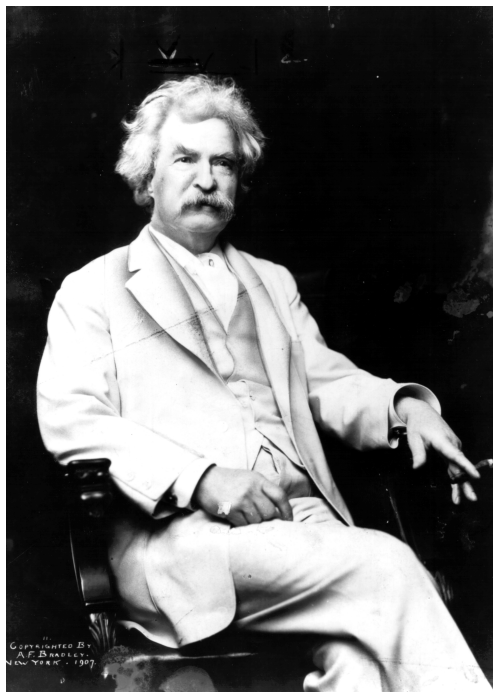
these ill-gotten gains generation after generation. They live forever, the publishers do.

As I say, this limit is quite satisfactory to me – for the author's life, and fifty years after. In a few weeks, or months, or years I shall be out of it. I hope to get a monument. I hope I shall not be entirely forgotten. I shall subscribe to the monument myself. But I shall not be caring what happens if there is fifty years' life of my copyright. My copyrights produce to me annually a good deal more money than I have any use for. But those children of mine have use for that. I can take care of myself as long as I live. I know half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years' extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do anything. So I hope Congress will extend to them that charity which they have failed to get from me.

Why, if a man who is mad – not mad, but merely strenuous about race suicide should come to me and try to get me to use my large political or ecclesiastical influence for the passage of a bill by this Congress limiting families to 22 children by one mother, I should try to calm him down. I should reason with him. I should say to him, "That is the very parallel to the copyright limitation by statute. Leave it alone. Leave it alone and it will take care of itself." There is only one couple in the United States that can reach that limit. Now, if they reach that limit let them go on. Make the limit a thousand years. Let them have all the liberty they want. You are not going to hurt anybody in that way. Don't cripple that family and restrict it to 22 children. In doing so you are merely offering this opportunity for activity to one family per year in a nation of eighty millions. It is not worth the while at all.

The very same with copyright. One author per year produces a book which can outlive the

forty-two year limit, and that is all. This nation cannot produce two authors per year who can create a book that will outlast forty-two years. The thing is demonstrably impossible. It cannot be done. To limit copyright is to



take the bread out of the mouths of the children of that one author per year, decade, century in and century out. That is all you get out of limiting copyright.

I made an estimate once when I was to be called before the copyright committee of the House of Lords, as to the output of books, and by my estimate we had issued and published in this country since the Declaration of Independence 220,000 books. What was the use of protecting those books by copyright? They are all gone. They had all perished before they were 10 years old. There is only about one book in a thousand that can outlive forty-two years of copyright. Therefore why put a limit at all? You might just as well limit a family to 22. It will take care of itself. If you try to recall to your minds the number of men in the nineteenth century who wrote books in America which books lived forty-two years

you will begin with Fennimore Cooper, follow that with Washington Irving, Harriet Beecher Stowe, and Edgar A. Poe, and you will not go far until you begin to find that the list is limited. You come to Whittier and Holmes and Emerson, and you find Howells and Thomas Bailey Aldrich, and then the list gets pretty thin and you question if you can find 20 persons in the United States in a whole century who have produced books that could outlive or did outlive the forty-two year limit. You can take all the authors in the United States whose books have outlived the forty-two year limit and you can seat them on the bench there. Allow three children to each of them, and you certainly can put the result down at 100 persons. Add two or three more benches. You have plenty of room left. That is the limit of the insignificant number whose bread and butter are to be taken away. For what purpose? For what profit to anybody?

Nobody can tell what that profit is. It is only those books that will outlast the forty-two year limit that have any value after ten or

fifteen years. The rest are all dead. Then you turn those few books into the hands of the pirate – into the hands of the legitimate publisher – and they go on, and they get the profit that properly should have gone to wife and children. I do not think that is quite right. I told you what the idea was in this country for a limited copyright.

The English idea of copyright, as I found, was different, when I was before the committee of the House of Lords, composed of seven members I should say.<sup>3</sup> The spokesman was a very able man, Lord Thring, a man of great reputation, but he didn't know anything about copyright and publishing. Naturally he didn't, because he hadn't been brought up to this trade.<sup>4</sup> It is only people who have had intimate personal experience with the triumphs and griefs of an occupation who know how to treat it and get what is justly due.

Now that gentleman had no purpose or desire in the world to rob anybody or anything, but this was the proposition – fifty years extension – and he asked me what I thought

3 See *Report (377) from the Select Committee of the House of Lords on the Copyright Bill [H.L.] and the Copyright (Artistic) Bill [H.L.] at 3-11 (1900)* (examination of Samuel Clemens). During that interview, Clemens argued that perpetual copyright was necessary in order to assure the continued availability of valuable works. Clemens' argument was that, upon the expiration of the copyright, several publishers would flood the market with cheap editions, the result being that none of them could make enough profit in order to sustain production over time. *Id.* at 3. See also Siva Vaidhyanathan, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY & HOW IT THREATENS CREATIVITY* at 69-78 (2001), which reprints in large part "The Great Republic's Peanut Stand," a fictional dialogue on copyright that Clemens wrote in 1898 and in which he develops the same argument.

But Clemens also offered an alternative to absolute perpetual copyright: At the end of a specific period, the copyright would continue only if the work were offered in a cheap edition priced at one-eighth the price of the original edition. If the work should fall out of print for a year, the copyright would lapse. In that way, works with longevity could be guaranteed to remain in print while, for lesser works, copyright would cease to be a barrier to access. *Report (377)* at 5-6. The bulk of the exchange between Clemens and the lords was over the mechanics of his proposal.

4 Clemens' impression of Baron Henry Thring is consistent with his oeuvre; Thring was foremost a legislative draftsman, not a copyright theorist. In addition to systematizing the drafting of legislation in Parliament, he was the first parliamentary counsel, an office he held for eighteen years. Although Thring eventually authored a book on *Practical Legislation* in 1902 along with other pamphlets and contributions to books and periodicals, he likely never personally considered the economic consequences of England's chosen copyright duration. See 3 *DICTIONARY OF NATIONAL BIOGRAPHY* at 520-23 (supp. 1901-11) (Oxford 1976) (Sidney Lee, ed. 1912).

the limit of copyright ought to be.

"Well," I said, "perpetuity." I thought it ought to last forever.

Well, he didn't like that idea very much. I could see some resentment in his manner, and he went on to say that the idea of a perpetual copyright was illogical, and so forth, and so on. And here was his reason – for the reason that it has long ago been decided that ideas are not property, that there can be no such thing as property in ideas.

I said there was property in ideas before Queen Anne's time, that it was recognized that books had perpetual copyright then. Doctor Hale has explained why they reduced it to forty-two years in Queen Anne's time. That is a very charitable explanation of that event. I never heard it before. I thought a lot of publishers had got together and got it reduced. But I accept Doctor Hale's more charitable view, for his information is more than mine and he is older than I am, but not much older. He is older, but not much older.<sup>5</sup>

That there could be no such thing as property in an intangible idea. He said, "What is a book? A book is just built from base to roof with ideas, and there can be no property in them."

I said I wished he could mention any kind of property existing on this planet, property that had a pecuniary value, which was not derived from an idea or ideas.

"Well," he said, "landed estate – real estate."

"Why," I said. "Take an assumed case, of a dozen Englishmen traveling through the South – Africa – they camp out; eleven of them see nothing at all; they are mentally blind. But there is one in the party who knows what that harbor means, what this lay of the land means; to him it means that some

day – you can not tell when – a railway will come through here, and there on that harbor a great city will spring up. That is his idea. And he has another idea, which is to get a trade, and so, perhaps, he sacrifices his last bottle of Scotch whiskey and gives a horse blanket to the principal chief of that region and buys a piece of land the size of Pennsylvania. There is the value of an idea applied to real estate. That day will come, as it was to come when the Cape-to-Cairo Railway should pierce Africa and cities should be built, though there was some smart person who bought the land from the chief and received his everlasting gratitude, just as was the case of William Penn, who bought for \$40 worth of stuff the area of Pennsylvania. He did a righteous thing. We have to be enthusiastic over it, because that was a thing that never happened before probably. There was the application of an idea to real estate. Every improvement that is put upon real estate is the result of an idea in somebody's head. A skyscraper is another idea. The railway was another idea. The telephone and all those things are merely symbols which represent ideas. The washtub was a result of an idea. The thing hadn't existed before. There is no property on this earth that does not derive pecuniary value from ideas and association of ideas applied and applied and applied again and again and again, as in the case of the steam engine. You have several hundred people contributing their ideas to the improvement and the final perfection of that great thing, whatever it is – telephone, telegraph, and all."

So if I could have convinced that gentleman that a book which does consist solely of ideas, from the base to the summit, then that

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5 Dr. Hale had explained that the common law copyright had been widely accepted in England prior to the passage of the Statute of Anne. The Statute of Anne, Hale argued, was intended to make it easier for the government to protect authors' common-law rights through the mechanism of registration. Statement of Rev. Edward Everett Hale at 114.

would have been the best argument in the world that it is property, like any other property, and should not be put under the ban of any restriction, but that it should be the property of that man and his heirs forever and ever, just as a butcher shop would be, or – I don't care – anything, I don't care what it is. It all has the same basis. The law should recognize the right of perpetuity in this and every other kind of property. But for this property I do not ask that at all. Fifty years from now I shall not be here. I am sorry, but I shall not be here. Still, I should like to see it.

Of course we have to move by slow stages. When a great event happens in this world, like that of 1714,<sup>6</sup> under Queen Anne, it stops everything, but still, all the world imagines there was an element of justice in that act. They do not know why they imagine it, but it is because somebody else has said so. And that process must continue until our day, and keep constantly progressing on and on. First twenty-eight years was added, and then a renewal of fourteen years; and then you encountered Lord Macaulay, who made a speech on copyright when it was going to achieve a life of sixty years, which reduced it to forty years – a speech that was read all over the world by everybody who does not know that Lord Macaulay did not know what he was talking about.<sup>7</sup> So he inflicted this disaster upon his successors in the authorship of

books. It has to undergo regular and slow development – evolution.

Here is this bill, one instance of it. Make the limit the author's life and fifty years after, and, as I say, fifty years from now they will see that that has not convulsed the world at all. It has not destroyed any San Francisco. No earthquakes concealed in it anywhere. It has changed nobody. It has merely fed some starving author's children. Mrs. Stowe's two daughters were very close neighbors of mine, and – well, they had their living very much limited.

That is, to my mind, about what I was to talk about. I have some notes – I don't know in which pocket I put them – and probably I can't read them when I find them.

There was another thing that came up in that committee meeting. I would rather get the advantage of a lord than most anyone. He asked me on what ground I could bring forth such a sort of monstrosity as that – the idea of a perpetual copyright on literature.

He said, "England does not do that." That was good argument. If England doesn't do a thing, that is all right. Why should anybody else? England doesn't do it. England stands for limited copyright, and will stand for limited copyright, and not give unlimited copyright to anybody's books.

I said, "You are excepting one book."

He said, "No; there is no book in England that has perpetual copyright."

6 Statute of Anne, 8 Anne, c. 19 (1709). There was no copyright act of 1714. The first major change to British copyright was in 1814, when the duration of copyright was extended to the greater of the authors' life or twenty-eight years. See Act of 1814, 54 Geo. 3, c. 156, s. 4.

7 Macaulay's first speech was in opposition to a proposal to extend copyright duration from the life-or-twenty-eight-year term set in 1814 to the life of the author plus sixty years. See 56 *PARL. DEB.* (3d Ser.) 341 (1841). It was during this speech that Macaulay made his famous analogy of copyright to "a tax on readers for the purpose of giving a bounty to writers." *Id.* at 350. The measure was defeated, but the next year a proposal to increase duration to the life of the author plus twenty-five years again drew a response from Macaulay. In his second speech, Macaulay offered in response to extend the life-or-twenty-eight-year term to a life-or-forty-two-year term. See 61 *PARL. DEB.* (3d Ser.) 1348 (1842). Parliament eventually adopted a copyright term of the greater of forty-two years or the life of the author plus seven years. See Act of 1842, 5 & 6 Vict., c. 45, s. 3; 12 *DICTIONARY OF NATIONAL BIOGRAPHY* at 414 (Oxford 1972) (Leslie Stephen & Sidney Lee, eds. 1893).


I said, "Yes; there is one book in England that has perpetual copyright, and that is the Bible."

He said, "There is no such copyright on the Bible in England."<sup>8</sup>

But I had the documents with me, and I was able to convince him that not only does England confer perpetual copyright upon the Old and New Testaments, but also on the Revised Scriptures, and also on four or five other theological books, and confers those perpetual copyrights and the profits that may accrue not upon some poor author and his children, but upon the rich and competent, who can take care of themselves without perpetual copyright.<sup>9</sup> There was that one instance of injustice, the discrimination between the author of the present day and the author of thousands of years ago, whose copyright had really expired by the statute of limitations.

I say again, as I said in the beginning, I have no enmities, no animosities toward this bill. This bill is plenty righteous enough for me. I like to see all these industries and arts propagated and encouraged by this bill. This bill will do that, and I do hope that it will pass and have no deleterious effect. I do seem

to have an extraordinary interest in a whole lot of arts and things. The bill is full of those that I have nothing to do with. But that is in line with my generous, liberal nature. I can't help it. I feel toward those same people the same sort of charity of the man who arrived at home at 2 o'clock in the morning from the club. He was feeling perfect satisfaction with life – was happy, was comfortable. There was his house weaving and weaving and weaving around. So he watched his chance, and by and by when the steps got in his neighborhood he made a jump and he climbed up on the portico. The house went on weaving. He watched his door, and when it came around his way he climbed through it. He got to the stairs, went up on all fours. The house was so unsteady he could hardly make his way, but at last he got up and put his foot down on the top step, but his toe hitched on that step, and of course he crumpled all down and rolled all the way down the stairs and fetched up at the bottom with his arm around the newel post, and he said, "God pity a poor sailor out at sea on a night like this."

The committee adjourned until 10 o'clock a.m. to-morrow. 

8 Clemens appears to have taken considerable dramatic license in relaying this conversation; there is no record of any such exchange in the report on Clemens' testimony before the select committee of the House of Lords. Although Clemens did mention the perpetual protection afforded the Bible, there was no response to his claim. *Report* (377) at 4.

9 The Queen's Printer (a for-profit printer) shares with the Universities of Oxford and Cambridge the exclusive right to print not only the Bible, but also "all other Books whatsoever which [the King or Queen has] commanded or hereafter shall command to be used for the service of God" in the Church of England including, for example, *The Book of Common Prayer*. Accordingly, as two Bibles, the right applies only to the Church of England's Authorized Version (more commonly known as the King James version), not revisions. See generally *Universities of Oxford and Cambridge v. Eyre & Spottiswoode, Ltd.*, [1964] Ch. 736; Kevin Garnett, Jonathan Rayner James & Gillian Davies, 1 *COPINGER AND SKONE JAMES ON COPYRIGHT* §§ 10-03 – 10-04 (14th ed. 1999). England's copyright statutes have consistently contained a savings clause to preserve this exclusive grant. See, e.g., Copyright, Designs, and Patents Act, 1988, c. 48, s. 171(1)(b) (Eng.).