

A COPYRIGHT RESTORED: MARK TWAIN, MARY ANN CORD, AND HOW TO RIGHT A LONGSTANDING WRONG

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Did Mark Twain and the *Atlantic* infringe a copyright belonging to Mary Ann Cord in the telling of how enslavers tore her family apart and how her son returned years later, as a Union soldier, to liberate her from bondage? If so, could that long-ignored infringement be remedied today?

This Article answers these questions and, in so doing, provides wide-ranging insights into how the doctrines of consent, estoppel, laches, abandonment, adverse possession, escheat, and the statute of limitations apply in copyright law. Cord's case—nearly a century-and-a-half-old but examined for the first time in this project—can also help chart a course for how to address other longstanding wrongs in intellectual property and beyond. This includes those raised in recent lawsuits against Harvard for its exploitation of enslaved people's images and Tulsa for the 1921 race massacre on Black Wall Street.

The project's first part, "A Copyright Ignored," forthcoming in the *Journal of the Copyright Society of the U.S.A.*, focuses on the issue of copyrightability and argues that Cord was an author who had a common-law copyright in the words she spoke to Twain.

This second part, "A Copyright Restored," tackles the issues of infringement and remedy, arguing that (1) Twain and the *Atlantic* likely violated Cord's rights by publishing her expression without her consent, and (2) her descendants could perhaps still bring a claim today. Given that it continues to publish and promote "A True Story, Repeated Word for Word as I Heard It," I propose that the *Atlantic* and the Mark Twain Foundation should seek out Cord's descendants and consider—among other potential remedies—adjusting the credit to recognize Cord, not just Twain, as the work's author.

In this way, a copyright ignored can be now in a sense restored, setting a vital precedent for righting longstanding wrongs when and how best we can.

* Associate Professor, Samford University—Cumberland School of Law, © 2023. Thank you to my friends and colleagues at the IP Scholars' Roundtables at Texas A&M University and University of New Hampshire Franklin Pierce Schools of Law; the IP Mosaic Roundtable Conference; the IP Scholars Conference, Benjamin N. Cardozo School of Law, Yeshiva University; the University of Houston Law Center Intellectual Property Student Organization; the 2022 AALS Annual Meeting, "Bring the Noise: IP in Tumultuous Times" panel; my "Trouble Begins" lecture at Quarry Farm, hosted by Elmira College's Center for Mark Twain Studies; and the Cumberland faculty, particularly Dr. J. Mark Baggett, for their invaluable comments on this project. Further thanks to Dustin Marlan, Tyler Ochoa, Andres Sawicki, Kara Swanson, and Alfred Yen for their comments on drafts, as well as to the Cumberland Law Library, particularly Ed Craig, for help with my research. Dedicated to my mother, Kathy F. McFarlin, 1943–2017, who took me up the river as a boy to visit Hannibal and learn about Twain, and to my father, Lyle H. McFarlin, 1939–2022, a great storyteller in his own right. Thank you, Mom and Dad, for everything.

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INTRODUCTION¹

Picture, if you will, a person sitting down at her desk, morning coffee in hand, scanning the day’s news. She clicks on an eye-catching link. It leads to an article about how, in 1874, Mark Twain wrote down a story he heard from Mary Ann Cord, who worked as a cook for his sister-in-law. Cord’s story told of the tragic and astounding things she experienced while enslaved. Twain published it in the *Atlantic* as “A

1. A note of caution: this Article quotes challenging language embedded in the historical record that I would not have included if it were not necessary for the analysis. There is one particular word I do not quote—it is not necessary for the analysis—but it is included in the full “A True Story” to which I do include a link. For a thoughtful, personal, and powerful discussion of this difficult language as well as of Twain’s portrayal of Cord in “A True Story” by a student who was studying the piece, see Alyssa Alexander, *A True Story, Repeated Word for Word as I Lived It*, 11 MARK TWAIN ANN. 113, 113-17 (2013).

True Story, Repeated Word for Word as I Heard It,” with credit and compensation to him alone.

The article argues that this publication likely infringed a common-law copyright belonging to Cord. Moreover, given the legal intricacies at play, the article suggests that Cord’s descendants may still have a viable claim today. It mentions that Leon Washington Condol, who died in 1986, is Cord’s last known descendant, at least that the author has discovered so far.²

The reader stops mid-sip, sets the coffee down, and slowly leans back in her chair. Condol is her grandfather. Cord, she realizes, is her ancestor.

This present-day revelation has not yet happened. In fact, it may never come to pass. Condol’s death may have ended Cord’s bloodline. But that line is not yet fully charted.³ As in my hypothetical above, someone reading this Article, or my prior one on the copyrightability of Cord’s story,⁴ could come forward with proof of ancestry.⁵ If that happens, what then?

What would be the descendant’s rights? The *Atlantic*, as I write these words, continues to publish Cord’s words, as used by Twain, on its website.⁶ Could her descendant successfully bring a claim? Even if

2. See Molly Sinclair, *Mother and Son’s Amazing Reunion*, WASH. POST (Feb. 27, 1986), <https://www.washingtonpost.com/archive/local/1986/02/27/mother-and-sons-amazing-reunion/5548ec00-0ad1-4a61-abe5-f1fa70d4852f/> [https://perma.cc/E7FD-QR7T]; VICKI S. WELCH, AND THEY WERE RELATED TOO: A STUDY OF ELEVEN GENERATIONS OF ONE AMERICAN FAMILY!, 319–21 (2006).

3. The most extensive genealogy so far appears to be located in Welch’s book, which traces the Cuff Condol/Congdon lineage, with Cord’s line intersecting with Condol’s. WELCH, *supra* note 2.

4. Timothy J. McFarlin, *A Copyright Ignored: Mark Twain, Mary Ann Cord, and the Meaning of Authorship*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2023) (manuscript on file with author).

5. Even if Cord’s line has ended, a further theory exists that, in light of the perpetual nature of common-law copyright, it could escheat to the State of New York, see *infra* Section II.C, such that a district attorney or a state attorney general might attempt to seek a remedy on Cord’s behalf, see also Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173 (2005) (contemplating semi-playfully the escheat of Ovid’s rights in the story “Pyramus and Thisbe” to the Roman Empire). Because I think it more likely that a descendant could come forward—and would have a better argument for standing than the State of New York—I focus here on that scenario.

6. Mark Twain, *A True Story, Repeated Word for Word as I Heard It*, 34 ATL. MONTHLY 591, 591–94 (1874). As of this writing, it is available in at least three places on the *Atlantic*’s website, Mark Twain, *A True Story, Repeated Word for Word as I Heard It*, THE ATLANTIC (Nov. 1874), <https://www.theatlantic.com/magazine/archive/1874/11/a-true-story-repeated-word-for-word-as-i-heard-it/306511/> [https://perma.cc/4XH8-NGJH]; *On His Birthday, Remembering Mark Twain’s Gifts to The Atlantic*, THE ATLANTIC (Nov. 30, 2011) <https://www.theatlantic.com/national/archive/2011/11/on-his-birthday-remembering-mark-twains-gifts-to-i-the-atlantic-i/249272/> [https://perma.cc/W6F5-NGAZ]; Mark

Cord had a copyright in her words, as I've previously argued, did Twain and the *Atlantic's* use constitute infringement? And if it did, is it too late to address now?

If it's not too late, what would be the proper remedy? Money damages paid to Cord's descendants by the Twain Foundation and the *Atlantic*?⁷ An injunction ordering a take-down of the infringing content? An order that Cord be credited as an author? One, none, or all of the above?

I grapple with these questions here, and not just for their own sake. In some ways, Cord's case appears unique—its age is extreme, and cases of copyright in the spoken word are rare—but in other ways it exemplifies a trend. More and more cold cases of copyright infringement are heating up. These include a forty-three-year-old claim brought in 2014 against Led Zeppelin,⁸ as well as recent claims from descendants and other relatives seeking control over the copyrights in the many-decades-old photography of Vivian Maier and Mike Disfarmer.⁹

Given a pivotal U.S. Supreme Court decision reviving a forty-six-year-old infringement claim against the film *Raging Bull*, allowing a scriptwriter's heir to sue based on the 1980 film's rerelease on DVD and Blu-Ray,¹⁰ such disputes will likely multiply in the coming years. This is true, first, for older copyrights like Led Zeppelin's "Stairway to Heaven"

Twain, *A True Story, Word for Word As I Heard It*, ATLANTIC (THE CIVIL WAR ISSUE) (2011) <https://www.theatlantic.com/magazine/archive/2012/02/a-true-story-word-for-word-as-i-heard-it/308792/> [<https://perma.cc/UQJ2-AHN8>]. The third link mentions Cord as the source of the story, but she is still not credited as an author.

7. See MARK TWAIN PROJECT, https://www.marktwainproject.org/about_support.shtml [<https://perma.cc/DYP6-M8WM>] (last visited Mar. 2, 2023) ("The Mark Twain Foundation, a perpetual charitable trust located in New York City, possesses the publication rights to all of Mark Twain's writings unpublished at his death. It was created by a provision in his daughter Clara's will, which also stipulated that the income from the Foundation be used for, among other things, 'enabling mankind to appreciate and enjoy the works of Mark Twain.'").

8. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056–57 (9th Cir. 2020) ("Stairway to Heaven has been called the greatest rock song of all time. Yet, hyperbole aside, nearly 40 years after the English rock band Led Zeppelin released its hit recording, the song is not impervious to copyright challenges."); John M. McCormick-Huhn, *Led Zeppelin, "Stairway to Heaven," and Cognitive Aging: Implications for Laches in the Copyright Context*, 21 NEV. L.J. 1261, 1262–63 (2021).

9. See Alexander Herman, *The Incredible Copyright Legacy of Vivian Maier*, INST. ART & LAW (May 24, 2019), <https://ial.uk.com/vivian-maier/> [<https://perma.cc/6KP3-UB2V>] (describing a case involving heirs suing for copyright infringement based on decades-old photos); Eren Orbey, *Who Owns Mike Disfarmer's Photographs?*, NEW YORKER (July 13, 2021), <https://www.newyorker.com/news/us-journal/who-owns-mike-disfarmers-photographs> [<https://perma.cc/V3SY-8JWG>] (same). Thank you to Professor Andrew Gilden for bringing the Disfarmer example to my attention.

10. *Petrella v. MGM*, 572 U.S. 663, 663 (2014); see also McCormick-Huhn, *supra* note 8, at 1270–73.

and ones dating back much further.¹¹ But it's also true for the copyrights of today and tomorrow, given their extensive duration under current federal law.

For example, the copyright in this article should last seventy years beyond my death.¹² So, if I live to eighty, the copyright will persist until 2130. Now let's say someone copies from it in 2023, and I'm aware of the copying, but for whatever reason I don't sue. Then, in 2129, the copyist's work is republished. Under the rule announced by *Petrella*, as detailed below, my heirs could bring a timely infringement claim as late as 2132, one hundred nine years after this article's creation and alleged infringement, as well as seventy-two years after I've shuffled off this mortal coil (likely long after the alleged infringer has, as well).¹³ Perhaps I orally consented to the copying back in 2023? No one in 2132 can ask me or the copyist about it—we are long gone—but *Petrella* in essence says, “No matter; the claim must be decided.”¹⁴ And absent

11. See 17 U.S.C. § 303(a). Under this provision, copyright in an authorized writing created before 1978 but first published between 1978 and 2003 endures through 2047. For a close-to-home, real-life example of this provision's impact: Mark Twain wrote his autobiography but never published it. See Stephen Carlisle, *Claiming Copyright in Public Domain Works: It's Time to Put an End to Publishing Sleight of Hand*, NOVA SE. UNIV. (Aug. 27, 2014), <http://copyright.nova.edu/claiming-copyright-public-domain/> [<https://perma.cc/KS77-K2CN>]. His estate, represented by the Mark Twain Foundation, quietly published it via microfilm in 2002 to secure a federal copyright through 2047. *Id.* So, the Foundation has essentially sought the right to bring an infringement claim through 2050, one hundred forty years after Twain's death. Considering this, a claim by Cord's heirs against the Twain Foundation would take on a certain flair of “what's good for the goose is good for the gander.”

12. 17 U.S.C. § 302(a). It's possible that it would be considered a work made for hire whose ownership is transferred by my university-employer to me via contract, such that the copyright would last ninety-five years after publication, *i.e.*, until 2118. *Id.* § 302(c); Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMP. & HIGH TECH. L.J. 1, 12 & n.50 (2001). It's also possible, however unlikely, that a future Congress will shrink the duration of existing copyrights.

13. The heirs' remedy, under the Copyright Act's three-year statute of limitations and the separate-accrual rule applied by *Petrella*, would be limited to the damages arising from the republication. See *Petrella*, 572 U.S. at 667–68, 677 (citing 17 U.S.C. § 507(b)). In other words, while the circumstances of the one-hundred-nine-year-old creation and infringement would have to be litigated, the recoverable damages would only extend back three years from the 2132 lawsuit. See *id.*; see also *infra* Section II.B (further discussing *Petrella*). For the phrase “shuffled off this mortal coil,” see WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 1, l. 64–67 (“To die, to sleep; to sleep: perchance to dream: ay, there's the rub; for in that sleep of death what dreams may come when we have shuffled off this mortal coil . . .”).

14. *Petrella*, 572 U.S. at 683 (“At that time, the author, and perhaps other witnesses to the creation of the work, will be dead. Congress must have been aware that the passage of time and the author's death could cause a loss or dilution of evidence.”) (internal citation omitted). The long life of federal copyright has necessitated navigating long-ago events in other contexts as well, such as determining when the federal term began. See Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1452

Congressional amendment, *Petrella* is likely to remain good law. Its holding was endorsed by a six-to-three majority of the Court and reaffirmed in its reasoning by a seven-to-one majority in 2017.¹⁵

In this light, the long timespan in Cord’s case looks less like a historical anomaly and more akin to the tough cases ahead. So, the issues discussed here—specifically, problems of consent, fair use, estoppel, laches, abandonment, escheat, the statute of limitations, and adverse possession in a case where the original parties are long-gone—should be instructive for the future of cold-case copyright litigation.

Cord’s case, moreover, may help forge a path for other authors and their descendants to achieve previously denied acknowledgment and compensation. Members of the Black community in particular have struggled to obtain recognition for works they or their ancestors authored but were appropriated by others.¹⁶ And beyond copyright, others are coming forward and seeking remedies for longstanding wrongs relating to discrimination, including recent high-profile lawsuits by victims of the 1921 Tulsa Race Massacre and by a descendant of enslaved persons

(2013) (“Given the length of the current copyright term, the copyright status of works will depend on events and facts that happened nearly one hundred years ago. Because there may be poor records and imperfect memories, we can expect a good deal of legal uncertainty surrounding the specific publication date for some works and, therefore, the specific date upon which a work enters the public domain.”).

15. *Id.* at 666; *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 580 U.S. 328, 331–32 (2017) (“In *Petrella*, we held that laches cannot preclude a claim for damages incurred within the Copyright Act’s 3-year limitations period. . . . The question in this case is whether *Petrella*’s reasoning applies to a similar provision of the Patent Act, 35 U.S.C. § 286. We hold that it does.”).

16. *See, e.g.*, K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’NS & ENT. L.J. 339 (1999); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009); Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213 (2010); Tonya M. Evans, *Reverse Engineering IP*, 17 MARQ. INTELL. PROP. L. REV. 61, 66–71 (2013); Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274 (2017); Trevor Reed, Note, *Who Owns Our Ancestors’ Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275 (2016); Elizabeth L. Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 661 (2019). While I raise here how issues of race and gender discrimination apply to Cord’s case, I am mindful of my limitations in understanding and fully exploring such issues. I humbly hope that I am at least treating them respectfully and bringing them to the attention and further discussion of other scholars, such as those cited above, who have expertise and experiences that differ from mine.

against Harvard University.¹⁷ Cord’s case, then, connects to efforts to identify, investigate, and redress such situations. It may inspire more.¹⁸

Showing, first, that the effort is justified here, Part I argues that Twain and the *Atlantic* likely infringed Cord’s copyright, despite potential defenses of consent, co-authorship, and fair use. Part II discusses whether that copyright could still exist today, despite the statute of limitations and the doctrines of estoppel, laches, abandonment, and adverse possession. Last, Part III considers how the *Atlantic* and the Twain Foundation might move forward, as well as how Cord’s case, and its use of state common law, may help chart a course to right other longstanding wrongs.

I. DID TWAIN AND THE *ATLANTIC* INFRINGE CORD’S COPYRIGHT?

Presuming that, as I’ve argued in “A Copyright Ignored,” Cord did have a common-law copyright in her spoken words which Twain wrote down and published,¹⁹ the next question is whether in doing so Twain infringed that copyright. New York law likely governs this issue, given that it was the state in which Cord lived, worked, and told her story to Twain and given that state law governs claims of copyright in the spoken word.²⁰ So the elements of a claim for state common-law copyright infringement in New York become an appropriate starting point.

17. Regarding the Tulsa plaintiffs’ case, see, for example, First Amended Petition, *Randle v. City of Tulsa*, No. CV-2020-01179 (Okla. Dist. Ct. Feb. 2, 2021) (on file with author); DeNeen L. Brown, *Judge Allows Lawsuit by Tulsa Race Massacre Survivors to Proceed*, WASH. POST (May 3, 2022); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors’ Story*, 24 B.C. THIRD WORLD L.J. 13 (2004) (discussing earlier stages in the survivors’ efforts and reparations in general); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921; RACE, REPARATIONS, AND RECONCILIATION* (2002) (same). Regarding Tamara Lanier’s case against Harvard, see, for example, *Lanier v. President & Fellows of Harvard Coll.*, 191 N.E.3d 1063 (Mass. 2022); Anemona Hartocollis, *Who Should Own Photos of Slaves? The Descendants, Not Harvard, a Lawsuit Says*, N.Y. TIMES (Mar. 20, 2019).

18. Within the context of copyright, see, for example, McFarlin, *supra* note 4; *infra* notes 293, 295–97 and accompanying text (discussing other examples of Twain’s and the *Atlantic*’s publication of Black persons’ oral expression, possibly without their consent). Twain scholars have uncovered the possible name of at least one of those examples—William Evans of Paris, Illinois—such that heirs could perhaps be identified. See Annotations to Letter from Mark Twain to Olivia Clemens (Jan. 10–11, 1872), in 5 MARK TWAIN’S LETTERS (Lin Salmo & Harriet Elinor Smith eds., 1997).

19. See generally McFarlin, *supra* note 4.

20. See *Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043, 1059 (S.D.N.Y. 1971); *Flexitized, Inc. v. Nat’l Flexitized Corp.*, 214 F. Supp. 664, 671–72 (S.D.N.Y. 1963), *rev’d on other grounds*, 335 F.2d 774 (2d Cir. 1964). Given the paucity of reported cases on the issue elsewhere, it’s likely that New York decisions would be looked to as the most persuasive precedent regardless. 4 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 17.5 (3d ed. 2023) (“[C]ourts have had little opportunity to flesh out common law copyright’s bare bones on such important points as

In 2005, New York’s highest court, citing authority dating back to 1786, defined the two elements of common-law copyright infringement as: “(1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright.”²¹ Because I’ve argued elsewhere that Cord did have a valid copyright in how she expressed her story, and because it’s detailed there how Twain consistently admitted to reproducing that expression,²² the focus here is on whether Twain’s reproduction was unauthorized.

In copyright, authorization is most often phrased as whether the owner has “licensed” the work to the defendant.²³ Yet another way of phrasing this question, which I will mainly use for purposes of plain-English clarity, is whether Cord consented to Twain’s use of her words.²⁴

The historical record shows, first, that Cord likely did not expressly consent. Further, given how the law typically treats situations where parties are in an unequal bargaining position, it’s also unlikely that Cord implicitly consented by telling her story to Twain and not objecting after he used it.

From there, Twain has the potential defenses of co-authorship and fair use, which I address in turn, arguing that neither are likely to dispose of an infringement claim.

A. Proving Bad Faith Is Unnecessary

As an initial matter, it’s important to note that neither Twain nor the *Atlantic* need to have known of Cord’s copyright for them to be held liable.²⁵ In this way, both under New York law specifically and as a

standards for protection, proof of infringement and remedies for infringement.”); Zvi S. Rosen, *Common-Law Copyright*, 85 U. CIN. L. REV. 1055, 1117–19 (2018) (including pervasive cites to New York cases); Ronald B. Standler, *Common Law Copyright in the U.S.A.*, 23 (Jul. 16, 2013), <http://www.rbs2.com/clc.pdf> [<https://perma.cc/B54K-YZEJ>] (same).

21. *Capitol Recs., Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 265 (N.Y. 2005).

22. *See* McFarlin, *A Copyright Ignored*, *supra* note 4.

23. *See, e.g., Underhill v. Schenck*, 143 N.E. 773, 775 (N.Y. 1924).

24. *See, e.g., Easton v. Universal Pictures, Inc.*, 288 N.Y.S.2d 776, 778 (N.Y. Sup. Ct. 1968).

25. The New York Court of Appeals has specifically addressed this issue, both historically and as a matter of current law:

To the extent that any inference of deceptive or fraudulent intent may have been referred to in early copyright case law, it appears to have been the view that bad faith was inherent in the act of copying and selling a work without permission from a competitor because this would deprive the true owner of the work’s value. But fraud or bad faith is not an element of an infringement action in modern New York law.

Capitol Recs., 4 N.E.2d at 266 (internal citations omitted). Though the court used the term “competitor,” and while it’s true that Cord had not previously participated in the

matter of copyright law more generally, infringement is considered a strict-liability offense, more concerned with protecting copyright owners than punishing malintent on the part of copyists or, conversely, excusing good-faith mistakes.²⁶

While a defendant’s mindset may affect the scope of the remedy, as discussed further in Part III, it’s irrelevant for purposes of liability.²⁷ So, for instance, even if we presume that Twain and the *Atlantic* incorrectly but innocently believed that copyright did not protect the spoken word, it would not entirely shield them from a claim.²⁸

What would fully shield them, though, is if Cord had consented to their use of her words. As stated above, the use must be unauthorized to constitute infringement.²⁹ So, consent becomes the focal point.

B. Did Cord Consent?

Consent is a well-recognized defense to copyright infringement, as it is with property and tort claims in general.³⁰ This reflects a

literary market, it’s also true that there was a substantial audience at the time for the narratives of other enslaved peoples, including ones that were orally dictated by the author. *See id.*; McFarlin, *supra* note 4 (citing examples such as Solomon Northup’s *Twelve Years a Slave* and Sojourner Truth’s *A Narrative of Sojourner Truth, A Northern Slave, Emancipated from Bodily Servitude by the State of New York, in 1828*). So, Twain and the *Atlantic* were, in a sense, Cord’s competitors, in that she could quite plausibly have sold her story to another writer and publisher.

Further, in making this statement of law, the *Capitol Records* court cited the 1949 case of *Chamberlain v. Feldman*, in which it had affirmed an injunction in favor of Mark Twain’s estate that blocked the unauthorized publication of an 1876 manuscript by Twain that the *Atlantic*, ironically, had rejected. 89 N.E.2d 863, 864–65 (N.Y. 1949). Twain’s estate itself, then, albeit indirectly, helped established the precedent that no bad intent is necessary for copyright infringement under New York law. *Capitol Recs.*, 830 N.E.2d at 266. Though the case did not expressly use the phrase “bad faith,” the court in *Capitol Records* apparently understood this implicitly, in that no bad faith by the unauthorized publisher was apparent from the facts. *Id.*

26. *See* Patrick R. Goold, *Unbundling the “Tort” of Copyright Infringement*, 102 VA. L. REV. 1833, 1851–54, 1868 (2016).

27. *See infra* Section III.D (discussing mindset’s relevance for the issue of punitive damages).

28. *Capitol Recs.*, 830 N.E.2d at 266; *see* Goold, *supra* note 26, at 1841–42, 1851–52.

29. *Capitol Recs.*, 830 N.E.2d at 266; *see supra* text accompanying note 21.

30. *See, e.g., Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904) (“The author of a work of art has at common law a property therein until it is published with his consent. He may withhold or communicate it, and in communicating it he may impose such restrictions upon its use as he sees fit.”) (citing EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 98–99 (1879)); 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 105 (2d ed. 2011); WANDA BORGES ET AL., ENFORCING JUDGMENTS AND COLLECTING DEBTS IN NEW YORK § 2:324 (2022–2023 ed.)

foundational, common-sense notion: You can't successfully sue someone for something you gave them permission to do. On the flip side, you generally can sue someone for something they did with your copyrighted work without your permission.

"Copyright, both common-law and statutory," observed the New York Court of Appeals, "rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author."³¹ The question, then, is whether Cord gave Twain that consent. There are two forms of consent recognized by law: express and implied.

1. EXPRESS CONSENT

We cannot today, of course, ask Twain or Cord whether Cord expressly consented. And, as is often observed, it's impossible to fully prove a negative—*i.e.*, it cannot be absolutely shown that Cord did not give Twain her permission.³² But in a civil matter like copyright infringement, the burden of proof is not absolute, or even "beyond a reasonable doubt," it's a preponderance of the evidence—*i.e.*, "more likely than not."³³ And the most vital facts at issue—the ones I believe would allow a court today to make sound more-likely-than-not judgments on the key issues—come from Twain's own pen, such that they are not just a matter of history but would likely be admissible in court today.³⁴

("Peaceable entry onto land by consent is privileged and thus not an actionable trespass.").

31. *Est. of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968).

32. *See United States v. Shwaish*, No. 2:18-cr-338-NR-1, 2021 WL 1060349, at *2 (W.D. Pa. Mar. 18, 2021) ("[W]hile it is perhaps impossible to absolutely prove a negative, Mr. Shwaish need only meet a preponderance-of-the-evidence standard. He has done so.").

33. *Herwitz v. NBC*, 210 F. Supp. 231, 234 (S.D.N.Y. 1962); *Establisement Kadaq Vaduz v. Piha*, No. 93 Civ. 0499 (HB), 1995 WL 598980, at *1 (S.D.N.Y. Oct. 11, 1995) ("To establish by a preponderance of the evidence means very simply to prove that something is more likely than not so. In other words, a preponderance of evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . the belief that what is sought to be proved is more likely true than not true.") (quoting *Duke Lab'ys v. United States*, 222 F. Supp. 400, 406 (D. Conn. 1963)).

34. *See generally* 5A ROBERT A. BARKER & VINCENT C. ALEXANDER, NEW YORK PRACTICE SERIES: EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS §§ 8:14, 8:74 (discussing the admissibility of documents more than thirty years old) (2022); *id.* §§ 8:79, 8:87, 8:89 (discussing the admissibility of party admissions and statements against proprietary interest by those deceased). But what about live testimony? The inability to call Twain or Cord to the stand is a significant issue here, of course, but it's an issue inherent in any cold case and, where the evidence allows for sound judgments even after the original parties have died, courts will render decisions. *See, e.g.*, Dylan O. Keenan, Comment, *Bullcoming and Cold Cases: Reconciling the Confrontation*

Moreover, the burden of proof on the issue of consent is typically on the defendant, so it would probably be the alleged infringers who would have to prove, more likely than not, that Cord expressly consented.³⁵ Is this fair, particularly when Twain is not here to defend himself? Perhaps not, and given the length of time at issue, a court could reasonably place the burden on Cord's heirs to prove the absence of consent.³⁶ But regardless of who has the burden, the evidence leads to

Clause with DNA Evidence, 30 YALE L. & POL'Y REV. 13, 24 (2012) ("Ancient document exceptions decline to exclude as hearsay statements contained in old documents The ancient document exception has a lengthy historical pedigree. It has been justified by the twin underpinnings of most hearsay exceptions: necessity and reliability. One court has referred to the ancient document exception as a 'child of necessity' because the witnesses who could testify to the claims of an ancient document are probably 'dead, or inaccessible.' At the same time, statements in ancient documents may be more reliable than live testimony as 'the passage of time tolls the memory and removes [orally transmitted statements] from the context in which they are made.' Moreover, ancient documents are less likely to suffer from problems of 'lack of candor, distortion or even deliberate falsehood' because they are generally not produced in preparation for litigation.") (quoting *Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1229 (D. Wyo. 1985)) (cleaned up).

Further, if we, like the *Compton* court, are realistic about the risks of lying and faulty memory inherent in live testimony, we may be more willing to hear a cold case like Cord's in which live testimony is lacking but documents are ample. See Mark Curriden, *The Lies Have It: Judges Maintain That Perjury Is on the Rise, but the Court System May Not Have Enough Resources to Stem the Tide*, 81 ABA J. 68, 69 (1995) (quoting U.S. District Judge Marvin Shoob, "I think people would be shocked if it were truly known how many witnesses lied under oath in a court of law every day"); Matthew S. Foster, Comment, *I'll Believe It When You See It*, 60 LOY. L. REV. 857, 866 (2014) ("Thousands of studies . . . have confirmed that eyewitnesses perceive and remember with a high degree of error.") (citing Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 28–29 (2009)).

35. See *Affiliated Recs. Inc. v. Taylor*, No. 09 Civ. 9938(KBF), 2012 WL 1675589, at *3 (S.D.N.Y. May 14, 2012) ("Consent is a defense to copyright infringement.") (citing *Love v. Kwitney*, 706 F. Supp. 1123, 1131 (S.D.N.Y. 1989)). Though the term "unauthorized" is used in the prima facie statement of the elements of common-law copyright infringement in New York, courts appear to typically treat it as an affirmative defense, placing the burden on the defense. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:133 (2022) ("All courts agree that the assertion of a license to excuse otherwise infringing conduct is an affirmative defense, the burden of which rests on the party putting forth the license.").

36. See *Petrella v. MGM*, 572 U.S. 663, 683–84 (seeming to support its reasoning for allowing a longstanding infringement claim to proceed on the burden of proof being on the plaintiff: "As in other civil litigation, a copyright owner bears the burden of establishing a prima facie case Any hindrance caused by the unavailability of evidence, therefore, is at least as likely to affect plaintiffs as it is to disadvantage defendants.") (quoting 3 PATRY ON COPYRIGHT, *supra* note 35, § 9:4). Further, in *Prevost v. Gratz*, 19 U.S. 481, 497–98 (1821), which involved a claim for fraudulent breaches of trust brought after the original parties to the trust had died, Justice Joseph Story waxed poetic on the thorny issues associated with adjudicating post-mortem claims:

It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief.

the conclusion that Cord likely did not expressly consent. Most basically, the ample historical record indicates that no one even considered asking her.

First, the letters between Twain and the *Atlantic's* editor William Dean Howells suggest that neither thought to ask Cord's permission or pay her. Her name is never mentioned; Twain simply wrote: "I have not altered the old colored woman's story except to begin it at the beginning, instead of the middle, as she did—& ~~worked~~ traveled both ways. I told this yarn to Hay & some company & they liked it. So I thought I'd write it."³⁷ Neither do their recollections after: when Howells recounted how much he paid Twain for the piece, he made no mention of payment to anyone else.³⁸

Next, a letter from Twain to William Seaver, the editor of *Harper's Monthly*, serves as further evidence that Twain gave no thought to whether Cord's permission was needed to publish her story.³⁹ Twain had told it to Seaver on a visit to New York City and, in his subsequent letter, Twain asked him whether he remembered "that darkey yarn," informing

On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of equity to grant ample and decisive relief.

But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favour of innocence, and against imputation of fraud. . . . [A]s to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt.

Id. Given that a claim by Cord's heirs would not hinge on proof of fraud—even an innocent failure to secure her consent would constitute infringement—a standard of "beyond a reasonable doubt" would seem a rough fit, but Justice Story's thoughts do resonate more generally, and they offer a strong argument for requiring that Cord's heirs be the ones to convince a court that consent was lacking, perhaps even under a higher "clear and convincing evidence" standard.

37. See McFarlin, *supra* note 4, at 22; Letter from Mark Twain to William Dean Howells (Sept. 2, 1874), in 1 MARK TWAIN—HOWELLS LETTERS: THE CORRESPONDENCE OF SAMUEL L. CLEMENTS AND WILLIAM D. HOWELLS, 1872–1910, 22–23 (Henry Nash Smith & William M. Gibson eds., 1960). The quoted material comes from a transcription of Twain's handwriting. The strikethrough is meant to reflect what appears in that handwriting.

38. William Dean Howells, *Recollections of an Atlantic Editorship*, ATL. MONTHLY (Nov. 1907), <https://www.theatlantic.com/magazine/archive/1907/11/recollections-of-an-atlantic-editorship/304475/> [<https://perma.cc/EP82-XBSS>].

39. 6 MARK TWAIN'S LETTERS 1874–1875, 245–46 (Michael B. Frank & Harriet Elnor Smith eds., 2022).

him that it was being published in the *Atlantic*, such that Seaver couldn't "gobble it up."⁴⁰

Perhaps Twain thought that the law did not protect Cord's spoken words and that the first one to publish them—whether it was him in the *Atlantic* or Seaver in *Harper's*—would have the copyright.⁴¹ Or perhaps Twain thought that, even if the law did protect Cord's expression, she was unlikely to complain or have any real recourse if she did. Or maybe it was a mix of both. Regardless, given the detailed, contemporaneous correspondence in which no mention is made of Cord's name, much less any thought to ask her permission, it's unlikely that Cord's consent was expressly sought or given.

The signed inscription on the copy of his book *Sketches New and Old*—which republished "A True Story" a year after it appeared in the *Atlantic*—is also significant:

The author of this book offers it to Aunty Cord with his kindest regards and refers her to page 202 for a well-meant but libelous portrait of herself and also the bit of personal history which she recounted to him once at Quarry Farm.⁴²

This wording provides further evidence that no permission was sought beforehand. When Twain "refers her to . . . the bit of personal history which she recounted to him once at Quarry Farm,"⁴³ it indicates no agreement or other arrangement by which Twain had acquired her consent to use it. Contrast this with how different wording, perhaps along the lines of "the author thanks her again for her kind permission to use the bit of personal history," would show us that consent had been sought and given.

Further consider the "bit of personal history" description and contrast it with how Twain, years later in a private notebook, described Cord's story as a "curiously strong piece of literary work to come unpremeditated from lips untrained in the literary art."⁴⁴ Gifting Cord a

40. *Id.* Professors Frank and Smith note that "Seaver and John Hay probably heard the germ of 'A True Story' in New York in late June or early July . . . Clemens admired Hay's verse portraits of the Western life and character, and Hay in turn lauded Clemens's proficiency at dialect and his memory and imagination." *Id.* at 246 n.2 (internal quotations omitted).

41. This, as I argue in *A Copyright Ignored*, *supra* note 4, was likely an incorrect understanding of the law. And, as set forth above in Section I.A, a mistake like this, *i.e.*, "I didn't know the law," would not be a defense to liability.

42. ROBERT D. JEROME & HERBERT A. WISBEY, JR., *MARK TWAIN IN ELMIRA* 280 (2d ed. 2013).

43. *Id.* Quarry Farm was the name of Twain's sister-in-law's home where Cord worked. *Id.* at 236, 280.

44. SHELLEY FISHER FISHKIN, *WAS HUCK BLACK? MARK TWAIN AND AFRICAN-AMERICAN VOICES* 8-9, 151 (1993).

signed copy of the book containing her story, while at the same time referring to it in the inscription as merely a “bit of personal history,” perhaps indicates a desire for her approval after the fact without acknowledging it was needed beforehand.⁴⁵

Again, it’s impossible for us to know for sure that Cord did not consent, but the legal standard isn’t “for sure,” it’s “more likely than not.” The evidence, in my view, allows for a sound judgment that Cord likely did not expressly consent to the publication of her words.

But it’s also possible that Cord implicitly consented.

2. IMPLIED CONSENT

Courts have consistently recognized that words and conduct which do not expressly grant consent to use copyright-protected expression can still do so by implication.⁴⁶ In deciding this issue, courts generally apply the broad, fact-specific standard of whether “the totality of the parties’ conduct indicates an intent” by the copyright owner to grant consent.⁴⁷ The caveat is often added, however, that implied consent is “found only in narrow circumstances.”⁴⁸

Commentators have expounded on these circumstances. In his copyright treatise, Professor William Patry explains that “there must be objective evidence permitting a reasonable person to conclude that the parties had reached an agreement, i.e., that there was a meeting of the minds.”⁴⁹ And Professor Paul Goldstein’s treatise observes that where a finding of implied consent would effectively bar a party’s claim to copyright, courts will often refuse to make that finding absent “the most compelling evidence.”⁵⁰

Beyond these general statements, it’s most instructive to consider the specifics of *Estate of Hemingway v. Random House*⁵¹—the leading case on common-law copyright and oral expression not only in New York

45. A somewhat puzzling issue is that historians have generally presumed Cord could not read or write at least at the time of these events. *See* McFarlin, *supra* note 4. If the presumption is true, then perhaps Twain’s intention was that he or a member of his or Cord’s families would read it to her.

46. 2 PATRY ON COPYRIGHT, *supra* note 35, § 5:131; 2 GOLDSTEIN, *supra* note 20, § 5.2.1.

47. *Est. of Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A][7] (2023)).

48. *Id.*

49. 2 PATRY ON COPYRIGHT, *supra* note 35, § 5:131.

50. 2 GOLDSTEIN, *supra* note 20, § 5.2.1.

51. 244 N.E.2d 250 (N.Y. 1968).

but in all U.S. case law—particularly given that it was ultimately decided on the basis of implied consent.⁵²

In the case, Ernest Hemingway’s widow sued Random House to block the publication of *Papa Hemingway: A Personal Memoir*.⁵³ The writer of that book was A.E. Hotchner, a younger friend and protégé of Hemingway.⁵⁴ The book quoted from conversations between Hemingway and Hotchner, which the latter described as “not necessarily verbatim but . . . renditions based upon notes which he kept and recorded during the years of his friendship with Hemingway and his natural talent for remembering such conversations.”⁵⁵

The claim was that Hemingway’s contributions to these conversations were “subject to a common law copyright, that is, the right of first publication of such material, which right belongs solely to his estate.”⁵⁶ Indeed, the estate argued, “[w]hat for Hemingway was oral one day would be or could become his written manuscript the next day.”⁵⁷ Thus, it claimed, what Hemingway said to Hotchner “was as much the subject of common-law copyright as what he might himself have committed to paper.”⁵⁸

Ultimately, the New York Court of Appeals ruled against Hemingway’s estate, holding that, even if Hemingway’s spoken words were copyrightable, the evidence established that he had implicitly consented to Hotchner’s use of those words.⁵⁹ First, the court noted that Hemingway never suggested to Hotchner, nor anyone else, that “he regarded his conversational remarks to be ‘literary creations’ or that he was of a mind to restrict Hotchner’s use of the notes and recordings which Hemingway knew him to be accumulating.”⁶⁰

52. *Id.* at 252–53. Today’s preeminent U.S. copyright treatises focus on the case in their discussion of common-law copyright. *E.g.*, 4 GOLDSTEIN, *supra* note 20, § 17.5.1; 1 NIMMER & NIMMER, *supra* note 47, § 2.02; 3 PATRY ON COPYRIGHT, *supra* note 35, § 5:19; 4 PATRY ON COPYRIGHT, § 10:42.

53. *Est. of Hemingway*, 244 N.E.2d at 252–53. Mary Welsh Hemingway, his widow, sued Random House on her own behalf and on behalf of his estate. *Id.*

54. *Id.* at 253. Hotchner was already at that time a lawyer—having graduated from the University of Washington in St. Louis School of Law—and a budding author in his own right. Bruce Weber, *A.E. Hotchner, Writer and Friend of the Famous, Dies at 102*, N.Y. TIMES (Feb. 15, 2020). He went on to live a long and interesting life, publishing many more books and befriending the actor Paul Newman, leading to their cofounding the massively successful charitable endeavor Newman’s Own. *Id.*

55. *Est. of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531, 536 (Sup. Ct. 1966).

56. *Id.* at 534.

57. *Est. of Hemingway*, 244 N.E.2d at 253–54 (alteration in original).

58. *Id.*

59. *Id.* at 255–56.

60. *Id.* at 255.

Next, the court noted it had become a continuing practice during the last thirteen years of Hemingway's life for Hotchner to write articles about Hemingway that liberally quoted Hemingway's spoken words.⁶¹ "Hemingway, far from objecting to this practice, approved of it."⁶² Further, the court noted, "other writers also quoted Hemingway's conversation without any objection from him, even when he was displeased with the articles themselves."⁶³ Given this history, the court held, Hotchner's authority to publish Hemingway's spoken words must be implied.⁶⁴

Similarities do exist between those circumstances and the ones at issue here. Like Hemingway, Cord likely did not suggest to Twain or anyone else that she regarded her story as a literary creation or that she wanted to restrict Twain from using them. And, like Hotchner, Twain was a writer, arguably putting Cord on notice that he might use her story in one of his works.

The differences, however, predominate. First, unlike Hotchner, Twain was not recording Cord's words while she was speaking, which the court noted Hotchner did at least some of the time.⁶⁵ Further, and most importantly, Twain and Cord's relationship was much different than Hemingway and Hotchner's. While Cord and Twain were apparently on friendly terms, they were not fellow writers or social friends.⁶⁶ In addition to Cord's status as an employee of Twain's in-laws, differences in their race and gender make it difficult to conclude that Cord truly had the liberty to instruct Twain on whether and how he could use her words. And though Cord likely knew that Twain was a writer, there was no prior history of him writing down her words and publishing them, much less the thirteen years that Hotchner had been publishing Hemingway's.⁶⁷

61. *Id.*

62. *Id.* at 253.

63. *Id.*

64. *Id.* at 255–56.

65. *Id.* at 253; see Letter from Mark Twain to William Dean Howells, *supra* note 37, at 23 ("I told this yarn to Hay & some company & they liked it. So I thought I'd write it.").

66. See Sharon D. McCoy, "Like real chums": Twain's Relations with African Americans in *Elmira's Domestic Circle* (Complicating Twain Symposium, October 20, 2012), <https://marktwainstudies.com/wp-content/uploads/2019/03/Elmira-2012-Complicating-Twain-Symposium-Program.pdf> [<https://perma.cc/XV5Q-HJ3D>] ("While Twain allowed Cord, as 'Aunt Rachel,' to tell her moving experiences in 'A True Story,' there is little evidence that the relationship developed beyond the level that he ironically mocks there, and his responses to Cord's illness and death disrupt a more romantic interpretation of any personal growth that 'A True Story' might seem to represent.").

67. Indeed, there is no evidence of other prior quotations from Twain. But see Sherwood Cummings, *The Commanding Presence of Formerly Enslaved Mary Ann Cord in Mark Twain's Work*, 34 MARK TWAIN J. 22, 22 (1996), for characters in later works by Twain that were at least in part inspired by Cord. And Twain did quote her briefly in a later letter to William Dean Howells, in describing an argument about religion between

Moreover, whereas Hemingway was a famous public figure, well aware that what he said to others could easily be quoted in an article or book—particularly if he didn’t tell them it was “off the record” or otherwise off-limits—Cord did not have the existing reputation or expectation that what she said could end up in print unless she specified otherwise.

Weighing these circumstances together, I think a court would be reluctant to find implied consent in Cord’s case. Specifically, I don’t think it reasonable to conclude that Cord consented to the publication of her story by telling it to Twain and his family, with no one writing it down while she was speaking. This is so either under the higher “compelling evidence of consent” standard that Professor Goldstein cites or the usual “more likely than not” rule.⁶⁸ More likely than not, Cord was not aware, nor should she have been aware, that she needed to say “don’t publish this” to have kept her story from ending up in print without credit or compensation to her.

To the contrary, particularly given the market for narratives like Cord’s—Solomon Northup’s *Twelve Years A Slave* and Sojourner Truth’s *A Narrative of Sojourner Truth, A Northern Slave, Emancipated from Bodily Servitude by the State of New York, in 1828*, for example, were both financially successful publications orally dictated by their authors—I think a court would place the duty on Twain and the *Atlantic* to have expressly requested her consent to publish her story.⁶⁹ Courts often apply contract principles to the licensing of copyrights, as reflected in Professor Patry’s observation that objective evidence must show that a “meeting of the minds” occurred to support a finding of implied consent.⁷⁰

One core principle of contract law is that, under certain circumstances, a party may have a duty to disclose information to which he knows the other side lacks access, if it could affect the value of property at issue.⁷¹ To this point, Professors Kimberly Krawiec and

her and John T. Lewis, who oversaw the Quarry Farm property. See Letter from Mark Twain to William Dean Howells (Aug. 25, 1877), *supra* note 37, at 194–99; Deborah A. Lee, *Love and Debt: A True Story of Mary Ann Cord, John T. Lewis, and Mark Twain at Quarry Farm*, 54 MARK TWAIN J. 97, 98–99 (2016).

68. See GOLDSTEIN, *supra* note 20, § 5.2.1.

69. See McFarlin, *supra* note 4, at 22–24.

70. 2 PATRY ON COPYRIGHT, *supra* note 35, § 5:131.

71. See generally Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795 (2005). For New York decisions discussing the general principle, see *Butz v. Bliss*, No. 84 Civ. 7030 (JMW), 1987 WL 14634, at *23 (S.D.N.Y. July 15, 1987) (“Under New York law a duty to disclose material information arises when one party has superior knowledge. A duty to disclose ‘may arise . . . where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.’”); *Sable v. Southmark/Envicon Cap. Corp.*, 819 F. Supp. 324, 334 (S.D.N.Y. 1993) (“[T]here is no duty to disclose information to one who

Kathryn Zeiler, in an empirical study of “466 decisions spanning a wide array of jurisdictions and covering over two hundred years,” found that courts are significantly more likely to require a party to disclose such information if the uninformed party is “sick, disabled, illiterate, or elderly, though still competent to contract.”⁷²

Certainly, Cord was legally competent to contract,⁷³ but given her apparent inability at that time to read or write,⁷⁴ her access to the information that her story could be valuable was significantly less than Twain’s or the *Atlantic*’s. This information imbalance, then, further supports a conclusion that, under the circumstances, a court here would likely decline to find implied consent.

Unlike with Hemingway, who was in an equal or better position than his protégé Hotchner to appreciate the economic value of his words and the consequences of communicating them without expressly reserving his rights, it seems unfair to hold Cord similarly responsible. Thus, while I

reasonably should be aware of it.”); *Noved Realty Corp. v. A.A.P. Co.*, 293 N.Y.S. 336, 340 (N.Y. App. Div. 1937) (“We agree with the defendant that the relation of the parties was merely that of buyer and seller not affected by any fiduciary obligations. Conceding this, there are limits beyond which parties even in that relation may not go in the concealment of material facts.”).

72. Krawiec & Zeiler, *supra* note 71, at 1779. Regarding women, specifically, they proceed to observe:

Our suspicion, however, that courts are more likely to require disclosure when the uninformed party is female is not supported by the data, although our data did reveal a time trend in fraudulent silence decisions when the uninformed party is female. The percentage of cases in which the uninformed party is female and the court required disclosure decreased significantly from the period 1793–1950 to the period 1951–2002.

Id. at 1880.

73. Since 1860, New York has recognized a married woman’s right to “bargain, sell, assign and transfer her separate personal property” and “sue and be sued in all matters having relation to her property.” Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2150 (1994) (citing Act of Mar. 20, 1860, ch. 90, §§ 2, 7, 1860 N.Y. Laws 157).

74. The scholarship on Twain and Cord refers to Cord as “illiterate,” *see, e.g.*, Cummings, *supra* note 67, at 22, but this appears to be a presumption without, as best I can tell, affirmative evidence, such as one of her descendants saying that she was in fact so. However, given the formal and informal prohibitions on education in the antebellum South, with literacy often expressly barred, there is a strong a basis for this presumption. Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 102 (1991) (“Through the middle of the nineteenth century, anti-literacy laws effectively denied any education to most Black people in the United States. Even states without laws prohibiting the education of non-white children did not recognize any obligation to educate those children in free public schools.”); Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools As A Matter of Justice*, 11 MICH. J. RACE & L. 419, 445 (2006) (“Penalties for violating the anti-literacy laws included whippings, imprisonment, and fines. Masters threatened slaves who wanted to read with the loss of limbs or fingers.”) (internal citations omitted).

advocate recognizing Cord as an author under the law,⁷⁵ just as Hemingway was an author, I also recognize that she and Hemingway were not similarly situated in every respect—Hemingway was not an employee of Hotchner’s in-laws and he did not, as Cord did, face the prospect of race or gender discrimination—and so we should not presume that one’s conduct necessarily meant the same as the other’s.⁷⁶

Moreover, though an instrumentalist might argue that a looser definition of consent will lead to more works being published,⁷⁷ history has shown us that a lack of trust is often sown from situations like Cord’s, particularly where race is an issue, which can lead people to disconnect from our system of law, including copyright law.⁷⁸ In essence, for every time we favor the listener’s ability to publish without consent, we may equally discourage the speaker’s willingness to communicate her words and share them with the world. With instrumentalist arguments going both ways, the tiebreaker for me is the notion of fairness, which I believe favors Cord.

In sum, it’s likely that Cord did not consent, either expressly or implicitly, to Twain and the *Atlantic*’s use of her words.⁷⁹

C. Were Twain and Cord Co-Authors?

Joint authorship is another possible defense here, in the sense that a joint author is a co-owner of a copyright and has a coequal right to it.⁸⁰

75. See McFarlin, *supra* note 4, at 68–69.

76. See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 755–56 (2007) (discussing how assumptions about copyright as a supposed body of “race-neutral” statutory and case law are problematic because “not all creators of intellectual property are similarly situated”) (quoting Greene, *supra* note 16, at 343).

77. Instrumentalism is, very generally speaking, a theory that law is a means to achieve social goals. See *Pragmatic Instrumentalism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

78. See, e.g., K.J. Greene, *Right of Publicity, Identity, and Performance*, 28 SANTA CLARA COMPUT. & HIGH TECH. L.J. 865, 886–87 (2012); Will Breland, *Acres of Distrust: Heirs Property, the Law’s Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. POVERTY L. & POL’Y 377, 402–03 (2021); McFarlin, *supra* note 4, at 54–55.

79. Presuming for sake of argument that Cord did consent, she would still have the same arguments for authorship set forth in the first part of this project, “A Copyright Ignored,” see McFarlin, *supra* note 4, at 68–69, but an authorized fixation and publication of her words would have caused her copyright, along with Twain’s, to have expired by 1930. See *infra* Part II.A.

80. See Timothy J. McFarlin, *Father(s?) of Rock & Roll: Why the Johnnie Johnson v. Chuck Berry Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship*, 17 VAND. J. ENT. & TECH. L. 575, 671 (2015); Norbert F. Kugele, Note, *How Much Does It Take?: Copyrightability as a Minimum Standard for Determining Joint Authorship*, 1991 U. ILL. L. REV. 809, 813–17. Professor Patry’s treatise takes the position that an assertion of joint authorship is not an affirmative

In other words, if Cord held at most a copyright co-owned by Twain, she could not have successfully sued him for infringement.⁸¹ She could perhaps have sued him for recognition as a joint author, but the statute of limitations on a joint authorship claim would likely have expired before the turn of the twentieth century,⁸² unlike the statute of limitations for an infringement claim, as detailed below in Part II.⁸³

Though courts' treatment of joint authorship has varied somewhat over the years, consent has remained a consistent requirement.⁸⁴ Combining someone else's expression with one's own, as Twain did here, constitutes infringement, not joint authorship, if the other person did not consent to that combination.⁸⁵ And if consent was absent here, as argued above, then joint authorship would not be a viable defense.

D. Fair Use

Even without consent or co-authorship, Twain and the *Atlantic* could legally use Cord's story if their use was deemed "fair" under the law.⁸⁶ A use is fair, very broadly speaking, if it builds creatively on a prior work without supplanting the market for that work.⁸⁷ This doctrine, first developed by the courts, dates back in British law at least as far as 1740 and in the United States at least as far as 1841.⁸⁸

In the United States, fair use has harmonized copyright with the constitutional right to freedom of speech, allowing people to use, without consent, "not only facts and ideas contained in a copyrighted work, but

defense: the burden should be on the party claiming sole authorship to prove it. 2 PATRY ON COPYRIGHT, *supra* note 35, § 5:43.50. But regardless of who has the burden on this issue, in my view the evidence here suggests no consent and thus no joint authorship. *See* Part I.B.

81. *See* sources cited *supra* note 80.

82. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 80 F. Supp. 3d 535, 542–43 (S.D.N.Y. 2015) (discussing the different treatment of common-law copyright ownership claims versus infringement claims under New York's statute of limitations); *see also* McFarlin, *supra* note 80, at 596–97 & n.54.

83. *See infra* Section II.B.

84. *See supra* note 80; *see also supra* Section I.B.

85. *See supra* note 80; *see also supra* Section I.B.

86. *See, e.g.*, 1 WILLIAM F. PATRY, PATRY ON FAIR USE § 1.2 (2018); *EMI Recs. Ltd. v. Premise Media Corp. L.P.*, No. 601209/08, 2008 WL 5027245, at *7–8 (N.Y. Sup. Ct. Aug. 8, 2008).

87. 1 PATRY ON FAIR USE, *supra* note 86, § 1.2; *EMI*, 2008 WL 5027245, at *7–8.

88. Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RESV. L. REV. 135, 142 (2011) (citing WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3–26 (2d ed. 1995) (tracing the history of fair use)); *see also* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011) (tracing further the roots of the doctrine).

also expression itself in certain circumstances.”⁸⁹ This doctrine further grew from the idea that authors who claim federal protection must allow “fair” uses “as a necessary incident of the [federal] constitutional policy of promoting the progress of science.”⁹⁰

A vital corollary, then, is that fair use has traditionally not applied to unpublished, state-law-protected works.⁹¹ The rationale is that unless and until an author chooses to publish her work, any public use of it by someone else will effectively erase her right not to publish and, if she *would* decide to publish, significantly risk supplanting the potential market for her work.⁹²

A New York court, though, has recognized a potential exception to this traditional treatment of unpublished works. In the 2005 case of *EMI Records Ltd. v. Premise Media Corp. L.P.*,⁹³ which dealt with the recording of the song “Imagine” by John Lennon, the court stated that “making the copyrighted work available, while not technically publishing, favors permitting fair use.”⁹⁴ The court was careful to cabin this statement to sound recordings, given that even a public sale of a sound recording did not necessarily constitute a “publication” prior to their protection by federal law in 1972.⁹⁵ But it is possible that a court would, today, extend that statement of law to Cord’s work, given that she did make her story available to Twain by telling it to him and his family.

What constitutes fair use, then, under New York law? Synthesizing prior cases, *EMI* declared that it “comport[s] with the federal statutory fair use regime,” and so the familiar four-factor balancing test will determine if a use is fair.⁹⁶ The four factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

89. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

90. Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S.A. 585, 626 (2011) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985)).

91. *Id.* (quoting *Harper & Row*, 471 U.S. at 550–51); Rosen, *supra* note 20, at 1130–31.

92. Linford, *supra* note 90, at 626–27; 2 NIMMER & NIMMER, *supra* note 47, § 8C.02.

93. *EMI Recs. Ltd. v. Premise Media Corp. L.P.*, No. 601209/08, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008).

94. *Id.* at *2–3, 11.

95. *Id.* at *5.

96. *Id.* at *12.

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁹⁷

A court analyzing the issue would, then, likely consider Twain's use of Cord's story under this four-factor framework.

1. THE PURPOSE AND CHARACTER OF TWAIN'S USE

First, Twain profited from his use of Cord's story. He was paid \$60 (worth approximately \$1,480 today) by the *Atlantic* for the right to the first publication of "A True Story."⁹⁸ Twain thereafter made additional monies by republishing it in book form and performing it on the lecture circuit.⁹⁹ This fact weighs against fair use, though it is not dispositive. As *EMI* notes, "if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings" that transformation will weigh in favor of fair use, even if for profit.¹⁰⁰

Twain did use Cord's story to arouse an empathy in his audience for the pain and pride of those who endured the evils of slavery, as well as to suggest that many people, like him, did not fully understand or appreciate the full scope and impact of those evils, particularly the separation of enslaved families.¹⁰¹ Further, Twain reordered Cord's story chronologically; per his letter to Howells at the *Atlantic*, he did not alter her story "except to begin it at the beginning, instead of the middle, as she did."¹⁰² He also added the setting, describing how Cord told her story to him and his family on the porch of the Quarry Farm house.¹⁰³

Finally, he may have made changes to some of Cord's phrasing. Twain's manuscript shows several edits. Examples are "good God" changed to "good gracious" and "O bless de chile, it mos' break my heart, he so good" changed to "O bless de chile, he always so good."¹⁰⁴

97. *Id.* (mirroring the four factors codified in federal law at 17 U.S.C. § 107).

98. See Judith Yaross Lee, "True Story, A," in *THE MARK TWAIN ENCYCLOPEDIA*, 751 (J.R. LeMaster & James D. Wilson eds., 1993).

99. See *id.* (noting how Twain's performance of "A True Story" was featured in his 1895 Australian lecture tour); Makoto Nagawara, "A True Story" and *Its Manuscript: Mark Twain's Image of the American Black*, 29•30 *POETICA* 143, 147 (1989).

100. *EMI*, 2008 WL 5027245, at *13.

101. See Lee, *supra* note 67, at 106–07; Lee, *supra* note 98, at 751–52; *MARK TWAIN* (Florentine Films 2001).

102. 1 *MARK TWAIN—HOWELLS LETTERS*, *supra* note 37, at 22–23.

103. See Twain, *supra* note 6, at 591 ("It was summer time, and twilight. We were sitting on the porch of the farm-house, on the summit of the hill, and 'Aunt Rachel' was sitting respectfully below our level, on the steps . . .").

104. Mark Twain, *A True Story, Repeated Word for Word as I Heard It* 9, 11–12 (undated) (unpublished manuscript) (on file with the University of Virginia), <https://twain.lib.virginia.edu/huckfinn/truest1.html> [<https://perma.cc/4KMA-A8YB>].

The most significant changes, it appears, were Twain altering the phrase “I ain’t jes houn’-dog mash to be trod on by common trash” from his first draft to “I wa’nt bawn in the de mash to be fool’ by trash!” and “If anybody come meddlin’ wid you, you jist come an tell me” to “If anybody come meddlin’ wid you, you jist make ‘em walk chalk.”¹⁰⁵

These changes may have been a refinement of Cord’s phrasing, creative decisions by Twain, or a mix of the two.¹⁰⁶ But even if they all came from Twain’s mind, it would likely still not swing this factor to him.

In other words, regardless of (1) Twain’s chronological reordering of Cord’s story, (2) his added description of how she told it, and (3) his changes to some of the phrasing, like “I ain’t jes houn’-dog mash to be trod on by common trash” to “I wa’nt bawn in the de mash to be fool’ by trash,”¹⁰⁷ Cord’s story—had it been published in its original form—would likely still have struck readers in essentially the same way it struck Twain when he heard it: as “[a] curiously strong piece of literary work to come unpremeditated from lips untrained in the literary art . . . clear, compact & coherent—yes, & vivid.”¹⁰⁸ As such, it’s hard to say that Twain “transformed” Cord’s story in the legal sense or otherwise used it with a meaningfully different purpose or character than Cord herself had when she told it to him.

This factor then—given that Twain kept the original spirit, meaning, and message of her words and he profited therefrom—likely favors Cord.

105. *Id.* at 7, 8, 14, 24. While some others who have analyzed Twain’s manuscript have attributed his edits to his “own authorial skills,” for example, PETER MESSENT, *THE SHORT WORKS OF MARK TWAIN: A CRITICAL STUDY* 62 (2001), Nagawara, *supra* note 99, at 145, 151, it’s in my view at least as likely that Twain was, as he himself said, working to improve the text’s fidelity to what Cord actually said. In other words, instead of assuming that the original draft was what Cord said, and that all later edits were creative decisions by Twain, it’s also plausible—probable, even, given Twain’s repeated statements that he was using Cord’s words, not his—that the final piece was closer to what Cord precisely said than his first draft. For instance, he could have heard her use the “I wa’nt bawn in the de mash to be fool’ by trash” saying again around the house at Quarry Farm. Professor Fisher Fishkin has also suggested this potential interpretation. *See* FISHER FISHKIN, *supra* note 44, at 32–33 (“[W]as he improving on Mary Ann Cord’s original story, or merely revising his record of it to read more accurately?”).

106. *See* MESSENT, *supra* note 105, at 60–64.

107. *See* Twain, *supra* note 104, at 7. Including the changes to some of the phrasing in the fair use analysis is presuming, for sake of argument, that the changes were Twain’s creative additions. As noted above, it’s also plausible that the changes were due to Twain revising his manuscript to more accurately reflect what Cord actually said. *See supra* note 105.

108. *See* FISHER FISHKIN, *supra* note 44, at 8–9.

2. THE NATURE OF CORD'S STORY

In evaluating this factor, courts regularly note that “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”¹⁰⁹ Here, Cord’s story is factual, which initially favors Twain.

However, as noted by the U.S. Supreme Court in *Harper & Row v. Nation Enterprises*,¹¹⁰ in which it found that the *Nation*’s unauthorized quotes from former President Gerald Ford’s unpublished memoir were not a fair use, “the extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will . . . vary from case to case.”¹¹¹ In the *Harper & Row* case, the *Nation* did not simply “stop at isolated phrases.”¹¹² Instead it used Ford’s “subjective descriptions” of those facts, “whose power lies in [his] individualized expression.”¹¹³ Twain did the same with Cord’s narrative.

Further, in weighing this second factor against the *Nation*, the Court held that the fact President Ford’s “individualized expression” had yet to be published was a “critical element” of its “nature.”¹¹⁴ The Court elaborated:

The author’s right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.¹¹⁵

Twain and the *Atlantic*, here, should have no greater right to use Cord’s unpublished expression without her consent than the *Nation* did with President Ford’s.¹¹⁶ “The only title in our democracy superior to

109. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 563 (1985) (citing Robert Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y U.S.A. 560, 563 (1982)).

110. 471 U.S. 539 (1985).

111. *Id.* at 563.

112. *Id.*

113. *Id.*

114. *Id.* at 564.

115. *Id.*

116. I recognize that Congress amended federal fair use in the wake of *Harper & Row*, declaring “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration” of the four fair use factors. *See* 17 U.S.C. § 107 (2018). This was implicitly recognized under New York law as well, as indicated above. *See Capitol Recs., Inc. v. Naxos of Am., Inc.*, 930 N.E.2d 250, 266 (2005). But here, as in *Harper & Row*, that Cord’s words had not previously been published is not dispositive; it just weighs significantly against fair use.

that of President,” as U.S. Supreme Court Justice Brandeis once wrote, is “the title of citizen.”¹¹⁷

Moreover, moving beyond the dichotomies of factual versus fictional and published versus unpublished, Professor Trevor Reed’s fair use scholarship encourages courts to consider (1) the work’s situs within a marginalized community and (2) the potential impact of an unauthorized use on the creative environment within that community.¹¹⁸

Here, Cord’s expression springs from an oral storytelling tradition within the Black community. That tradition was vital in Cord’s time—in which one of the myriad ways she and others were marginalized was by antiliteracy laws—and it continues to have poignancy and power today.¹¹⁹ If an unauthorized use of her oral expression would be found fair, it would risk chilling that tradition.

For example, Twain’s early biographer Albert Bigelow Paine described Cord as initially reluctant to tell her story to Twain.¹²⁰ While Paine did not spell out the reason for her reluctance, one plausible rationale is that she was concerned Twain would do what he did—publish it without her permission. If, by finding Twain’s use fair, we reinforce that concern in others, the next time the speaker’s reluctance may ultimately and understandably prevail, and the story may not be told at all.

117. Christine M. Naassana, Comment, *Access to Literacy Under the United States Constitution*, 68 BUFF. L. REV. 1215, 1267 (2020) (quoting U.S. DEP’T OF HOMELAND SEC. & U.S. CITIZENSHIP AND IMMIGR. SERVS., *THE CITIZEN’S ALMANAC* 2 (2014)). Relating this concept to the context of copyright, the Pennsylvania Supreme Court, quoting Eaton Drone’s nineteenth-century intellectual property treatise, observed that “[t]here is ‘no distinction between the poet and the peasant in the ownership of their productions.’ The true test is whether the thing in question is ‘capable of identification so that exclusive ownership may be asserted.’” *Waring v. WDAS Broad. Station*, 327 Pa. 433, 457 (1937) (Maxey, J., concurring) (quoting DRONE, *supra* note 30, at 98).

118. See Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CAL. L. REV. 1373, 1421–22, 1429 (2021).

119. See Greene, *supra* note 16, at 378–79; see also McFarlin, *supra* note 4, at 1–5. And as Professor Reed notes, the unauthorized use of oral expression is an issue in other marginalized communities, as well, including those of Indigenous peoples. Reed, *supra* note 118, at 1389 (“Thus, telling Indigenous peoples’ stories for them, singing their songs, and publishing their oral histories without permission diminishes Indigenous sovereignty, just as the dispossession of Indigenous lands and assimilation of Indigenous peoples into the settler-state diminished that sovereignty.”); see also PAUL KURUK, *TRADITIONAL KNOWLEDGE, GENETIC RESOURCES, CUSTOMARY LAW AND INTELLECTUAL PROPERTY: A GLOBAL PRIMER* 200 (2020) (discussing copyright). See generally Aman K. Gebru, *Intellectual Property Law and the Protection of Traditional Knowledge: From Cultural Conservation to Knowledge Codification*, 15 ASPER REV. INT’L BUS. & TRADE L. 293 (2015) (explaining the value in preserving traditional knowledge).

120. See McFarlin, *supra* note 4, at 19–21 (citing ALBERT BIGELOW PAINE, *MARK TWAIN, A BIOGRAPHY*, 1835–1910, COMPLETE (1912)).

Given, then, the unpublished nature of Cord's expression and its situs within the traditions of a marginalized community, this factor, too, ultimately favors Cord.

3. WHAT TWAIN USED IN RELATION TO CORD'S STORY AS A WHOLE

Most basically, this factor asks how much of Cord's story Twain used.¹²¹ The less used—such as discrete quotes—the more the scales tip toward fair use;¹²² the more used, the more they tilt the other way.¹²³ As Judge Pierre Leval cogently described it: “[A] finding of fair use is more likely when small amounts, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original.”¹²⁴

Accordingly, when the entire original work has been copied, courts generally weigh this factor heavily against fair use.¹²⁵ Further, though courts are heavily influenced by Judge Learned Hand's remark that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate,”¹²⁶ they will sometimes, in a way that overlaps with factor one, take a defendant's added expression into account.¹²⁷

Here, Twain apparently incorporated Cord's entire story into “A True Story, Repeated Word for Word As I Heard It.” At no point in his contemporaneous communications or later recollections did Twain say that he only used selected parts of it.¹²⁸ That, alone, weighs this factor heavily in Cord's favor. But then, if we proceed to consider the proportion of Cord's story in relation to Twain's own expression, we see that Cord's words formed the basis for nearly 87% of “A True Story.”¹²⁹ His own words—in the sense that they were not based on Cord's—make up just over 13%.¹³⁰ This ratio seems to cement factor three for Cord.

121. See PATRY ON FAIR USE, *supra* note 86, § 5.1.

122. *Id.*

123. *Id.* § 5.3.

124. *Id.* (quoting Judge Leval's opinion in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)).

125. See *id.*

126. *Id.* § 5:1 (quoting *Sheldon v. MGM*, 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936)).

127. *Id.* § 5:2 (“The substantiality’ factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose.”) (quoting *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1205 (2021)).

128. See generally FISHER FISHKIN, *supra* note 44.

129. *Id.* at 31–32, 36–37.

130. As Professor Nagawara notes, the manuscript evidence suggests that Twain may have added the introductory question “Has I had any trouble?” question and the concluding “O no, I ain't had no trouble. An' no joy!” remark as a creation from his own mind. See Nagawara, *supra* note 99, at 153–55. But even after crediting Twain with those words, the ratio is still 86% to 14%.

4. THE EFFECT OF TWAIN'S USE ON THE MARKET FOR CORD'S STORY

This final factor is often cited as the most important of the four,¹³¹ and I believe it's the most straightforward one to apply here. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."¹³² Thus, the fourth factor is "concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original."¹³³ This includes, as *Harper & Row* held, an author's potential market to sell the right to first publication of an unpublished work.¹³⁴

Weighing this factor against the *Nation* in the *Harper & Row* case, the U.S. Supreme Court noted that there was "a fully functioning market that encourages the creation and dissemination of memoirs of public figures."¹³⁵ Similarly, here, there was a fully functioning market for dictated slave narratives, both in the pages of periodicals like the *Atlantic* and in book form.¹³⁶ It's hard to see how, after "A True Story" was published, a publisher would have paid Cord much if anything for her story. It was already in print and available to the public in its entirety.

Judge Leval noted this relationship between the amount of the use, which is considered in factor three, and factor four's focus on potential

131. PATRY ON FAIR USE, *supra* note 86, § 6:5 (recognizing this in the cases but arguing against weighing any one factor higher than the others as a general rule). Professor Patry elaborates:

What is the source, then, of this erroneous emphasis on the fourth factor? The *Harper & Row* Court did not provide any explanation for the proposition, citing only a single commentator, the late Professor Melville Nimmer. The handful of cases cited by Professor Nimmer do not bear out his assertion. Nimmer himself hedged his assertion by declaring that one had to look beyond the cases' "stated rationale," and further undercut his position by citing a number of cases to the contrary. Certainly, when one is told to ignore the plain words of opinions and to focus instead on their "stated rationale," it is difficult to marshal any confidence that those opinions, either singly or collectively, bear out the proposition asserted.

Id.

132. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566–67 (1985); see also NIMMER & NIMMER, *supra* note 47, § 1.10[D]; PATRY ON FAIR USE, *supra* note 86, at § 6:7.

133. PATRY ON FAIR USE, *supra* note 86, § 6:7 (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014)).

134. *Harper & Row*, 471 U.S. at 569.

135. *Id.* at 568 n.9.

136. See *supra* note 69 and accompanying text. And contrast this with many if not most private conversations—whether oral or, for instance, in email or text today—that likely have no market value. See Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501, 545 (2007). Fair use would be robust in these situations, such that deciding against fair use here would not alter or diminish the doctrine.

market harm: “The larger the amount, or the more important the part, of the original that is copied,” he posited, “the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original, and might therefore diminish the original rights holder’s sales and profits.”¹³⁷

Now, Twain did use the name “Aunt Rachel” instead of Cord’s real name,¹³⁸ which could suggest that Twain’s work wasn’t a total substitute. For instance, *Harper & Row* placed great emphasis on how the excerpts of President Ford’s memoir, attributed to him, “lent *The Nation*’s piece a special air of authenticity . . . the reader would know it was Ford speaking and not *The Nation*.”¹³⁹ In theory, then, the *Atlantic*’s pseudonymous publication would not constitute a complete substitute.

But this misses the real point. The potential market for Cord’s narrative was not based on her name. Unlike President Ford, Cord had no prior public persona that would create demand for anything attributed to her. The potential market was, instead, based on the striking substance of her story¹⁴⁰ and, as Twain put it, its “curiously strong” literary form.¹⁴¹

The publication of that substance and form under Twain’s name, alone, likely eliminated or at least greatly reduced the possibility that it could attract a publisher or readers if and when it was published under Cord’s name. And given the prior success of other such narratives, that possibility was very real.¹⁴² The fourth factor, then, as with the other three, weighs in Cord’s favor and against fair use.

In sum, given that Cord likely did not consent to the publication of her story and that Twain appears to have no other viable defense, “A True Story” likely was an infringement.¹⁴³ And because publishers of infringing works are themselves deemed infringers,¹⁴⁴ both Twain and

137. PATRY ON FAIR USE, *supra* note 86, § 5.3 (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)).

138. *See* Twain, *supra* note 6, at 591–92.

139. *Harper & Row*, 471 U.S. at 568.

140. For a discussion of how the rights of privacy and publicity are implicated with regard to Cord’s life experiences, see Alyssa DiRusso & Timothy J. McFarlin, *Identity Appropriation and Wealth Transfer: Twain, Cord, and the Post-Mortem Right of Publicity*, 48 AM. COLL. TRUST & ESTATE COUNSEL L.J. 41 (2022).

141. *See* FISHER FISHKIN, *supra* note 44, at 8–9.

142. *See supra* note 69 and accompanying text.

143. Dan L. Burk, *Thirty-Six Views of Copyright Authorship*, by Jackson Pollock, 58 HOUS. L. REV. 263, 316 (2020) (“Copying that constitutes infringement by definition cannot constitute original expression; copied expression originates elsewhere and is transmitted via the copyist to the infringing creation.”).

144. *See* Comment, *The Publisher’s Monetary Liability for Copyright Infringement*, 29 U. CHI. L. REV. 385, 397 (1961) (citing *De Acosta v. Brown*, 146 F.2d 408 (2d Cir. 1944)). *Per De Acosta*:

Thus it appears usual to hold an innocent publisher of a copyrighted book liable. . . . This body of authority shows a unanimity of view which is

the *Atlantic* likely did, in 1874, infringe a common-law copyright belonging to Mary Ann Cord. But what, if anything, can be done about it now?

II. DO CORD'S DESCENDANTS OWN A COPYRIGHT IN HER STORY TODAY?

Copyright ends someday, we think. Once it does, the creative expression it once guarded enters the public domain, where we can all use it, without asking or paying.¹⁴⁵ And the copyright in every U.S. work with an authorized publication before 1923 has by now expired.¹⁴⁶ So, the copyright in “A True Story,” first published in 1874, has ended, and the essay long ago entered the public domain, right? Not so fast.

The words in “A True Story” that came from Twain—roughly thirteen percent—undoubtedly are in the public domain.¹⁴⁷ But Cord’s words—the other eighty-seven percent or so—may not be. Unlike federal copyright, common-law copyright can, in theory, last forever.¹⁴⁸ The idea is that an author and her heirs should have the right to choose if and

impressive; we cannot find in it any suggestion of a distinction that one type of innocent copying is less “direct” than another or that innocent copying by newspapers and magazines acquires a protection not accorded to book or gravure printing This result is not surprising. As Drone pointed out so many years ago, the protection accorded literary property would be of little value if it did not go against third persons, or if, it might be added, insulation from payment of damages could be secured by a publisher by merely refraining from making inquiry.

146 F.2d at 411–12.

145. *Public Domain*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“*Intellectual property*. The universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. • When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.”).

146. *Copyright Services: Copyright Term and the Public Domain*, CORNELL UNIV. LIBR., <https://guides.library.cornell.edu/copyright/publicdomain> [https://perma.cc/MLF7-XWCN] (Jan. 9, 2022); Peter B. Hirtle, *When Is 1923 Going to Arrive and Other Complications of the U.S. Public Domain*, INFO. TODAY (Mar. 7, 2022), <https://www.infotoday.com/searcher/sep12/Hirtle--When-Is-1923-Going-to-Arrive-and-Other-Complications-of-the-U.S.-Public-Domain.shtml> [https://perma.cc/Y7NP-LFDD].

147. Hirtle, *supra* note 146.

148. *See* Rosen, *supra* note 20, at 1122 (“It is axiomatic that common-law copyright is perpetual; it lasts until ‘the sun rises in the west and sets in the east.’”). I say “in theory” because I’m not aware of a common-law copyright as old as Cord’s being asserted in a court of law. Perhaps the next-oldest involved a 2015 judicial examination of an alleged common-law copyright in the over-one-hundred-year-old lyrics to the song “Happy Birthday,” discussed further *infra* in notes 157–61 and accompanying text. So this project is, in a sense, probing the outer limits of the theory.

when to publish her expression, a right which will last indefinitely.¹⁴⁹ Now, the U.S. Copyright Act has since given a durational limit to all fixed works of authorship, regardless of whether they have been previously published.¹⁵⁰ But it expressly excluded any unfixed works.¹⁵¹ And a work is “fixed” under the Act only when done so “by or under the authority of the author.”¹⁵²

Here, given the analysis above, it’s unlikely that Cord authorized Twain to write or publish her story.¹⁵³ And I have not found evidence that she either personally wrote down her story or ever authorized anyone else to do so. So, though Twain’s claim to copyright in “A True Story” expired in 1930—fifty-six years after its publication in 1874—the state-law copyright in Cord’s words may persist, belonging now to one or more of her descendants or, conceivably, the state of New York.

There is, however, an argument that by not objecting after the 1874 publication, Cord ratified Twain’s fixation and publication of her story, thereby placing them under her authority, such that her copyright has similarly expired. For reasons I expand on further below, I reject this argument. I do so primarily on the basis that a reasonable person in Cord’s position, given the power dynamics, should not have had a legal duty to affirmatively object, which is the key issue in whether silence constitutes a ratification of Twain’s fixation and the *Atlantic*’s publication.¹⁵⁴

A. Fixation and Publication

Because Cord likely did not write her story down or consent to its writing or publication, her story was likely not fixed or ever published in a way that would destroy her common law copyright in it.¹⁵⁵ The best argument against this conclusion, as I see it, is that she subsequently

149. *Id.*

150. 17 U.S.C. § 303. “Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted [under federal law], subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.” 17 U.S.C. § 302. “Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.” 17 U.S.C. § 302.

151. 17 U.S.C. § 301(b)(1).

152. *Id.* § 101.

153. *See supra* Part I.

154. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 31–42 (1995).

155. *See* 17 U.S.C. §§ 101, 301; *see also supra* Part I.

ratified the publication of her story, or at least its fixation, such that no common-law copyright can presently exist.

There appears to be no case law and only scant scholarly commentary on whether subsequent ratification, much less ratification by silence, can constitute an authorized fixation or publication of a work of authorship.¹⁵⁶ There is, however, at least one case stating that unauthorized but unobjected-to publications by third parties does *not* constitute a publication by the copyright owner: *Marya v. Warner/Chappell Music*.¹⁵⁷

In *Marya*, several parties brought a class action against Warner/Chappell Music, the entity that claimed copyright over the song “Happy Birthday.”¹⁵⁸ One of the plaintiffs’ theories was that Warner could not own a copyright in the song because the Hill sisters—the alleged authors from whom Warner claimed to have acquired the copyright—had not objected when the song had been “published, publicly performed, and sung millions of times” by others before they themselves had published the work with a copyright notice.¹⁵⁹

The court held that these prior publications could not divest the Hill sisters of common-law copyright because there was no evidence that they had authorized them.¹⁶⁰ Their lack of objection was not enough.¹⁶¹

156. Cf. Paul S. Bilker, *The Showdown Continues at the Circle C Ranch: Non-Preemption of State Copyright Protection for Unfixed Improvisational Works*, 18 Sw. U. L. REV. 415, 438 (1989).

157. 131 F. Supp. 3d 975, 990 (C.D. Cal. 2015).

158. *Id.* at 975.

159. *Id.* at 989–91.

160. *Id.* at 991.

161. *Id.* at 990–91. It bears noting that the court in *Marya* ultimately granted summary judgment against Warner/Chappell, *see id.* at 1002–03, followed by a court-approved settlement announcing that the lyrics to “Happy Birthday” are in the public domain, *see Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, 2016 WL 6156076, at *1 (C.D. Cal. Aug. 16, 2016). It bears further note, however, that the judgment was based on the defendants’ failure to prove that they had acquired the Hill sisters’ alleged common-law copyright in those lyrics, not that a copyright did not exist or that a court in 2015 could not effectively pass judgment on its existence. *Marya*, 131 F. Supp. 3d at 1002–03. Again, as indicated above, the court found that a jury in 2015, long after the Hill sisters’ deaths, could reasonably conclude that they had a common-law copyright in lyrics authored near the turn of the twentieth century. *Id.* at 988–93, 1002–03. Given this nuance, was the settlement’s “public domain” announcement overbroad? To the extent that the Hill Foundation, a party to the case, owned or was otherwise empowered to direct the disposition of both the Hill sisters’ potentially persisting interests in a common-law copyright to the “Happy Birthday” lyrics, the announcement seems fully sound. However, it’s not clear that such was the case. The court had previously noted that no evidence was presented “showing that the Hill sisters transferred their rights in the lyrics to the Hill Foundation.” *Id.* at 1002. For further details on the history behind the “Happy Birthday” copyright, see generally Robert Brauneis, *Copyright and the World’s Most Popular Song*, 56 J. COPYRIGHT SOC’Y U.S.A. 335, 336 (2009).

Though this supports Cord's case—under its logic, Cord's lack of objection to third parties like Twain and the *Atlantic* publishing "A True Story" would not destroy her common-law copyright—the issue in *Marya* was publication not fixation. While no case appears to address the similar though distinct issue of whether a lack of objection to a fixation can thereafter bring it under an author's authority—so as to bring it under the auspices of federal copyright—some helpful commentary does exist.¹⁶²

First, a perceptive student article by Paul Bilker has analyzed whether authors could decide to ratify an initially unauthorized fixation, like someone recording their oral expression without their knowledge.¹⁶³ Given the lack of case law directly on point, Bilker looks to the common law of agency, which courts have applied in dealing with other issues of federal copyright law.¹⁶⁴

Under the law of agency, even the wrongful acts of an agent can later be approved and adopted, *i.e.*, ratified, for the benefit of the principal.¹⁶⁵ Bilker argues persuasively that an author, upon discovering the recording, could elect to treat the wrongful recorder as an agent, thereby ratifying the recording and bringing the author's work within the ambit of federal copyright.¹⁶⁶

Applying this argument here, we can consider whether Cord implicitly ratified Twain's fixation of her story through her lack of objection. If she did, then a court could under the operation of 17 U.S.C. §§ 302–03 find that federal copyright did attach to that story, one that expired as of December 31, 2002, so that her story is now in the public domain.¹⁶⁷ Conversely, if there was not a fixation by or under her authority, then a common-law copyright in her story may persist.¹⁶⁸

Professor Peter Tiersma's article "The Language of Silence" is very instructive on this question.¹⁶⁹ Tiersma explains how the law has sometimes interpreted silence as implicit approval of an agent's action.¹⁷⁰ Here, we know that Twain gave Cord a copy of the second publication of "A True Story" in his book *Sketches New and Old*.¹⁷¹ The copy of

162. See Bilker, *supra* note 156, at 438.

163. *Id.*

164. *Id.* (noting how *CCNV v. Reid*, 109 S. Ct. 2166 (1989), applied the common law of agency to the work-made-for-hire doctrine under federal copyright law).

165. *Id.* at 137–39. New York law defines ratification as "the act of knowingly giving sanction or affirmance to an act that would otherwise be unauthorized." *Green Tree Servicing, LLC v. Feller*, 159 A.D.3d 1246, 1247–48 (N.Y. Ct. App. 2018) (quoting 57 N.Y. JUR. 2d, *Estoppel, Ratification, and Waiver* § 94).

166. Bilker, *supra* note 156, at 438–39.

167. See *supra* note 150 and accompanying text.

168. See *supra* notes 151–52 and accompanying text.

169. Tiersma, *supra* note 154, at 31–42.

170. *Id.*

171. See *supra* note 42 and accompanying text.

Sketches he gave her contained an inscription, quoted in full above, in which Twain noted that he used her “personal history.”¹⁷² There does not appear to be any record of a reaction by Cord to this copy, other than the fact that she kept it and passed it down to her descendants, who treasured it and ultimately donated it to the University of Maryland.¹⁷³

Did this action—or lack thereof—constitute a ratification of Twain’s fixation of her words, as well as their publication? Professor Tiersma identifies the core question facing courts in such a situation—would a reasonable person, in Cord’s shoes, have voiced her objection if she did not in fact approve of Twain’s actions?¹⁷⁴ Here, I think the answer is no.

It was reasonable for Cord, who remained in the employ of Twain’s sister-in-law, to stay silent. First, it was unlikely that she knew any legal recourse existed against Twain if she did object. This was and is a challenging field—both copyright in general and the protectability of the spoken word in particular—a field which Twain and the *Atlantic* themselves may not have fully understood.¹⁷⁵ Second, even if she did know, it’s unlikely that she had the access and resources to obtain legal counsel to pursue that recourse.¹⁷⁶ Third, voicing an objection could have jeopardized her job at Quarry Farm. Cord’s employers (Twain’s in-laws) may have frowned on their employee calling his actions into question.

Considering these dynamics, it would seem unfair to decide that Cord had a duty to speak or otherwise express an objection—such as by

172. See *supra* note 42 and accompanying text.

173. See Sinclair, *supra* note 2; *Women and Leadership Archives*, GANNON CTR. ARCHIVES, <http://lucweb.luc.edu/orgs/gannon/archives/completelist.cfm> [<https://perma.cc/Z8B5-JJKT>] (listing Leon Washington Condol’s papers as part of the University of Maryland’s collection) (“A rare copy of *Sketches Old and New* (1875), autographed by the author, in which Auntie Cord’s story appears, was handed down through the Condol family and is included in this collection.”). Professor Wisbey notes, apparently from an obituary for Mr. Condol’s mother, the daughter of Cord’s son, Henry Washington, that she “treasured” this copy. Wisbey, *supra* note 42, at 280.

174. See Tiersma, *supra* note 154, at 31–41.

175. Twain, in 1869, wrote to his wife how he had rebuked a newspaper hoping to publish a lecture of his: “I said my lecture was my property & no man had a right to take it from me & print it, any more than he would have a right to take away any other property of mine.” Letter from Mark Twain to his wife, Olivia L. Langdon (Oct. 31 or Nov. 1 1869), in 3 MARK TWAIN’S LETTERS, *supra* note 37, at 379. But Twain further wrote that “although the law protects rigidly the property a shoemaker contrives with his hands, it will not protect the property I create with my brain.” *Id.* at 380; see also FRED W. LORCH, *THE TROUBLE BEGINS AT EIGHT: MARK TWAIN’S LECTURE TOURS 106–07* (1966) (discussing the context of Twain’s letter). This suggests Twain thought that the law should protect his spoken words but that he was perhaps unaware it likely did.

176. See Greene, *supra* note 16, at 386 (“The factors of societal discrimination include substandard education, illiteracy, and a lack of access to legal assistance. Each of these factors has an impact on who will get protection for artistic and creative works. The exclusion of Blacks from cultural institutions of power such as law firms, governmental positions, and corporations is another factor in the disparity in protection in the copyright system.”).

refusing or returning the signed copy—if she did not approve.¹⁷⁷ Cord may have very reasonably decided that none of that would have been wise for her or her family.¹⁷⁸ So, I don't think we should infer approval from her silence. And without approval by Cord, there can be no fixation.

Fixation must be by or under the authority of the author,¹⁷⁹ but publication is a separate question. We could conceivably conclude that Cord's heirs' lack of objection, as well as the indication that they treasured and passed down the inscribed copy of *Sketches New and Old*,¹⁸⁰ could constitute a ratification of that publication. And a common-law copyright would have ended upon a ratified publication.¹⁸¹

The court in *Marya* refused, however, to reach such a conclusion,¹⁸² and I think a court here would similarly refuse. How can we say that Cords' heirs had a duty to object when no one had ever argued that they even had a right to object and when the one time a scholar raised the possibility, in 2001, he quickly dismissed it?¹⁸³ Contrast this with what may occur after the publication of this article. If Cord's heir(s) became aware, now, of the potentially viable claim discussed here, subsequent inaction could more reasonably be construed as approval of Twain and the *Atlantic's* publication.¹⁸⁴

In sum, if there was no authorized fixation or publication here, federal law cannot apply. Subject then to other defenses, a common-law

177. Tiersma, *supra* note 154, at 41–42.

178. Regarding the risk to her family, Cord's son Henry—the one who had liberated her from slavery in her story's astounding conclusion—worked as a barber in the town of Elmira, where Quarry Farm was located. SHELLEY FISHER FISHKIN, *WRITING AMERICA: LITERARY LANDMARKS FROM WALDEN POND TO WOUNDED KNEE* 137 (2015). Twain was Henry's regular customer during his many visits there. *Id.* at 137–38.

179. 17 U.S.C. § 301.

180. *See supra* note 173 and accompanying text.

181. *See Rosen, supra* note 20, at 1057–58.

182. *See supra* notes 157–61 and accompanying text.

183. *See SIVA VAIDHYANATHAN, COPYRIGHT AND COPYWRONGS*, 65–66 (2001) (discussing Twain's use of Cord's story and commenting: “Who is the author of the piece? Copyright law affected only expressions fixed in print. So legally, Cord had no legal claim to authorship.”). However, as I argue in the first part of this project, Cord likely did have such a claim. *See McFarlin, supra* note 4; *see also Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 80 F. Supp. 3d 535, 540 (S.D.N.Y. 2015) (finding that there was no waiver of a New York common-law copyright claim by former members of the rock band the Turtles, despite their prior appearances on radio shows in which the Turtles recordings were broadcast, stating that those appearances were “hardly ‘unmistakable’ and ‘[un]ambiguous’ evidence of a waiver of their right to invoke the benefits of their common law copyright—especially in view of the very lack of clarity over the scope of common law copyright protection that occasioned this lawsuit and companion lawsuits in other states”).

184. *But see infra* notes 189–94 and accompanying text (discussing *Petrella v. MGM*, 572 U.S. 663, 663 (2014), in which the descendant's mere knowledge of the infringement did not ultimately bar a federal copyright claim).

copyright could still exist, and a claim could be brought by a descendant today.

B. Other Defenses: Statute of Limitations, Laches, Estoppel, Abandonment, and Adverse Possession

The *Atlantic* and the Twain Foundation would have various other potential defenses to a present-day claim of common-law copyright infringement: the statute of limitations, laches, estoppel, abandonment, and adverse possession. They all share common concerns over evidence and reliance.¹⁸⁵

Here, for instance, Twain, Cord, and the *Atlantic's* editor Howells have all long passed into history; we can no longer subpoena them to testify or otherwise provide evidence about what happened. And the *Atlantic* has likely presumed for many years that there was no problem with publishing “A True Story” without Cord or her heirs’ consent.

These are valid concerns that, in turn, form the basis for these potentially valid defenses, and they must be addressed to properly evaluate the merits of any future claim based on Cord’s copyright. My goal here is not to exhaustively analyze each defense, but to discuss them and suggest that none provides an easy, complete bar to a present-day claim.

First, the limitations period that likely applies to an infringement claim here is ten years.¹⁸⁶ So we might decide that any claim here has been barred since at least 1885, ten years after Cord received the signed copy from Twain.¹⁸⁷ Copyright law, however, adds an interesting wrinkle. Courts have generally held that the limitations period runs separately from each incident of infringement, such that lawsuits based on many-decades-old creations have been allowed to proceed, with the

185. See Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 536–40 (2020).

186. See John R. Mix, *State Statutes of Limitation: Contrasted and Compared*, 3 ROCKY MOUNTAIN L. REV. 106, 125 (1931) (citing Rev. Stat. of N.Y., 1852, Part II, p. 496, as applying to all unspecified civil claims). At minimum, if a court would decide that New York’s current statute would apply, the period appears to be either six or three years. See *Flo & Eddie*, 80 F. Supp. 3d at 541–42. Regarding the nature of statutes of limitation more generally, see Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 511 (1997) (noting society’s longstanding ambivalent attitude towards them, summed up well by nineteenth century scholar Horace G. Wood’s observation that “laws of limitations are to be encouraged; yet, as they are acts which take away existing rights, they should always be construed with reasonable strictness, and in favor of the rights sought to be defeated thereby, so far as is consistent with their letter and spirit”) (quoting 1 HORACE G. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS, 8–9 (4th ed. 1916)).

187. See *supra* note 42 and accompanying text.

caveat that money can only be recovered based on infringing activities that took place within the statutory period preceding the suit.¹⁸⁸

This approach was seen most prominently in the U.S. Supreme Court's decision in *Petrella v. MGM*.¹⁸⁹ There the Court recognized that neither the U.S. Copyright Act's statute of limitations nor the equitable doctrine of laches barred a suit filed in 2009 by the daughter of the author of a screenplay written in 1963 on which the 1980 film *Raging Bull* was allegedly based.¹⁹⁰ The Court applied a "separate-accrual rule" for copyright infringement, which holds that the Act's three-year limitations period accrues separately for each separate infringing act.¹⁹¹

So, though the statute barred recovery based on MGM's allegedly infringing acts from before 2006, the claims based on acts that occurred within three years prior to the date of suit, January 6, 2009, could go forward.¹⁹² Further, the suit could proceed despite the fact that the daughter was aware of her potential claims since at least 1991, when she filed to renew the copyright registration in the 1963 screenplay, and perhaps as early as 1980, when *Raging Bull* was first released.¹⁹³

Justice Ginsburg, writing for the six-justice majority, summarized the rationale for this "separate-accrual" approach to the statute of limitations:

If the rule were, as MGM urges, "sue soon, or forever hold your peace," copyright owners would have to mount a federal case fast to stop seemingly innocuous infringements, lest those infringements eventually grow in magnitude. [The] three-year limitations period, however, coupled to the separate-accrual rule . . . avoids such litigation profusion. It allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle. She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered.¹⁹⁴

188. See 3 NIMMER & NIMMER, *supra* note 47, § 12.05. Professor Nimmer also notes how some courts have applied a "continuing wrong" theory where, if an infringing incident has occurred within the statutory time period preceding the suit, liability may then attach to all incidents going back in time. *Id.* Though *Petrella* chose a different approach for federal copyright infringement, a New York state court could decide that the "continuing wrong" theory should apply here.

189. 572 U.S. 663, 670–72 (2014).

190. *Id.* at 673–79. Only the laches issue was actually in dispute before the Court. *Id.* at 676.

191. *Id.* at 671.

192. *Id.*

193. *Id.* at 673–74, 685.

194. *Id.* at 682–83.

Here, certainly, this approach to the statute of limitations is not mandatory, given that *Petrella* was interpreting and applying federal copyright law, and any claim of infringement based on recent or future publications of “A True Story” is necessarily a state-law claim.¹⁹⁵ Though there appears to be no authoritative state court decision on the issue, federal courts have so far followed a similar approach when applying the New York state statute of limitations to common-law copyright infringement claims.¹⁹⁶ And the separate-accrual rule has already been recognized in at least one other context by the New York Court of Appeals.¹⁹⁷

More specifically, and importantly, I think there are compelling reasons to take this approach with a claim based on Cord’s copyright. First, and most strikingly, it seems clear that Cord stood a greater risk of losing her claim due to race and gender prejudice in the late nineteenth century than her descendants would today. While New York statutory law did recognize Cord’s right to own a copyright and sue for infringement,¹⁹⁸ her chances of prevailing against Twain and the *Atlantic* had she tried to exercise that right in court are another matter. While race and gender discrimination still unfortunately exist in our twenty-first century justice system, as in our society as a whole,¹⁹⁹ it’s also evident that such prejudices were relatively more pervasive, ingrained, and unchallenged in Cord’s time, thus making them more likely to infect the decisions of judge and jury.²⁰⁰

195. See 17 USC § 301:

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression

196. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 80 F. Supp. 3d 535, 542 (S.D.N.Y. 2015) (“In general, under New York law each new act of infringement gives rise to a new claim. Therefore Flo and Eddie’s claim is not time-barred, but it can recover damages for infringement only going three years back”) (internal citation omitted).

197. *Ajdlar v. Province of Mendoza*, 33 N.Y.3d 120, 126 n.3 (2019) (“We note that it has long been settled that in limited circumstances involving the obligation to pay interest prior to the maturity date by way of contractually-scheduled installment payments, New York courts apply a separate accrual rule”).

198. See *supra* note 73.

199. See, e.g., Edith Honan, *Whites Over-Represented in New York Jury Pools: Study*, REUTERS (June 27, 2007), <https://www.reuters.com/article/us-jury-race/whites-over-represented-in-ny-jury-pools-study-idUSN2741843020070627> [<https://perma.cc/24A8-HZ9K>].

200. As merely one example, consider the common acceptance of racially stereotyped advertising against Black women at the time versus the often-successful efforts to eliminate such advertising today. Compare Marilyn Maness Mehaffy, *Advertising Race/Raceing Advertising: The Feminine Consumer(-Nation), 1876–1900*, 23 J. WOMEN CULTURE & SOC’Y, (1997), with Deborah R. Gerhardt, *The Last Breakfast*

In this way, Justice Ginsburg’s observation that the separate-accrual rule “allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle”²⁰¹ may be seen in a new light. It becomes not just a matter of economics but a matter of perceived justiciability. Over the length of a copyright’s existence, an owner may decide that litigation at any given point may not be worth the risk due to external but unfortunately real factors like race and gender discrimination. At a future point, however, upon the occurrence of another triggering act of infringement, copyright owners like Cord’s descendants may decide that the judicial system is more capable of rendering a fair, unprejudiced outcome.

Second, evidentiary concerns are present here, of course, but they are much less challenging than would normally be the case with such long-past events.²⁰² Given Twain’s incredible fame and the scholarly attention he attracts, we have a record that is as strong or stronger than in many current cases.²⁰³ And unlike many if not most infringement disputes, there is no dispute here that Twain copied Cord’s story, given Twain’s consistent admissions in his correspondence and private notes.²⁰⁴ Contrast this with *Skidmore v. Led Zeppelin*,²⁰⁵ and most others, in which copying is denied and memories are often questionable.

This is a vitally important issue. If there is a genuine dispute over copying, and oral testimony based on memory is the sole or main evidentiary source, then courts will struggle to justly adjudicate the case. But in a case like Cord’s, where copying is established by the documentary evidence, the expanse of time is not nearly as problematic.²⁰⁶ And as detailed above, I think the record here also permits

with *Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & ARTS 231, 259 (2022). *But see* Krawiec & Zeile, *supra* note 71, and the results of their study indicating that the cases in which the court required affirmative disclosures to women in contract cases were higher from the period 1793–1950 to the period 1951–2002.

201. *See supra* note 194 and accompanying text; *Petrella v. MGM*, 572 U.S. 663, 682–83 (2014); *see also* Ryan Vacca & Ann Bartow, *Ruth Bader Ginsburg’s Copyright Jurisprudence*, 22 NEV. L.J. 431, 442 (2022) (“*Petrella*’s holding is therefore very favorable to copyright owners who have delayed filing infringement suits for strategic or other reasons.”).

202. *See, e.g.*, McCormick-Huhn, *supra* note 8, at 1263–65 (discussing the problems of witness memory in long-lost infringement cases like *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056 (9th Cir.) (2020)).

203. *See supra* Part II.

204. *See supra* Part II.

205. 952 F.3d 1051 (9th Cir. 2020); *see supra* notes 8, 202; *see also infra* note 303 and accompanying text.

206. Compare further with the Tulsa and Harvard cases discussed in Part IV. The underlying wrongs there—the organized killing on Black Wall Street and the acquisition of unconsented photos of enslaved people for racist research—are undisputed. *See infra* notes 304–30 and accompanying text. Further, a quote dating back to Twain and Cord’s time is instructive:

a sound more-likely-than-not judgment on whether Cord consented to Twain's use.²⁰⁷

Given the *Atlantic's* continued publication of "A True Story" on its website, and the emails it sends to new subscribers linking to Twain's writings, this judgment could still be rendered today.²⁰⁸

Beyond evidentiary concerns, however, the other problem with allowing claims based on old events is when others have relied for so many years on the status quo.²⁰⁹ Here, these concerns most specifically apply to the *Atlantic* and the Twain Foundation, as well as to the public

There is no principle of equity sounder, more conservative and more prolific, in all the fruits of peace, than this: That he who slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim is founded, may, from lapse of time, be presumed to be lost; until the generation cognizant of the transactions between the parties has passed away, and until original actors are in their graves, and their affairs are left to representatives--the law, in the exercise of an equitable sovereignty, presumes it to be unjust, that under such circumstances, a complainant should be heard; and in nine cases out of ten, it is unjust in fact, as well as in theory.

Camp v. Green, 106 S.E. 394, 397 (Va. 1921) (quoting *Akins v. Hill*, 7 Ga. 573, 577-78 (1849)). While Cord's case, as well as the cases against Tulsa and Harvard, do connect with this principle in the plain fact that "the generation cognizant of the transactions between the parties has passed away, and [most of the] original actors are in their graves," these cases are also distinguishable on several grounds: (1) much evidence still exists in these cases—it has not all been lost; (2) given the official and unofficial barriers Black people and women have encountered in our court system, particularly at the time of the events at issue, the parties did face impediments to asserting their rights; and (3) it's hard to argue that the original parties or their heirs here truly slumbered on their rights. Further, perhaps each case is simply unique enough to be the proverbial tenth one in which a present-day hearing is not in fact unjust. *Id.* ("[I]n nine cases out of ten, it is unjust in fact, as well as in theory.").

207. See *supra* Part II.

208. See *supra* note 6 and accompanying text; see also E-mail from Jeffrey Goldberg, Ed.-in-Chief, The Atlantic, to subscribers (Feb. 6, 2022, 08:04 AM CST) (on file with author). Courts since *Petrella* have appeared skeptical that the continued existence of an infringing publication on a website can, itself, constitute a separate act of infringement so as to trigger the accrual of a new claim. 3 NIMMER & NIMMER, *supra* note 47, § 12.05 n.66. Here, the last new posting of "A True Story" may have occurred no later than 2012. However, the linking to Twain's publications on the *Atlantic's* site in a 2022 email from its editor-in-chief to its new subscribers would seem to support an argument that a new act of infringement has occurred and therefore that a new claim has arisen. Cf. *Nakada & Assocs., Inc. v. City of El Monte*, 2017 WL 2469977, at *3 (C.D. Cal. June 2, 2017) (arguing that the defendant's current website having a link to an infringing YouTube video is "a separate instance of allegedly infringing conduct based on a purported new infringing act"). In other words, this is not a situation where the *Atlantic* posted "A True Story" long ago and has simply passively let it remain on its website. The *Atlantic* has taken recent action to market Twain's publications, including "A True Story," on its site. Beyond that, in 2013, The *Atlantic* included "A True Story" in a "Mark Twain Collection" book. MARK TWAIN, *A True Story*, in THE MARK TWAIN COLLECTION: FEATURING CLASSIC STORIES FROM THE PAGES OF THE ATLANTIC (The Atlantic Books ed. 2013).

209. See *Petrella*, 572 U.S. at 687.

generally, given that everyone previously thought that the only copyright in “A True Story” was exclusively owned by Twain and licensed to the *Atlantic* and that it has been in the public domain since 1930.²¹⁰

There are different types of reliance recognized in situations like this, ones which may bar a claim completely or affect the type of remedies available. These different types are generally reflected in the doctrines of laches, estoppel, abandonment, and adverse possession.²¹¹ *Petrella* took the position that laches, a doctrine based on reliance on a claimant’s “lengthy neglect or omission” in asserting a right, “and the resulting prejudice to an opposing party,”²¹² should not completely bar a claim but that it could be applied by a court to limit the remedies awarded.²¹³

Here, I think it’s hard to view the past lack of objection to be the result of negligence or omission by Cord or her heirs. No one until now appears to have seriously entertained that Cord had a claim.²¹⁴ This is understandable, given that the situation involves a field in which deep, uncertain aspects abound—Justice Story once described both patent and copyright as “the metaphysics of the law”—and an even more challenging, obscure subfield: copyright in the spoken word.²¹⁵ Laches, then, should not pose a complete bar to a claim by Cord’s heirs today.

210. See Robert Brauneis, *A Brief Illustrated Chronicle of Retroactive Copyright Term Extension*, 68 J. COPYRIGHT SOC’Y U.S.A. 479, 482 (2015) (showing a fifty-six-year term retroactively applied to works published between 1867 and 1906, which would result in a term lasting from 1874 to 1930 for Twain’s copyright in “A True Story”).

211. See Fagundes & Perzanowski, *supra* note 185, at 498–99, 539; *In re Santander Consumer USA, Inc. v. Steve Jayz Auto. Inc.*, 154 N.Y.S.3d 147, 150 (N.Y. App. Div. 2021). I do not list acquiescence separately. Acquiescence is generally treated as a type of estoppel where someone fails to act. See Fagundes & Perzanowski, *supra* note 185, at 539. New York also appears to treat it this way. See *Mazzucco v. Eastman*, 236 N.Y.S.2d 986, 990 (N.Y. Sup. Ct. 1960), *aff’d*, 239 N.Y.S.2d 535 (N.Y. App. Div. 1962).

212. *In re Santander*, 154 N.Y.S.3d at 150.

213. *Petrella*, 572 U.S. at 686–88.

214. See VAIDHYANATHAN, *supra* note 183, at 66–69 (“Who is the author of the piece? Copyright law affected only expressions fixed in print. So legally, Cord had no legal claim to authorship.”).

215. *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977). As the court explained:

Justice Story in an early case addressing the fair use defense which involved alleged infringement of copyrighted letters of George Washington remarked that “Patents and copyrights approach nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent.” It is thus not surprising that the application of the fair use doctrine to the facts of this case confronts us with difficult and complex issues.

On the other hand, given the extreme length of time, some typical remedies—such as a forward-looking injunction that would effectively take “A True Story” out of the public domain and grant exclusive control to Cord’s heirs—may well be inappropriate.²¹⁶ These remedies are discussed in Part III, below.²¹⁷ For now, it suffices to say that a court could use the doctrine of laches to prevent unfair effects on the *Atlantic*’s current owners and on the public in general.

Though laches would not necessarily bar a claim by Cord’s heirs, the defenses of estoppel, abandonment, and adverse possession, if any were found to succeed here, would likely operate as a complete bar to recovery.²¹⁸ It’s unlikely, though, that any of these defenses would prevail.

First, estoppel and waiver are related doctrines under New York law, both of which focus on fairness, recognizing that

a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had . . . against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct.²¹⁹

Unlike laches, which focuses primarily on the passage of time, estoppel generally focuses more on whether a party has misled another party by an act or failure to act.²²⁰

Id. (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841)). Cf. K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179, 1201–02 (2008) (discussing the particular challenges that navigating the 1909 U.S. Copyright Act posed for blues musicians and arguing that “imputing knowledge of complex [copyright] law is just another form of white domination given the state of Black education and legal representation in the 1920’s”).

216. See *Petrella*, 572 U.S. at 686–88; see also *Salinger v. Colting*, 607 F.3d 68, 80, 82 (2d Cir. 2010) (“[T]he court must ensure that the public interest would not be disserved by the issuance of a preliminary injunction The public’s interest in free expression, however, is significant and is distinct from the parties’ speech interests. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information. Every injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment.”) (cleaned up).

217. See *infra* Part III.

218. See Fagundes & Perzanowski, *supra* note 185, at 536–40; *Mazzucco v. Eastman*, 236 N.Y.S.2d 986, 990 (N.Y. Sup. Ct. 1960), *aff’d*, 239 N.Y.S.2d 535 (N.Y. App. Div. 1962).

219. *Moncel Realty Corp. v. Whitestone Farms*, 68 N.Y.S.2d 673, 677 (N.Y. App. Div. 1947) (cleaned up); see also *Besicorp Grp. Inc. v. Enowitz*, 652 N.Y.S.2d 366, 369 (1997) (cleaned up).

220. *Petrella*, 572 U.S. at 684–85.

Here, for the reasons specified above, I think a court would be loath to decide that Cord had a duty to object, given her employment with Twain's in-laws. A court would similarly be reluctant to decide that the fact Cord's heirs treasured the inscribed copy of Twain's book could reasonably have been understood as an informed waiver or relinquishment of a copyright claim.²²¹

The related but distinct defense of abandonment requires that an owner overtly act or fail to act in a way that shows an intent to relinquish a copyright.²²² Abandonment does not merely bar an infringement claim against any one party; it bars all claims against anyone now and in the future.²²³ In light of this severe result, Professors Dave Fagundes and Aaron Perzanowski argue that courts should be wary of finding abandonment absent clear written and oral statements of intent to abandon.²²⁴

Here, most basically, it's difficult to argue that Cord or her heirs knew or should have known (at least before now) that they had any potential claim of copyright in the work and that any act or omission by them therefore demonstrated an intent to abandon a copyright. How could they intentionally abandon a copyright that no one thought existed?

Last, the doctrine of adverse possession can operate to transfer property ownership away from someone when another, without her consent, possesses that property exclusively, openly, and continuously for the length of the statute of limitations.²²⁵ As a threshold matter, courts have rejected the doctrine's application to federal copyright,²²⁶ but some have applied it to state-law copyright.²²⁷

A New York court briefly considered applying it to a copyright in 1915 but decided the case on other grounds, noting that it could find no decision "which holds that such rights may be acquired by adverse possession."²²⁸ In *Gee v. CBS*,²²⁹ however, a Pennsylvania federal court found that, regardless of whether Pennsylvania or New York law applied, Columbia Records had adversely possessed a common-law copyright once owned by Bessie Smith in the sound recording of her performance

221. See *supra* Part II.

222. Fagundes & Perzanowski, *supra* note 185, at 536–40.

223. *Id.* at 549.

224. *Id.* at 549, 554.

225. See, e.g., *Gee v. CBS, Inc.*, 471 F. Supp. 600, 654–55 (E.D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

226. Rosen, *supra* note 20, at 1119–20; *Advance Mag. Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 635 (D. Md. 2006).

227. Rosen, *supra* note 20, at 1119–22.

228. *O'Neill v. General Film Co.*, 152 N.Y.S. 1028, 1036 (N.Y. App. Div. 1916).

229. 471 F. Supp. 600 (1979).

of the song “At the Christmas Ball.”²³⁰ Because Columbia had exclusively, openly, and continuously over the statutory period sold that sound recording, apparently without Smith’s permission, the court found that Columbia became the copyright owner.²³¹

The key difference between the *Gee* case and this one is the nature of the copyright. As the *Gee* court noted: “‘At the Christmas Ball’ apparently was not composed by Bessie Smith, and plaintiffs have nowhere alleged that she authored the song. We therefore must assume that plaintiffs are asserting a right in Smith’s *recording* of that song; *i.e.* the style and manner in which she performed it in the recording session.”²³² Here, however, Cord did author the underlying expression, not just a particular performance or fixation of it. Accordingly, where Columbia could make a strong argument for exclusive possession of the sound recording where it controlled the tapes on which the only copy of that particular recording existed,²³³ Twain could not say the same.

As noted by Professor Wisbey, who interviewed Cord’s descendants, her family continued to tell her story.²³⁴ Wisbey documented that, as of 1981, “the story still exist[ed] in the oral tradition handed down from generation to generation in Mary Cord’s family.”²³⁵

It is possible that Cord’s line has ended and that no descendant of hers continued this oral tradition past the early 1980s.²³⁶ However, if the tradition has persisted to this day, that would seem conclusive against any defense of adverse possession here: Twain and his estate could not have exclusively possessed the story.

Adverse possession must further be exclusive not just against the owner but the world in general.²³⁷ Given that Twain’s claim to federal copyright protection in Cord’s words could last no longer than 1930—when Twain’s copyright in “A True Story” expired—it has been considered freely useable since then, with apparently more than one publication occurring outside of the control of the Twain Foundation or

230. *Id.* at 654–57.

231. *Id.*

232. *Id.* at 654.

233. *See id.* at 621, 654–56.

234. WISBEY, *supra* note 42, at 277.

235. *Id.* Professor Wisbey further explained that “[a] version of the story was told recently by her great grandson who heard it many times from his own mother and grandfather, the Henry in Mark Twain’s account. The two versions differ slightly in some details, but both confirm the same remarkable coincidence.” *Id.*

236. *Id.*

237. *See* 16 POWELL ON REAL PROPERTY § 91.06 (2022) (“[T]he adverse possessor must also exclude third parties to the extent that a true owner would do the same.”).

the *Atlantic*.²³⁸ Again, it seems unlikely that adverse possession could be established here.

C. Who Then Could Assert a Claim?

The common-law copyright, presuming it still exists today, would belong to Cord's heirs, or if no heirs survive, it could perhaps belong to a state government. Regarding Cord's heirs, they are her descendants as specified by New York's intestacy laws, unless she or they specified other beneficiaries in a will or trust.²³⁹ If more than one heir still lives, any one of them would have standing to sue, with a duty to account to the other heirs (who would all be considered co-owners of the copyright) for any monetary award resulting from the suit.²⁴⁰

If no such heirs survive, then the law could conceivably treat her copyright as belonging to a state government under a doctrine called "escheat."²⁴¹ Under this doctrine, property that is no longer owned by anyone generally becomes the property of the state in which it is located.²⁴² Intangible property has been found to have escheated to the state where the owner was domiciled at death.²⁴³ Copyright is generally considered a species of intangible property, and at least one court has recognized the possibility that a copyright could escheat under New York law.²⁴⁴

If an escheat has occurred, it would seem a novel and open question as to whether it would effectively transfer Cord's expression into the public domain, or if a representative of a state government, such as the New York Attorney General, would have standing to bring a claim,

238. See, e.g., *Sketches New and Old Twain*, ISBN SEARCH, <https://isbnsearch.org/search?s=sketches+new+and+old+twain> [<https://perma.cc/P4N9-U3ZM>] (last visited Mar. 2, 2023) (one can search for "Sketches New and Old Twain" and note the many editions listed in the ISBN).

239. See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 55–56 (2009).

240. See Orbey, *supra* note 9 (discussing Disfarmer's heirs suing for copyright infringement based on unpublished works and seeking to split any recovery); see also Avner D. Sofer, *Joint Authorship: An Uncomfortable Fit with Tenancy in Common*, 19 LOY. L.A. ENT. L.J. 1, 6–7 (1998); Andrea S. Hirsch, Comment, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U. L. REV. 1071, 1079–85 (1982).

241. See *Pannonia Farms, Inc. v. USA Cable*, 2004 WL 1794504, at *9 (S.D.N.Y. Aug. 10, 2004); *In re Menschefrend's Est.*, 128 N.Y.S.2d 738, 743–44 (App. Div. 1954), *aff'd*, 8 N.Y.2d 1093 (1960); The Editors, Notes, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1340 (1961).

242. *State by Van Riper v. Am. Sugar Ref. Co.*, 119 A.2d 767, 774–75 (N.J. 1956).

243. *Id.*

244. *Pannonia Farms*, 2004 WL 1794504, at *3; see also Posner, *supra* note 5, at 177.

perhaps seeking an order that Cord, who lived and died a New York citizen, be properly attributed as an author of “A True Story.”

In sum, given my conclusions that Twain and the *Atlantic* likely infringed Cord’s copyright and that it’s at least possible for a valid claim to be asserted today, what can be done to resolve the situation?

III. POTENTIAL REMEDIES TODAY

That “every wrong should have a remedy” is a deeply rooted principle of the common law.²⁴⁵ Here, where the statute of limitation and other defenses do not, as argued above, counter this principle, it’s up to the courts, or to the voluntary actions of those who have inherited the fruits of the wrong, to provide that remedy. Deciding how best to do so is a challenging matter, particularly when Cord is no longer here to receive a remedy herself and the persons who committed the wrong are long gone.

My goal here is not to present a perfect solution—none may exist—but instead to discuss the possible remedies, as well as connect them to two other recent, high-profile lawsuits that aim to right longstanding wrongs. Those suits—against Tulsa and Harvard—can inform Cord’s case, and Cord’s case may do the same for them. Ultimately, out of all the possible remedies, there is at least one that could be implemented now: adjusting the credit on “A True Story” to recognize Cord, not just Twain, as its author.

A. Attribution

Recognizing Cord as an author would fall under what is generally known as the right of attribution. Although federal copyright law generally does not provide authors a right of attribution,²⁴⁶ common-law

245. *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 572 (1994) (Friedman, J., dissenting); *Rozell v. Rozell*, 22 N.E.2d 254, 257 (N.Y. 1939); see also *Monarque v. Monarque*, 80 N.Y. 320 (N.Y. 1880).

246. “Of all the many counter-intuitive features of US copyright law—and they abound—the lack of an attribution right may present the greatest gap between perceived justice and reality.” Jane. C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One’s Work*, 8 GEO. MASON J. INT’L COM. L. 44, 45 (2016). But see 17 U.S.C. § 106A (granting authors of certain works of visual art a right of attribution). Congress could, though, amend the Copyright Act to incorporate a more general right of attribution, relying on scholars’ previous arguments for the right and taking additional inspiration from Cord’s story. See generally Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002).

copyright may well include such a right, given its concern for personhood.²⁴⁷

At least one U.S. court has recognized this rationale in *Bajpayee v. Rothermich*,²⁴⁸ a case involving a doctor who wrote but did not publish a research paper.²⁴⁹ Dr. Bajpayee claimed that his colleague Dr. Rothermich copied his work and published it as his own.²⁵⁰ The Ohio Court of Appeals framed the issue as whether there is “a right in plaintiff to be recognized for his work product which was violated by defendant’s claiming that work product as his own[.]”²⁵¹ The court concluded that this right does exist and though it is not “invaded by failure to give recognition to another upon an authorized publication, it is invaded when one claims the other’s work product as his own.”²⁵²

Here, in “A True Story,” Twain does convey that the narrative of enslavement and miraculous liberation comes from the person to whom it happened.²⁵³ The problem, with respect to attribution, is that he does not credit Cord as that person.²⁵⁴ Both in some contemporary reviews, and still today, readers have posited that Twain may have invented “Aunt Rachel” as a literary device and simply created the story on his own.

Most strikingly, in its description of “A True Story” the University of North Carolina’s *Documenting the American South* online collection still includes the following note:

247. See Rosen, *supra* note 20, at 1129; Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517, 529 (1990) (“Thus, early American copyright theorists did not share the modern view that copyright is motivated solely by economic considerations. Instead, early Americans saw copyright as a matter of both economic policy and natural law.”); Margaret Chon, *Intellectual Property Infringement and the Right to Say No*, 114 NW. U. L. REV. ONLINE 169, 175 (2019) (“[M]uch of what is protectible by copyright is not intended to be monetized, but rather to contribute to self-actualization and/or the nurturing of sociality to the end of human flourishing. Numerous IP scholars have critiqued the anachronistic view that all authors and inventors care about is remuneration. Even the U.S. Copyright Office recently departed from its usual focus on economic rights with a report emphasizing moral rights such as attribution.”) (cleaned up).

Moreover, state or federal unfair competition law might work in conjunction with a copyright claim here to provide a right and remedy of attribution. See, e.g., *Harms, Inc. v. Tops Music Enters., Inc.*, 160 F. Supp. 77, 83 (S.D. Cal. 1958) (“Courts will protect against . . . the omission of the author’s name unless, by contract, the right is given to the publisher to do so . . .”).

248. 372 N.E.2d 817 (1977).

249. *Id.* at 818.

250. *Id.*

251. *Id.* at 821.

252. *Id.*

253. See generally Twain, *supra* note 6.

254. *Id.*

Twain's title is all we have in the way of a preface, so it is not clear who originally told this story. Indeed, given Twain's frequent quips about honesty and deceit—"all men are liars, partial or hidlers of facts, half tellers of truths"—we cannot rule out the possibility that the story is a product of his own imagination.²⁵⁵

If the *Atlantic* added a credit to Cord, along with an explanation of what parts she authored, it could help clear up such misconceptions and give Cord her due—not merely as an inspiration, but as an author.

There is recent precedent for such an effort. Duke University librarians Jessica Janecki and Lauren Reno discovered that the Online Computer Library Center (OCLC) catalog, used by libraries word-wide, had been listing Olive Gilbert, not Sojourner Truth, as the author of Truth's famous first book, *A Narrative of Sojourner Truth, A Northern Slave, Emancipated from Bodily Servitude by the State of New York, in 1828*.²⁵⁶ Truth had orally dictated her narrative to Gilbert, which Gilbert "recorded, shaped, and filled with scribal interpolations," though unlike Twain, she "did not put her own name into *Narrative* in any capacity, not as scribe, compiler, editor, and certainly not as author."²⁵⁷ Despite this, Gilbert was being listed in the OCLC catalog as the book's author.²⁵⁸

Janecki and Reno decided to address this misattribution. They created "authority records" in the U.S. Library of Congress to ensure that authorship was credited to Truth and editorship to Gilbert.²⁵⁹ "With these edited or newly created authority records established," they then "went through each of the hundreds of OCLC bibliographic records for the *Narrative* and updated the authorship to Sojourner Truth."²⁶⁰

Here, historians and librarians like Janecki and Reno could similarly update various catalogs and other historical databases that include "A

255. Patrick E. Horn, Summary of *A True Story, Repeated Word for Word As I Heard It*, DOCUMENTING THE AM. S., at <https://docsouth.unc.edu/neh/twain/summary.html> [<https://perma.cc/7YYQ-9JA7>]. Regarding contemporary reviews, see TRACY WUSTER, MARK TWAIN AMERICAN HUMORIST 309 (2016) (quoting William Dean Howells on how many contemporary critics, "fearing 'a lurking joke,'" were "confused by the story" and that "[n]ot above two or three notices out of hundreds recognized A True Story for what it was, namely, a study of character as true to life itself, strong, tender, and most movingly pathetic in its perfect fidelity to the tragic fact").

256. See ERLENE STETSON & LINDA DAVID, GLORYING IN TRIBULATION: THE LIFEWORk OF SOJOURNER TRUTH 14–15 (1994); Jessica Janecki & Lauren Reno, *Sojourner Truth's Narrative*, THE DEVIL'S TALE (Feb. 14, 2018), <https://blogs.library.duke.edu/rubenstein/2018/02/14/sojourner-truths-narrative/> [<https://perma.cc/3EN5-GHMN>].

257. STETSON & DAVID, *supra* note 256, at 13–14.

258. Janecki & Reno, *supra* note 256.

259. *Id.*

260. *Id.*

True Story” or its bibliographical information to add Cord as an author, particularly if the *Atlantic* and the Twain Foundation would announce that change.²⁶¹

From there, however the potential remedies become more challenging. They could include monetary compensation to Cord’s heirs as well as injunctive relief,²⁶² which I discuss in turn.

B. Compensatory Damages

At least some of the money that Twain and the *Atlantic* made from “A True Story”—the impact of which has benefitted Twain’s heirs and the *Atlantic*’s ongoing corporate enterprise—could have gone to Cord and her family.²⁶³ A starting point would be the \$20 per page that Twain cited as his payment, the highest rate that the *Atlantic* had yet paid to an author, which totaled up to \$60, worth approximately \$1,480 today.²⁶⁴ As an additional rough calculation, using the nine percent prejudgment interest rate prescribed by current New York law,²⁶⁵ and if calculated from the year of first publication, 1874, the principle plus interest could top \$21,000.

261. Another recent example of a revised attribution is the song “Imagine,” in which the songwriting credit has been changed from John Lennon, alone, to Lennon-Ono. See Tehila Rozencwaig-Feldman, *The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 172, 191 n.79 (2021) (“[I]n June 2017 . . . the National Music Publishers Association announced that Yoko Ono would be credited as a joint songwriter. Lennon provided the rationale for this in 1980 during a joint interview with Yoko Ono on BBC Radio 1. In the interview Lennon said ‘[t]hat [‘Imagine’] should be credited as a Lennon-Ono song because a lot of it—the lyric and the concept—came from Yoko. But those days I was a bit more selfish, a bit more macho, and I sort of omitted to mention her contribution.’”) (citations omitted) (quoting Elias Leight, *Yoko Ono Will Receive Songwriting Credit on John Lennon’s ‘Imagine,’* ROLLINGSTONE (June 15, 2017), <https://www.rollingstone.com/music/music-news/yoko-ono-will-receive-songwriting-credit-on-john-lennons-imagine-195957/> [<https://perma.cc/CQ9U-QFA3>]).

262. See, e.g., Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 42 n.76 (1983) (“Common law copyright was defined as the right of first publication, and injunctive relief to prevent unauthorized publication or damages calculated to compensate for loss of that right were the remedies available.”).

263. For a discussion of the benefits that owning property have had for a Black family through the generations, as well as the devastating effects felt by many more others who have had property taken away, see Emma Ockerman, *How One Black Family Got its 40 Acres—and Turned Them into Intergenerational Success*, MARKETWATCH, <https://www.marketwatch.com/story/how-one-black-family-got-its-40-acres-and-turned-them-into-intergenerational-success-2e174032> [<https://perma.cc/SD3G-E5XC>] (Feb. 26, 2023, 10:56 AM); see also DiRusso & McFarlin, *supra* note 140. Here it is intellectual property at issue, not land, but the principle—property aids intergenerational wealth and success, while its loss impedes them—pertains.

264. See *supra* note 98 and accompanying text.

265. N.Y. C.P.L.R. § 5004.

But this does not account for additional monies that Twain and his heirs earned from the use of “A True Story.” These would include the percentage of those profits that could be attributed to the inclusion of “A True Story” in his *Sketches New and Old* book, in his performances of the story during his lecture tours, and future benefits stemming from the story’s success.²⁶⁶

A relatively lesser but similar accounting could be made with the *Atlantic*. Its association with Twain, which began with “A True Story,” and which the *Atlantic* continues to promote to this day,²⁶⁷ has a value that, in an infringement case, might be quantified and apportioned in a monetary judgment for Cord’s heirs. But, as noted above, the retrospective damages are likely limited to money made in the past ten years,²⁶⁸ which is not as easily calculated, and likely relatively minimal.²⁶⁹

A prospective compensatory award, such as an order that the *Atlantic* and the Twain Foundation pay a royalty to Cord’s heirs for future publications,²⁷⁰ would also be challenging due to the basic question of how long it would last. Upon authorized publication, a common-law copyright is supposed to end, with federal copyright at that point

266. See *supra* note 99 and accompanying text; *Casino Prods., Inc. v. Vitaphone Corp.*, 295 N.Y.S. 501, 505 (Sup. Ct. 1937) (recognizing consequential damages in action for common-law copyright infringement). Cf. *Crestwood Membranes, Inc. v. Constant Servs., Inc.*, 2016 WL 659105, at *6 (M.D. Pa. Feb. 17, 2016) (recognizing availability of consequential damages in an action for federal copyright infringement).

267. See, e.g., Jeffrey Goldberg, *Introducing the Atlantic Archive*, ATLANTIC (July 11, 2022), <https://www.theatlantic.com/technology/archive/2022/07/introducing-atlantic-archive/670473/> [<https://perma.cc/9YES-5PDB>]; E-mail from Jeffrey Goldberg, Ed.-in-Chief, The Atlantic, to subscribers (Feb. 6, 2022, 08:04 AM) (on file with author).

268. See *supra* note 188 and accompanying text. Now, if Cord or her heirs had not known of the copying—*i.e.*, if Twain had not gifted her a copy of his book containing her story—then there would be an argument that damages could go further back in time than ten years. See, e.g., *Starz Ent., L.L.C. v. MGM Domestic Television Distrib., L.L.C.*, 39 F.4th 1236, 1242 (9th Cir. 2022) (holding that, under the discovery rule, a plaintiff could recover damages for infringing conduct going back in time until the date on which that conduct was—or reasonably should have been—discovered, though further noting that the Second Circuit has held otherwise). But, even if a court here were to follow *Starz*, it likely would find that Cord and her heirs at least should have discovered the subsequent publications of “A True Story” up to and including the present day. So, again, damages would likely be limited to no further than ten years preceding the date that an heir would file suit.

269. But see *supra* note 208 (detailing the story’s recent inclusion in an *Atlantic*-published “Mark Twain Collection” book and its use in materials sent to new subscribers).

270. See *Roy Exp. Co. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1100 n.11 (2d Cir. 1982) (recognizing the possibility of a remedy requiring the payment of a reasonable royalty going forward in an action for common-law copyright infringement).

beginning.²⁷¹ But given the timespan—one hundred forty-eight years and counting from the first unauthorized publication and one hundred thirty-four years since Cord’s death—there is no easy way to see how the U.S. Copyright Act could now protect Cord’s expression.²⁷² So there would be no clear endpoint for such royalty payments.

C. Injunctive Relief

The same concern applies to a possible injunction prohibiting further publications of Cord’s expression—how long would it last? Moreover, while injunctions are a traditional form of relief in common-law copyright infringement cases, they are most powerful when a publication has yet to occur.²⁷³ Once the bell has been rung, as they say, it’s hard to unring. This is particularly true here, given how long “A True Story” has been in print and how long society has thought it in the public domain.²⁷⁴

The public interest, one of the key considerations in determining whether an injunction should issue,²⁷⁵ would seem to argue against any general injunction—*i.e.*, one that would essentially take “A True Story” out of the public domain—or even a more narrowly tailored one that would expressly apply only to the *Atlantic* and the Twain Foundation.

Neither seems an easy result. The former would be difficult if not impossible to enforce at this point, and it would run counter to the public’s prior reliance on the story’s public domain status. The latter would effectively act more as a punitive measure than a protection of the copyright owner’s right; and punishment, if deemed appropriate, is typically accomplished via punitive damages, as discussed below.²⁷⁶

271. See Rosen, *supra* note 20, at 1057.

272. See 17 U.S.C. §§ 301–03 (protecting previously unpublished works, but with the maximum of seventy years beyond the author’s death).

273. This is based on the focus of the right—to be the first to publish—and if someone else has become the first, without consent, the value of the right diminishes substantially. Cf. Tiffany D. Trunko, Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1956 n.96 (1989) (citing James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263, 296 (1987)).

274. See *supra* note 210 and accompanying text.

275. See, e.g., *Quinn v. Cuomo*, 126 N.Y.S.3d 636, 641 (Sup. Ct. 2020) (“Finally, the factor that must be satisfied before injunctive relief can be granted is a balancing of the equities, including the public interest. It has long been held that injunctive relief is a drastic remedy and must be exercised within the sound discretion of the court.”), *aff’d as modified*, *In re Quinn v. Cuomo*, 125 N.Y.S.3d 120 (2020).

276. See *infra* Part III.D.

Given these dynamics, I think a court would be reluctant to issue an injunction restricting the story's future publication.²⁷⁷

D. Punitive Damages

Punitive damages may be awarded under New York common law “where a wrong is aggravated by recklessness or willfulness.”²⁷⁸ A strong argument can be made here that Twain and the *Atlantic* were recklessly indifferent toward Cord's rights. Their correspondence, in which they referred to her not by name but as “the old colored woman” and in which Twain called her story a “darkey yarn,” suggests that they did not even consider the possibility that she could have a copyright in her story or, worse, that they thought her consent simply unnecessary as a practical matter, given that she was a Black woman employed by Twain's in-laws.

The *Atlantic*, which had been publishing for over fifteen years,²⁷⁹ was well-versed in matters of copyright generally, as was Twain. Though he and his authorial career were yet relatively young—Twain was thirty-eight in 1874—he had already filed his first copyright infringement lawsuit and had complained about newspapers printing his lectures without his permission.²⁸⁰ And while relatively scant, the case law at the time sided with the speaker's right to control the publication of his words, either as a matter of copyright or implied contract.²⁸¹ Beyond that, as referenced above, the publishing industry had commonly credited and compensated people for their orally dictated stories of enslavement.²⁸²

In sum, if the *Atlantic* or Twain had asked a lawyer to research and opine on the issue, the prudent legal advice likely would have been: “Obtain Cord's consent in writing before publishing what she said.” By

277. See, e.g., *Petrella v. MGM*, 572 U.S. 663, 687–88 (2014) (describing how a court could, in its equitable discretion, limit the remedies awarded if it ruled in favor of the copyright owner).

278. *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1106 (2d Cir. 1982).

279. See Goldberg, *supra* note 267.

280. See Herbert Charles Verschleisser Feinstein, *Mark Twain's Lawsuits* (1968) (Ph.D. Dissertation, University of California Berkeley) (ProQuest); see also *supra* note 175.

281. *Abernethy v. Hutchinson* (1824) 47 Eng. Rep. 1313, 1317; *Nicols v. Pittman* (1884) 26 Ch 374, 381; see also David J. Brennan & Andrew F. Christie, *Spoken Words and Copyright Subsistence in Anglo-American Law*, 4 INTELL. PROP. Q. 309, 319, 322 (2000).

282. See *supra* note 69 and accompanying text; see also Univ. N.C. Chapel Hill, *First Person Narrative of the American South*, DOCUMENTING THE AM. S., <https://docsouth.unc.edu/fpn/aboutfpn.html> [<https://perma.cc/SK59-G3AJ>] (last visited Feb. 10, 2023) (compiling a collection of slave narratives written between 1860 and 1920).

failing to seek such advice, or to otherwise consider that Cord could have rights in her story, the evidence supports a finding of recklessness.

Why didn't they consider Cord's rights? The language used in their correspondence—"old colored woman," "the realest kind of [B]lack talk," "darkey yarn"—all show a focus on Cord's race and gender instead of her personhood.²⁸³ Issues of discrimination can be highly relevant to punitive damages awards. As a federal district court in an employment discrimination case against Tesla recently observed:

[I]ntentional discrimination on the basis of race or ethnicity is especially reprehensible and a different kind of harm, a serious affront to personal liberty. . . . [T]here can be no question of the importance of our society's interest in combating discrimination; this nation fought the bloodiest war in its history in part to advance the goal of racial equality, adding several amendments to the Constitution to cement the battlefield victory. . . . As a result, [r]acial discrimination often results in large punitive damage awards.²⁸⁴

The evidence that Twain and Howell's recklessness towards Cord's rights was influenced by her race and gender would thus further justify an award of punitive damages here.

On the other hand, making twenty-first century judgments on Twain and the *Atlantic* for their nineteenth-century mindset is a fraught enterprise. Though discrimination is apparent from their words, Twain's and Howell's nobler motives—their better angels, in Lincoln's phrasing—have been amply documented, as well. The publication of "A True Story"—particularly at a time when a backlash was brewing against the rights, power, and property the Black community had gained after the Civil War—vividly reminded people of the horrors, physical and psychological, that slavery truly entailed.²⁸⁵ It continues to remind us today, both in its own right and through its influence on Twain's most widely read work, *The Adventures of Huckleberry Finn*.²⁸⁶

Many have explored Twain's racial tensions,²⁸⁷ but perhaps no one has described them better than Professor Arthur Pettit in *Mark Twain*

283. See *supra* notes 37, 40, and accompanying text; see also McFarlin, *supra* note 4, at 19.

284. *Diaz v. Tesla, Inc.*, 598 F. Supp. 3d 809, 842 (N.D. Cal. 2022) (first quoting *Flores v. City of Westminster*, 873 F.3d 739, 760 (9th Cir. 2017); and then quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003)).

285. See, e.g., Lee, *supra* note 67, at 106–07.

286. FISHER FISHKIN, *supra* note 44, at 7–9.

287. See, e.g., *id.*; Ed Piacento, *Recontextualizing Mark Twain's "A True Story"*, MARK TWAIN ANN., 2011, at 31–43; Laura Skandera Trombley & Ann Ryan, *Mark Twain and Critical Race Theory*, INSIDE HIGHER ED (Oct. 7, 2021),

and the South.²⁸⁸ There, a clergyman is quoted as calling Twain “the worst man I ever knew. And the best.”²⁸⁹ As Pettit profoundly elaborates:

Like his creator Samuel Clemens and the South which nurtured him, [Twain] is a great tangle of tensions and dualities Indeed any list of paired Southern affinities and antipathies reads like a catalog of Clemens’s own attitudes and affects: leanings toward aristocracy and toward democracy, love of past and lust for progress, devotion to religion and allegiance to nation. And, more than anything, ambivalence toward blacks: affection and distaste, defense and abuse, compassion and callousness. It is true that other Americans had these mixed feelings, but they were the raw nerves of the South.²⁹⁰

Illustrating this duality, the University of North Carolina’s *Documenting the American South’s* North American Slave Narratives database catalogs over two hundred such narratives.²⁹¹ All relevant entries appear to credit or at least reference the formerly enslaved person, except the one that lists Twain as the sole author of “A True Story.”²⁹²

Why is Twain unique? Perhaps few others could have cared enough about Cord’s story to have painstakingly written it down from memory, edited, and published it, yet still callously referred to it as a “darkey yarn” that anyone could simply “gobble up.”²⁹³ Late in his life, Twain wrote of Abraham Lincoln as “a man of the border,” one “who knew slavery not from books only, but as a living thing, knew the good that

<https://www.insidehighered.com/views/2021/10/07/mark-twain-was-american-lits-first-critical-race-theorist-opinion> [<https://perma.cc/HHM2-G968>]; David E. E. Sloane, *Mark Twain and Race*, J. OF ENGLISH LANG. AND LIT. (SEOUL, KOREA), 869 (Winter 1998); ARTHUR G. PETTIT, MARK TWAIN & THE SOUTH 5–6 (1974); TERRELL DEMPSEY, SEARCHING FOR JIM: SLAVERY IN SAM CLEMENS’S WORLD (2003).

288. PETTIT, *supra* note 287, at 5–6.

289. *Id.* at 6.

290. *Id.* at 5–6.

291. Univ. N.C. Chapel Hill, *First Person Narrative of the American South*, DOCUMENTING THE AM. S., <https://docsouth.unc.edu/neh/> [<https://perma.cc/T88H-RXMP>] (last visited Mar. 2, 2023).

292. *Id.* at *Alphabetical List of North American Slave Narratives*.

293. See 6 MARK TWAIN’S LETTERS, *supra* note 18, at 245–46 and accompanying text. Another way to interpret this is that additional uncredited uses of such narratives have not yet been discovered and documented (*i.e.*, that Twain’s and the *Atlantic’s* just scratch the surface). Further to that thought, Twain apparently treated at least one other Black speaker’s words as his own to publish without permission. See McFarlin, *supra* note 4, at 9 n.22. Twain published “Sociable Jimmy” in the *New York Times* in November 1874, the same month the *Atlantic* first published “A True Story,” taken from the things that a Black child told him during his travels in 1872. *Id.* But in publishing the words of an adult white male in 1881, Twain made it a point to note that he submitted his manuscript to the storyteller for approval prior to publication. *Id.* at 10.

was mixed with its evil, and knew the evil not merely as it affected” the enslaved, “but in its hardly less baneful influence upon the poor whites.”²⁹⁴ Surely Twain felt something of himself as well in that description.

Similar tensions may have existed in Howells, the *Atlantic’s* editor. Professor Toshio Watanabe has pointed out that two other contemporary pieces in the *Atlantic* purported to include stories heard from the mouths of formerly enslaved people.²⁹⁵ The first, “Miss Georgine’s Husband,” appeared in the very same issue of the *Atlantic* as a “True Story,” and the second, “Story of a Contraband,” was published in an 1875 issue.²⁹⁶ The latter named the source of the story, Joe McEntyre, who worked for the writer’s friend.²⁹⁷ It’s fair to say, then, that Howells, like Twain, took interest in such stories, but again, akin to Twain, it seems unlikely Howells considered that the sources of the stories—those who told them to the writers—might be entitled to authorial credit or compensation.

In sum, there is much to ponder on the issue of punitive damages. Reasonable minds—ultimately that of a jury if the claim were brought in court—could come to different conclusions. As for my mind, I respectfully suggest that punitive damages are a difficult fit for this case and for others involving longstanding wrongs, and not just because of the challenges in justly judging the mindset and morality of our ancestors. Punitive damages are generally designed to punish the offender and to deter similar misconduct going forward.²⁹⁸ But the offenders here, Twain and Howells, are long gone. They can no longer be punished or deterred from future infringement. And the *Atlantic’s* staff today has thus far presumably lacked knowledge of the infringement or the discrimination behind it.

A punitive damages analysis should, in my view, consider primarily if not exclusively how the parties, today, act after they become aware.²⁹⁹

294. Mark Twain, *A Lincoln Memorial: A Plea by Mark Twain for the Setting Apart of His Birthplace*, N.Y. TIMES, Jan. 13, 1907, at 8.

295. See Toshio Watanabe, *Mark Twain’s Debut in the “The Atlantic Monthly”*: A Study in Comparison of “A True Story,” 4 STUD. AM. LIT. 48, 50, 61 (1967).

296. *Id.* (discussing Lucy Ellen Guernsey, *Miss Georgine’s Husband*, ATL. MONTHLY, Nov. 1874, at 568–76, and Launt Thompson, *Story of a Contraband*, ATL. MONTHLY, June 1875, at 705–12).

297. *Id.*

298. See *J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 564 (2021) (“We explained ‘that the purpose of punitive damages is solely to punish the offender and to deter similar conduct’ and ‘not . . . to compensate or reimburse’ an injured party.”) (quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1068 (N.Y. 1994)).

299. Cf. *Lanier v. President & Fellows of Harv. Coll.*, 191 N.E.3d 1063, 1075–77 (Mass. App. Ct. 2022) (focusing on how Harvard treated Ms. Lanier after she came forward in 2011 and identified herself as a descendant of Renty and Delia, whose images Harvard had misappropriated in the nineteenth century).

We shouldn't be blamed for our ancestors' misdeeds, but we can acknowledge them. And we should consider what can be done today. This prompts the question of how the *Atlantic* and Twain Foundation, as well as other inheritors of longstanding wrongs, might best move forward.

E. Moving Forward in this Case and Beyond

Cord's case is unique, as all are in some way, but it also shares some striking commonalities with others that may help chart the best path forward. First, it connects generally with our society's longstanding and still-simmering debates over race and gender discrimination.³⁰⁰ These debates are prominently reflected in current federal and state legislative initiatives dedicated to exploring these issues, as well as by private institutions like universities and corporations recognizing and addressing their role in such discrimination.³⁰¹

300. For discussions and examples of issues of race and gender in the intellectual property field, see Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 *CARDOZO ARTS & ENT. L.J.* 735, 740 (2018) (proposing a theoretical framework called "Critical Race Intellectual Property" in studying racial implications of several IP laws); see also Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 *AM. U. J. GENDER, SOC. POL'Y & L.* 175, 175–76 (2015) (identifying women's challenges and opportunities in the next ten years of intellectual property scholarship by using feminism framework); Kara W. Swanson, *Race and Selective Legal Memory: Reflections on Invention of a Slave*, 120 *COLUM. L. REV.* 1077, 1117–18 (2020) (arguing that disregarding obsolete law in the era of slavery rejecting slave owners' rights to patent inventions created by their slaves costs society the opportunity to study the history of racism of the United States); Brian L. Frye, *Invention of a Slave*, 68 *SYRACUSE L. REV.* 181, 229 (2018) (arguing that Attorney General's opinion before Reconstruction Amendments rejecting the rights of slave owners to patent inventions created by their slaves led to Patent Office's rejection of free African-American's rights to patents afterward); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 *AM. U. J. GENDER SOC. POL'Y & L.* 551, 570–71 (2006) (noting the history of women being disadvantaged in filing for copyrights). Regarding reparations, specifically, in the intellectual property context, see Greene, *supra* note 215, at 1182, 1226–27. Regarding reparations more broadly, see, for example, Ta-Nehisi Coates, *The Case for Reparations*, *ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/UP9B-3VEE>].

301. See, e.g., Emmanuel Felton, *Supporters Say They Have the Votes in the House to Pass a Reparations Bill After Years of Lobbying*, *WASH. POST* (Feb. 25, 2022), <https://www.washingtonpost.com/nation/2022/02/25/reparations-bill-congress-support/> [<https://perma.cc/NFZ7-YQT5>] (discussing how the bill would create a commission to study reparations); see also Kurtis Lee, *California Panel Sizes Up Reparations for Black Citizens*, *N.Y. TIMES* (Dec. 5, 2022), <https://www.nytimes.com/2022/12/01/business/economy/california-black-reparations.html> (discussing California's statewide efforts to address reparations for African-Americans); Elizabeth Redden, *Paying Reparations*, *INSIDE HIGHER ED* (June 15, 2021), <https://www.insidehighered.com/news/2021/06/15/virginia-theological-seminary-issues-first-reparations-checks> [<https://perma.cc/R3L9-K8H4>] (reporting

But Cord's case connects even more directly with recent efforts to enlist the judiciary in remedying longstanding wrongs. Cases like these are traditionally rare, as discussed above, given the general operation of statutes of limitations to bar such lawsuits.³⁰² Today, however, more of these suits are finding their way into the courts, particularly since the U.S. Supreme Court's decision in *Petrella v. MGM*. In the copyright sphere, suits against Led Zeppelin and suits based on the use of Mike Disfarmer's and Vivian Maier's photography are prominent examples.³⁰³

Beyond copyright but, like Cord's case, raising issues of racial discrimination, are (1) the ongoing lawsuit by victims the 1921 Tulsa Race Massacre—including three living survivors and the descendants of many now deceased—against the City of Tulsa, Oklahoma, and others for their role in the massacre and its aftermath,³⁰⁴ and (2) the ongoing lawsuit against Harvard University by Ms. Tamara Lanier, a descendant of two formerly enslaved persons named Renty and Delia, whose misappropriated images Harvard continues to possess and exploit.³⁰⁵

While all these cases have dramatic differences—most particularly the death and physical destruction in the Tulsa case—they all share a similar potential to utilize the current court system to address a wrong that originated many years earlier.

In a striking initial connection, the Tulsa plaintiffs have cited *Petrella v. MGM*, a U.S. Supreme Court copyright case discussed above,³⁰⁶ in support of the proposition that courts can, under certain circumstances, adjudicate cases involving longstanding wrongs.³⁰⁷ Professor K.J. Greene has noted how, in the field of intellectual property, statutes of limitations have often posed a barrier to claims by members

Virginia Theological Seminary's institution-wide monetary remedies to descendants of unpaid African-Americans who worked there); Anne E. Bromley, *New Law, Signed at UVA, Focuses on Reparations for Descendants of Enslaved Workers*, UVA TODAY (May 5, 2021), <https://news.virginia.edu/content/new-law-signed-uva-focuses-reparations-descendants-enslaved-workers> [https://perma.cc/7V6R-JJKW] (reporting Virginia Governor Ralph Northam's passage of bills requiring pre-Civil War Virginia public universities reparations to descendants of the enslaved); Clyde McGrady, *Bruce's Beach Was Hailed as a Reparations Model. Then the Family Sold It*, N.Y. TIMES (Feb. 19, 2023) (summarizing how California beachfront property, once seized from Charles and Willa Bruce via eminent domain, was restored to their descendants and then sold by those descendants).

302. Greene, *supra* note 215, at 1214.

303. See *supra* notes 8–9 and accompanying text.

304. See *supra* note 17.

305. *Lanier v. President & Fellows of Harv. Coll.*, 191 N.E.3d 1063, 1075–77 (Mass. App. Ct. 2022) (finding plaintiff's complaint plausibly supports claims for negligent and reckless infliction of emotional distress).

306. See Pls.' Combined Opp'n to the Mots. of Defs. City of Tulsa & Tulsa Metropolitan Area Planning Commission to Dismiss Pls' First Am. Pet. at 13–14, *Randle v. City of Tulsa*, No. CV-2020-01179 (Okla. D. Ct. June 1, 2021).

307. *Id.*

of the Black community.³⁰⁸ Here, applying *Petrella*, future outcomes could perhaps be different, and not only with respect to intellectual property. Just as a descendant of Cord would, as discussed above, likely have a better chance at a fair court proceeding now than Cord would've had in her time, so too the Tulsa plaintiffs now have an improved chance at a just adjudication of the longstanding wrongs committed against them.³⁰⁹ Applying the statute of limitations in a way that seeks not to punish people for the misdeeds of their ancestors but that opens the possibility for forward-looking relief—such as a chance to reacquire title to land owned in Tulsa before the massacre—is a path that copyright law, through cases like Cord's, can help pave.³¹⁰

A further connection—particularly among the Tulsa plaintiffs' suit, Ms. Lanier's action against Harvard, and Cord's case—is that all involve an effort to apply the common law to right a wrong near or beyond a century old.

The U.S. common law, in brief, is a court-recognized—in effect court-created—body of law whose contours have developed, and continue to develop, case by case from the courts of England to the courts of each

308. Greene, *supra* note 215, at 1214.

309. In yet another interesting connection, the Mark Twain House and Museum hosted a talk on December 8, 2022, by author RJ Young concerning the Tulsa Massacre. See *Requiem for the Massacre: A Black History on the Conflict, Hope, and Fallout of the 1921 Tulsa Race Massacre* with RJ Young and Katy Mullins (Virtual), MARK TWAIN HOUSE & MUSEUM, <https://marktwainhouse.org/event/requiem-for-the-massacre-a-black-history-on-the-conflict-hope-and-fallout-of-the-1921-tulsa-race-massacre-with-rj-young-and-katy-mullins-virtual/> [https://perma.cc/3PV5-36CX].

310. Other cases of land loss by, and violence against, Black communities pervade our history. See, e.g., *supra* note 301; Sandra L. Rierson & Melanie H. Schwimmer, *The Wilmington Massacre and Coup of 1898 and the Search for Restorative Justice*, 14 ELON L.J. 117, 121 (2022) (discussing Wilmington Massacre and Coup and restorative efforts in regard); Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653, 676 (2002) (“[E]vidence suggests that investigating and pressing reparative claims for less publicized racially motivated wrongs yields positive results in comparison to efforts to obtain general slavery reparations.”); Kerri M. Gefeke, Comment, *America to Me—A Public Nuisance Reparations Framework Through the Lens of the Tulsa Massacre*, 55 UNIV. ILL. CHI. L. REV. 681, 723 (2022) (emphasizing how restorative efforts such as those in *Randle v. City of Tulsa* hold promise for the future); MARGARET BURNHAM, *BY HANDS NOW KNOWN: JIM CROW'S LEGAL EXECUTIONERS* (2022) (exploring the history of anti-Black violence, particularly that perpetrated by law enforcement officers, and efforts to engage descendants of its victims); Rebecca Beyer, *Let the Records Show . . . An Unprecedented Digital Archive launched by Northeastern Law's Civil Rights and Restorative Justice Project Makes Available Thousands of Documents Related to Lynchings and Anti-Black Violence in the South*, NORTHEASTERN U. SCH. OF L. MAG. (Winter 2023) (same). And so, a fresh analysis of whether judicial remedies could be available today in such cases could be aided by the discussion here.

of the United States today.³¹¹ In Cord’s time and long before, the common law was robust and celebrated, developed by judges unafraid to exercise their judgment, building on prior case decisions and their sense of what would best accomplish justice within their communities.³¹²

Judges in the twenty-first century, however, now often view themselves more as baseball umpires, merely calling balls and strikes in interpreting others’ laws.³¹³ Though many have criticized the metaphor—noting how much discretion courts exercise in tough cases—it has had its influence.³¹⁴ Indeed, the common law has often been declared dead.³¹⁵

Cases like Cord’s remind us, though, to paraphrase Twain himself, that the reports of its death have been greatly exaggerated.³¹⁶ In Cord’s case, it manifests as common-law copyright, and the courts of New York decide what that law *is*, not merely how it is interpreted.³¹⁷ In the Tulsa case, it is a common-law public nuisance claim, and the courts of Oklahoma, not its legislature, make that law.³¹⁸ In Lanier’s case it is a common-law property claim in her ancestors’ images as well as a claim in common-law tort for Harvard’s infliction of emotional distress in how it treated her after she reached out.³¹⁹ The Massachusetts courts make that law.³²⁰

Lanier filed her suit in 2019, and in June 2022 the Massachusetts Supreme Judicial Court decided that the latter common-law claim—negligent infliction of emotional distress—could go forward, but it

311. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881); M. Stuart Madden, *The Vital Common Law: Its Role in A Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 555–56 (1996).

312. See Madden, *supra* note 311, at 556.

313. RICHARD A. POSNER, *HOW JUDGES THINK* 78–81 (2008) (arguing how this view is likely genuinely held by some judges and many others adopt it as a political expedient); Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1220.

314. See Walker, *supra* note 313, at 1210.

315. Madden, *supra* note 311, at 555.

316. This quote, one of the most famous of those attributed to Twain, has long been altered from its original wording. Now most often repeated as “The reports of my death have been greatly exaggerated,” it was originally “The report of my death was exaggerated.” ERIC DONALD HIRSCH, JR., JOSEPH F. KETT & JAMES TREFIL, *THE NEW DICTIONARY OF CULTURAL LITERACY* 137 (3d ed. 2005).

317. See *supra* text accompanying note 20.

318. See *First Amended Petition*, *supra* note 17, ¶¶ 187–92.

319. Lanier has asserted that she is a descendant of Renty and Delia, enslaved people whose photographs were commissioned by Harvard’s Louis Agassiz for his research into since-discredited pseudoscience on supposed racial hierarchies. *Lanier v. President & Fellows of Harv. Coll.*, 191 N.E.3d 1063, 1069–70 (Mass. App. Ct. 2022). Ms. Lanier sued Harvard for continuing to profit from Renty’s and Delia’s images via its control and exploitation of the original photographic plates. See *id.*

320. See *id.*

affirmed the dismissal of her property-based claims.³²¹ All the justices decried the way in which Harvard obtained Renty's and Delia's images as well as how it treated Ms. Lanier after she came forward.³²² The majority of the justices decided, however, that the statute of limitations on Lanier's property-based claims had expired, thereby preventing a court-ordered transfer of the original photographic plates (called daguerreotypes) to her.³²³

But Chief Justice Budd, in a concurring opinion, indicated being receptive to future arguments on how an unjust enrichment claim could justify that transfer.³²⁴ And Justice Cypher, in a further concurrence, wrote that she would recognize a new common-law cause of action allowing a descendant, like Lanier, to obtain possession of an artifact that resulted from the enslavement of her ancestors, like the daguerreotypes of Renty and Delia.³²⁵

A full, critical analysis of that specific proposed cause of action, and its rejection by her fellow justices, is beyond the scope of this Article. But a direct connection to Cord's and the Tulsa plaintiffs' cases is Justice Cypher's expansive view of the common law as an instrument to right longstanding wrongs.

The common law, as Justice Cypher described it, is "to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community," having a "flexibility and capacity for growth and adaptation which [is] the peculiar boast and excellence of the system."³²⁶

To illustrate why that growth and adaptation is so important, Cypher proceeded to quote a speech by a former chief justice of the court:

We are responsible [for] and the sole arbiter of the common law of Massachusetts. The common law of Massachusetts is ours. We are responsible for it. If it turns out that it does not work, it is our fault. . . . Our job here is ultimately to do justice. . . . We don't generally say, "well, we rely upon the importance of continuity, so if it was an injustice that occurred

321. The court also took the fairly remarkable steps of encouraging Ms. Lanier to amend her complaint on remand to expressly add a claim for reckless infliction of emotional distress and ordering the trial court to permit her to do so. *Id.*

322. *Id.* at 1076–77.

323. A separate accrual argument likely was not made because the claims concerned tangible property, as opposed to intangible intellectual property. The former involves physical possession—only one party can have it—which the law has historically treated as necessitating one accrual period to settle a zero-sum dispute over possession. *Cf. id.* at 1079–81.

324. *Id.* at 1083–84, 1090–91 (Budd, C.J., concurring).

325. *Id.* at 1091–96 (Cypher, J., concurring).

326. *Id.* at 1094 (cleaned up).

a while ago, we're just going to leave it be." Our obligation is to correct a miscarriage of justice whenever it happens, and that is part of what is bred in our bone.³²⁷

While Cord's case would not need the courts to recognize a new cause of action—common-law copyright infringement is centuries old—it would require, as with the Harvard and Tulsa cases, a flexible and open-minded application of common-law principles to right a longstanding wrong.

No case so far has applied a public nuisance theory to a race massacre. No case so far has transferred an artifact to an enslaved person's ancestor. And no case so far has remedied a nearly century-and-a-half old copyright infringement. But the excellence of the common law, as Justice Cypher observed, is the courts' power to adapt and apply the decisions and reasoning of prior cases to new claims—whether those claims spring from new situations or arise from old ones like Cord's where wrongs have been ignored or otherwise permitted to stand.

The common law's potential to adapt, moreover, can help motivate institutions to right prior wrongs themselves.³²⁸ Conversely, if the courts ignore or effectively abandon their common-law powers—if they truly see themselves as mere umpires of others' rules—private parties are more likely to further entrench those wrongs. As Chief Justice Budd explained in *Lanier*, Harvard recently released a report detailing the university's historic ties to slavery and recommending reparative action:

"Today, Harvard University . . . embraces reckoning with its past," and is "seeking to make amends for these wrongs." . . . The report declares that "[t]he damage caused by Harvard's entanglements with slavery and its legacies warrant action," even in "the absence of a legal requirement" to act. . . . Thus, the spirit of the report would appear to encompass dialogue and relationship building with the descendants of those pictured in the . . . daguerreotypes, as well as pursuit of a visible and lasting remedy to the harm Lanier suggests such a remedy. Harvard's refusal even to discuss respectfully with Lanier her request to possess the daguerreotypes of Renty and Delia flies in the face of its aspirational report. Harvard's

327. *Id.* at 1093–94.

328. Professor Balganesch has discussed this adaptive power in the context of intellectual property. Shyamkrishna Balganesch, *The Genius of Common-Law Intellectual Property*, 50 J. LEGAL STUD. S91, S107–08 (2021) (arguing, for example, that judicial lawmaking "offers intellectual property law an opportunity to experiment with different rules over time, learn from any mistakes, and eventually settle on a rule that works the best" and "allows judges—as generalists—to carry over important insights about the judicial process and legal system more generally into intellectual property").

conduct thus belies its purported commitment to enable descendants to “recover their histories,” to “tell their stories,” or to repair meaningfully the harm it has done to them.³²⁹

Similarly, in the Tulsa case, the plaintiffs allege that the

Defendants are using a well-orchestrated, multi-faceted marketing campaign designed to influence wealthy donors and business interests to give them money and distract the public from the fact that Defendants refuse to accept responsibility for the Massacre, compensate Massacre victims, or abate the public nuisance the Massacre created. . . . Defendants have misappropriated the history of the Massacre, using names and likenesses of survivors and descendants of Massacre victims without permission or compensation, to exploit the horrific event in which they actively participated and the subsequent trauma they caused . . . which continues to this day Defendant’s misappropriations not only result in their unjust enrichment; but rather than offering an apology and compensate for the damages they caused, they are exacerbating the pain of the continued trauma they caused, and perpetuating the nuisance by ignoring its ongoing consequences.³³⁰

Without the potential for the common law to adapt—that is, if the courts ignore or effectively abandon their common-law authority—institutions like Harvard and Tulsa can continue to ignore with impunity longstanding wrongs like the ones detailed above.

But if courts act to address such wrongs when and how best they can—as they have to some degree so far in Ms. Lanier’s case and the Tulsa plaintiffs’ current case—then institutions like the *Atlantic* and the Twain Foundation will have a greater motivation to provide tangible remedies to specific victims, not mere platitudes.

329. *Lanier*, 191 N.E.3d at 1087 (Budd, C.J., concurring). Regarding the *Atlantic*, consider the recent email by its national editor, Scott Stossel, to its subscribers, touting the continuing importance of its publication of Ta-Nehisi Coates’ “The Case for Reparations,” *supra* note 300, specifically the article’s ranking by the Carter Journalism Institute as “the most important piece of journalism in any format . . . published between 2010 and 2020.” E-mail from Scott Stossel, National Editor, Atl., to subscribers (Feb. 3, 2023, 1:37 PM CST) (on file with author). An engagement with the history discussed here and a search for Cord’s ancestors would, as the saying goes, show that the *Atlantic* will put its money where its mouth is. On the other hand, ignoring it would seem to fly in the face of its proclaimed aspirations. *Cf. Lanier*, 191 N.E.3d at 1087 (Budd, C.J., concurring).

330. *First Amended Petition*, *supra* note 17, ¶¶ 178–80.

CONCLUSION

Irony, in the sense of “a contradictory outcome of events as if in mockery of the promise and fitness of things,”³³¹ is a literary device with which Mark Twain was intimately familiar.³³² Here, at the intersection of life, literature, and the law, he has presented us with yet another deep irony. In writing of how enslavers separated Mary Ann Cord from her family, Twain himself separated Cord from her story.³³³ That story ended with an astounding reunion. Might we, today, bring about another?

The *Atlantic* and the Twain Foundation have an opportunity to do so. As argued in this project, first in “A Copyright Ignored” and now here in “A Copyright Restored,” Cord likely had a common-law copyright that Mark Twain and the *Atlantic* likely infringed and which may still exist today.³³⁴ Twain and his publisher could have done as many others in that time had done and given Cord credit, or at least compensation, for using her words.³³⁵ That they did not does not, in my view, reduce the literary power of “A True Story,” but it does leave a wrong in search of a remedy.

What might that remedy look like? A search for Cord’s descendants, marshalling the investigative journalism of the *Atlantic* and the resources of the Twain Foundation, would seem a logical first step. From there, ideally in consultation with any living descendants, the *Atlantic* and the Twain Foundation could recognize Cord as an author of, not just an inspiration for, “A True Story.”³³⁶ Beyond that, these institutions could consider what further remedies—such as monetary compensation—are feasible. Further, even if Cord’s lineage has ended, a scholarship in her name, perhaps relating to the study of Black and women authors, could

331. *Irony*, THE OXFORD ENGLISH DICTIONARY 87 (2d ed. 1989).

332. See Richard K. Barksdale, *History, Slavery, and Thematic Irony in “Huckleberry Finn,”* 22 MARK TWAIN J. 17, 19 (1984).

333. Dr. Emahunn Raheem Ali Campbell has noted the parallel between a lack of copyright in a story of enslavement “with the lack of natural rights afforded the slave.” Emahunn Raheem Ali Campbell, *Copyright, Fugitivity, and the Fight for Self-Ownership in Early African American Literature*, in AFRICAN AMERICAN LITERATURE IN TRANSITION 1830–1850, at 115, 120 (Benjamin Fagan ed., 2021).

334. See *supra* Parts I, II.

335. See *supra* Parts II, III.

336. A restorative justice approach could provide a helpful guide. See Henry J. Shea, *Restorative Justice, Law, and Healing*, 17 U. ST. THOMAS L.J. 1 (2020) (“Restorative justice, which is rooted in seeking healing and accountability from harm, has not been well recognized or widely practiced for much of this nation’s existence. But it has increasingly received growing attention in recent years from many persons and organizations.”); Trevor Reed, *Restorative Justice for Indigenous Culture*, 70 UCLA L. REV. (forthcoming 2023) (applying restorative justice to help address and remedy the misappropriation of Indigenous intellectual property).

be appropriate. These ideas are certainly not meant as exclusive, but they can hopefully help start the process of restoration.

That a court could use its common-law authority to order such restoration, as courts are beginning to do in similar cases,³³⁷ should help motivate the *Atlantic* and the Twain Foundation to begin this process, but it should not be the only motivation. While we can't right every longstanding wrong, that doesn't mean we can right none. When one arises, as it has here, and when the evidence allows for a sound present-day evaluation, as I think it does here, the parties involved will hopefully themselves reflect on what steps they can proactively take, today, to help make it right.

337. See *supra* Section III.E.

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