Optimizing Copyright Duration for the Digital Age

Brady W. Frazier
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I. INTRODUCTION

Copyright law faces a fundamental problem, the likes of which may be seen in many facets of the human experience. It is a problem so ancient that the Roman poet Juvenal addressed it in his Satires with the simple question: *Quis custodiet ipsos custodes?* A more modern observer might phrase the problem a little differently: How does society protect the interests of the majority from the interests of the minority when the minority is able to make the rules? In the case of copyright law, a powerful and vocal minority has steadily been advancing its own interests for centuries without formidable opposition. As we move through the digital age, acquiring new technology that will allow us to create and share to an unprecedented degree, it is important that we reevaluate the proper role of copyright in an information-based society, so that the interests of all are best served by the law.

The history of American copyright law dates back to the formation of the United States. Thomas Jefferson, widely known for his opinion of copyright as a "necessary evil," sought to limit its term and privileges accordingly during the Constitutional Convention. Jefferson's viewpoint was captured accurately in the simple language of Article I, Section 8 of the Constitution. Standing as the building block for all subsequent statutes, policies and rulings, the Copyright Clause grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In Jefferson's time, copyright law was predominantly concerned with the rights of authors and book publishers. Facing a widespread system of counterfeit publishing rings, the Framers feared that without copyright, authors and publishers would not obtain compensation adequate to incentivize

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3. *Id.*

them to continue their work. In contrast, the onset of the digital age has opened up the floodgates for both the production and consumption of copyrighted material to the layperson, requiring only access to a computer. As a result, modern copyright law concerns itself with a myriad of mediums of tangible expression, including songs, films, speeches, slogans, and software. Unfortunately, rather than evolve in accordance with the technological developments of the digital era, copyright law has devolved to the point of perilous stagnation.

Beginning in the second half of the twentieth century, media conglomerates have been increasingly fervent in their efforts to quash the “piracy” of their intellectual property by consumers. Powerful lobbies have pushed multiple bills through Congress, such as the Digital Millennium Copyright Act and the Copyright Term Extension Act, which heavily favor entrenched media and publishing corporations at the expense of the creative general public. In addition, as exemplified by recent practices of the Recording Industry Association of America (RIAA), Big Media has attempted to enforce their overbearing laws by arbitrarily suing individual “pirates” for vast amounts of money and unilaterally shutting down software providers through “temporary” injunctions.

With the advent of new software tools and an increased awareness of the realities of copyright law today, there is a growing movement, known as the Copy Left, which favors broad changes that would reshape copyright law, improve the dissemination of information and better protect First Amendment free speech rights. Although recent experiments in copyright protection designed for the digital age, such as the Creative Commons, have been

6. NETANEL, supra note 4, at 8.
8. See Breyer, supra note 5, at 9.
9. NETANEL, supra note 4, at 8.
10. NETANEL, supra note 4, at 8.
met with substantial success and scholarly praise, media conglomerates appear reluctant to yield any ground in this intellectual property battle.\textsuperscript{14} Despite this resistance to change, there are important economic, constitutional, and moral arguments surrounding copyright policies, particularly with the regards to the term of copyright protection, which must be considered if copyright law is to continue to remain a fair and viable system.

\section{II. History of Copyright Law}

\subsection{A. The Origin of Copyright}

Though copyright law is currently a subject of much debate and activism, until recently, commentators generally thought of copyright as a bland and predictable area of law.\textsuperscript{15} However, when the notion of copyright and freedom from oppressive copyright first manifested itself during the Renaissance, violence and passion surrounded it.\textsuperscript{16}

Access to the written word, and literacy in general, became more commonplace in the Western World as the revolution of the printing press slowly, but inevitably, spread across Europe.\textsuperscript{17} Unfortunately, because the Church and many European governments opposed the publishing of opinions they considered dangerous, an attempt was made to suppress dissenters by exerting precise control over what was permissible for publication.\textsuperscript{18} Establishing close ties to booksellers and granting them a perpetual monopoly on the right to publish approved books accomplished such censorship.\textsuperscript{19} It was not until John Milton published his eloquent and ultimately influential \textit{Aeropagitica} that the notion of freedom of speech and freedom of the press began to seep into the public consciousness.\textsuperscript{20} Milton, who published his essay in direct violation of the Licensing Order of 1643, argued that Parliament had no right to censor English citizens.\textsuperscript{21} He believed the search for truth demanded the freedom to consider both sides of an issue, famously stating, 

\textsuperscript{14} See Boynton, supra note 2.
\textsuperscript{15} Boynton, supra note 2.
\textsuperscript{17} E.g., K. Fogel, The Surprising History of Copyright and the Promise of a Post-Copyright World, QUESTIONCOPYRIGHT.ORG, available at http://questioncopyright.org/promise (last visited June 2, 2011).
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
“Give me the liberty to know, to utter, and to argue freely according to conscience, above all other liberties.”

In 1709, Parliament acted on the growing popularity of Milton’s ideas for freedom of expression and simultaneously ceded to the authors’ demands for a more substantial property right in their work by passing the Statute of Anne. Which declared by its full title to be “An Act for the Encouragement of Learning,” and was subsequently the world’s first set of codified copyright laws? The Statute blazed the trail for the next two centuries of copyright by abolishing the older system of bookseller censorship and granting a fourteen-year term of legal protection to authors. Perhaps most importantly, it also ended the system of booksellers’ perpetual ownership of literature by creating the world’s first public domain.

“History, as we know, is apt to repeat itself.” Viewed through the clarity of a historical lens, today’s fierce copyright battles are simply the newest theater of a war consuming two continents and nearly three centuries. In the decades following the promulgation of the Statute of Anne, copyright owners’ rights inevitably began to expire. The booksellers fought the ending of copyright protection with a series of protracted lawsuits, attempting to assert that the Statute of Anne only supplemented preexisting common law rights that acted to prolong the copyright term indefinitely. The booksellers faced strenuous opposition from the public however, as is shown by the text of a popular pamphlet written in 1735, which stated the case in timeless terms:


23. Fogel, supra note 17.

24. Fogel, supra note 17.

25. If the author was alive at the end of the fourteen-year term, he was granted an additional fourteen years of copyright protection. Books published prior to the Statute of Anne were granted a single twenty-one year term beginning in 1710. See Fogel, supra note 17.


27. GEORGE ELIOT, SCENES OF CLERICAL LIFE, 186 (1858).


29. The booksellers purported to sue in the name of authors’ rights, although according to law professor Raymond Patterson, “The publishers . . . had as much concern for authors as a cattle rancher has for cattle.” LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY, 90 (2005).

30. Id.
I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire . . . it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to Authors, but a general Tax on the Public; and all this only to increase the private Gain of Booksellers.31

Through multiple rulings spanning over two decades, culminating in *Donaldson v. Beckett*, the courts ultimately established that the Lords had intended to completely replace the old common law rule by explicitly creating a fourteen-year term of protection.32 These decisions ushered in a new era of shared literacy for the English, where prices fell dramatically and publishers made the classics readily available to the people.33 The dominion of the public domain had begun, but its vitality would soon prove to be short-lived.

B. Copyright Law in the New World

In the midst of the copyright revolution taking place in England, the young and largely agrarian American colonies were content to leave the formulation of copyright law as a low priority.34 However, although the Statute of Anne did not apply in English colonies, it proved to be highly influential, as it was in keeping with the colonists’ anti-monopoly tendencies.35 Prior to 1783, three states passed copyright laws with the term ranging from five to seven years.36 During this time, several authors petitioned the Continental Congress to pass a more uniform law to protect their interests.37 The Continental Congress agreed with the idea in spirit, but under the Articles of Confederation it did not have the power to issue copyrights.38 Instead, the Continental Congress passed a resolution urging the states “to secure to the authors or publishers of any new books . . . the copyright of such books for a

33. *Id.*
37. *Id.*
38. *Id.*
certain time not less than fourteen years from the first publication."

As written in the Constitution, the Copyright Clause was intended to serve a very different and much more limited purpose than today’s copyright law. In submitting their proposal for the Copyright Clause to the Constitutional Convention, James Madison and Charles Pinckney endured great pains to ensure that the scope of copyright was well defined. While the stated goal of copyright law shifted during the centuries preceding the Constitution, at its inception, American copyright law was intended to act merely as a conflict resolution mechanism. The Framers desired copyright protection to balance the need to keep book revenues high enough to secure adequate production, while maintaining book prices low enough to ensure widespread dissemination of written materials. Furthermore, the wording of the Copyright Clause in the Constitution, though simple, evokes an understanding that in order to “promote the progress of science and useful arts,” the ending of copyright protection was just as important as the protection itself. Thomas Jefferson intended copyright protection to provide just enough incentive to create and nothing more. He believed that an individual’s idea was his exclusive possession, as long as he kept it quiet, but “the moment it is divulged, it forces itself into the possession of everyone.”

This principle of the public domain was important to the first Congress, and was reflected in the passage of the Copyright Act of 1790. Closely mirroring the Statute of Anne, it granted protection for a term of fourteen years from the time of creation, with the right to renew for an additional fourteen years. In the spirit of America’s status as a young and rebellious nation, the Act granted protection only to authors of American citizenship, thus robbing their British counterparts of substantial profits and allowing cheap access to a multitude of popular literature from overseas. One notable difference between the Copyright Act of 1790 and our current conception of copyright law

39. Id.
40. Id. at 143.
41. Yu, supra note 37, at 143.
42. Breyer, supra note 5, at 282.
43. Breyer, supra note 5, at 282.
45. Boynton, supra note 2.
46. Boynton, supra note 2.
47. Yu, supra note 3736, at 143.
is that the renewal right was originally vested in the author alone and could not be conveyed.49 This concept of limited renewal reflected the Congressional Congress' view that authors should receive the benefit of their work if, and only if, they would personally benefit.50 Unfortunately, modern copyright law has strayed far from this guiding principle.

Congress amended the copyright term for the first time by passing the Copyright Act of 1831, which Senator Daniel Webster pushed through Congress on behalf of his equally famous cousin, Noah Webster.51 Best known for his contribution to American education and the dictionary, Noah was also a prolific author, who stood to gain substantially from the extra copyright protection.52 This amendment changed the first term of protection from fourteen to twenty-eight years, while leaving the term for the option to renew untouched at fourteen years.53 Apparently, there was very little debate over the passage of this bill, no doubt due in large part to the fame and prestige held by both Websters.54 The Copyright Act of 1909 changed the law yet again, and with equally little fuss, by lengthening the term of the renewal period to 28 years, matching the length of the initial term.55

During this time, there was heavy pressure on the United States to become a signatory to the Berne Convention, an international copyright treaty established in 1886, which was already joined by many developed nations.56 However, Congress was unwilling to sign the treaty for many years because of the wide chasm in policy goals and requirements between the American copyright system and the Berne Convention.57 The Berne Convention was unprecedented in the depth and breadth of its copyright regulations.58 At the insistence of famous authors, such as Victor Hugo, the Convention was established for the purpose of establishing worldwide recognition of foreign

49. Yu, supra note 3736, at 143.
50. Yu, supra note 3736, at 143.
52. Id.
53. WILLIAM PATRY, PATRY ON COPYRIGHT § 1:23 (2009).
57. Id.
58. Id.
copyrights for the first time.\textsuperscript{59} It was developed out of the French concept of "right of the author," which stood in stark contrast to the role of copyright favored by the English and American systems as a purely economic solution.\textsuperscript{60} The Convention heavily emphasized the moral component of copyright protection and mandated that the term of protection last at least fifty years after the life of the author.\textsuperscript{61} Furthermore, it required that copyright be granted automatically as opposed to requiring registration with a governing body.\textsuperscript{62}

On the other hand, the American copyright system was based on the idea that an author could reap the benefits of his work only during his lifetime, after which the work should disseminate into the public domain.\textsuperscript{63} Furthermore, U.S. copyright required that an author affirmatively state his intent to claim the copyright for his work at the time of publication through registration as opposed to receiving automatic protection for all work, published or unpublished.\textsuperscript{64} Rather than sacrifice its ideals, Congress instead chose to ratify the Universal Copyright Convention in 1954 and again in 1971.\textsuperscript{65} Although not as widespread as the Berne Convention, this treaty allowed the U.S. to keep its current copyright system unchanged, while allowing some limited international cooperation.\textsuperscript{66}

C. The New Age of Copyright Law

When Congress passed the Copyright Act of 1976, it effectuated a complete revision of the policy goals and scope of copyright in the United States and laid the foundation for our current laws.\textsuperscript{67} Under the new Act, the copyright term was measured by the life of the author plus fifty years, or seventy-five years for works of unknown authorship.\textsuperscript{68} Moreover, it granted an automatic copyright to works falling under the Act, rather than requiring artists to


\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} \textit{International Copyright}, supra note 57.

\textsuperscript{64} \textit{International Copyright}, supra note 57.


\textsuperscript{66} Id.


\textsuperscript{68} Id.
register their works with the Copyright Office.\textsuperscript{69} Congress, having formed a committee decades earlier to study the problem, claimed to have taken into account the enormous advances achieved in media since the last major update in 1909.\textsuperscript{70} Curiously, this major shift in American intellectual property law almost went unnoticed at the time. Only, one news article appeared in the New York Times, and the vast majority of scholarly discussion appeared solely in publishers' and librarians' journals.\textsuperscript{71}

The Copyright Act of 1976 codified what had essentially been the common law doctrine up until that point by clearly stating the five exclusive rights of copyright owners: the right to reproduce, create derivative works, sell or lease, perform, and display.\textsuperscript{72} Furthermore, for the first time, the Act codified the fair use defense to copyright infringement, the exception to the exclusive right granted by copyright law, whereby copyrighted material may be used without infringing the author's rights.\textsuperscript{73} Congress embodied fair use in four governing considerations: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the original work used, and (4) the effect of the use upon the market.\textsuperscript{74} By clearly stating the new components of copyright doctrine, Congress hoped to streamline this field of law, while benefitting authors and creators over that of publishers.\textsuperscript{75}

However, it was no mere accident that the Copyright Act of 1976 met the minimum standards enabling the U.S. to become a signatory member of the Berne Convention.\textsuperscript{76} Since the turn of the century, the U.S. had evolved from a nation of copyright pirates to the home of the most valuable copyrights in the world.\textsuperscript{77} Only by accepting the Berne Convention could American copyrights be assured international protection.\textsuperscript{78} Thus, with powerful lobbies backed by media conglomerates demanding legislative action, Congress finally yielded and passed the Berne Convention Implementation Act of 1988.\textsuperscript{79} After over a century of defiance in the face of international pres-

\textsuperscript{69}. Id.


\textsuperscript{71}. Id.


\textsuperscript{73}. Id. at § 107.

\textsuperscript{74}. Id.

\textsuperscript{75}. Id.

\textsuperscript{76}. See, e.g., International Copyright, supra note 57.

\textsuperscript{77}. Id.

\textsuperscript{78}. Id.

\textsuperscript{79}. Id.
sure, the U.S. finally "updated" its copyright law to a standard written two years before the first silent movie was made.80

III. CURRENT STATE OF AMERICAN COPYRIGHT LAW

A. The Battle Over Copyright Duration

For copyright owners in the U.S., the battle was not yet won. Media conglomerates began pushing for an even longer term of protection, as a large number of their copyrights threatened to enter the public domain.81 Leading the charge was the Walt Disney Company, who invested heavily in the lobbying effort to get new legislation passed.82 Disney, desiring to protect its iconic early work for as long as possible, knew it would be well worth the cost if its efforts succeeded.83 Representative Sonny Bono, whose past musical success had left him with numerous-valuable copyrights in his possession, was the most notable of the twelve sponsors of the bill.84 Bono, reportedly a proponent of an infinite copyright term, zealously promoted a House bill that would authorize a mere twenty-year increase to the term of copyright protection.85 Sadly, Bono died shortly before the passing of an alternate bill, the Copyright Term Extension Act (CTEA) of 1998, which was named the Sonny Bono Act in his honor.86

Some of the largest corporations in the U.S. endorsed the CTEA, which was no surprise considering the staggering amount of potential licensing fees at issue.87 Proponents of the CTEA also cited many benefits of extending copyright protection aside from the obvious self-interest. Lobbyists argued that copyright duration should be lengthened because general lifespan expec-

80. Id.
81. See PATRY, supra note 54.
83. The original copyrights for Mickey Mouse and many other Disney characters were set to expire in the early 2000s. Indeed, some critics have noted "copyright law has become equal to the life of Mickey Mouse." See, e.g., Mike Masnick, Copyright Length And The Life Of Mickey Mouse, TECHDIRT (Aug. 11, 2009), available at http://www.techdirt.com/articles/20090811/0123105835.shtml.
84. Sprigman, supra note 82.
86. Sprigman, supra note 82.
tancy had increased significantly since the original Copyright Act of 1790. Additionally, they argued that U.S. copyright should keep pace with European copyright, which had recently increased to a seventy-year term in many countries. Furthermore, lobbyists claimed there was a certain class of long-term, large investment works that would only be incentivized by a seventy-year copyright term.

Proponents of the CTEA rejected the idea that Congress did not have the constitutional authority to lengthen copyright law, claiming the language of the Copyright Clause did not create a substantive limitation; instead, it merely required that the copyright term last for some finite term. Likewise, they rejected the idea that lengthening the copyright term would infringe the value of the public domain, since for the first time the CTEA would allow unpublished works to go into the public domain. In addition, proponents of the CTEA cited specific instances in which society was better served by keeping a work out of the public domain. Such an example is when the film *It's a Wonderful Life* repeatedly aired in various low quality versions until the copyright was enforced and a higher quality version was produced to much critical acclaim.

However, unlike past copyright bills, vigorous opposition appeared during the buildup to the CTEA. Under law professor Dennis S. Karjala’s leadership, this opposing movement spoke out against the CTEA, and for the first time attempted to educate the populace on the impact of copyright law. The opponents castigated the CTEA as a blatant act of corporate welfare, demonstrating Congress’s tendency to be swayed by powerful lobbying groups. In contrast to Representative Bono’s claims, the opponents claimed the CTEA was unconstitutional for a variety of reasons. They argued the CTEA introduced the possibility of increasing the copyright term without limit, thereby preventing works from entering the public domain, an action clearly contrary to the intention of the Copyright Clause. Additionally, they argued that because it was not “necessary and proper” legislation to

88. *Id.* at 288.
89. *Id.* at 290–91.
90. *Id.* at 296–97.
91. *Id.* at 297–98.
95. *Id.*
96. *Id.* at 20–21.
97. *Id.* at 8.
accomplish the Copyright Clause’s stated purpose, the CTEA was outside the bounds of Congressional authority.98

Opponents of the CTEA also contended that few copyright holders benefitted substantially from copyright ownership after the first years following creation.99 Thus, the only copyright holders with an economic incentive to extend copyright protection, and summarily benefit substantially are large corporate entities with a collection of highly successful past creations, such as Disney.100 The opponents countered the proponents’ suggestion that new works needed a longer term in order to incentivize their creation by noting that the patent term of twenty years remained unchanged, but still afforded enough protection for inventors to incentivize an enormous amount of creative energy in the U.S. patent field.101 Moreover, they argued that while life expectancy had risen to almost double that of 1790, the copyright term had more than tripled already.102 Further, rather than incentivize new creation, a longer copyright term would actually discourage new work in the arts and sciences by limiting material available in the public domain.103 Additionally, this problem would be compounded by requiring an artist to track down the owner of a copyright, who might be over a century old or risk being sued.104

Members of organizations, such as the National Restaurant Association and the National Licensed Beverage Association in particular, were apprehensive about the passage of the CTEA, since it would lengthen the duration of the stringent licensing standards dealing with playing copyrighted music in their establishments.105 In writing the initial draft of the CTEA, established music licensing groups, such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) claimed they were owed the requisite licensing fee every time one of their songs was played in public, in light of the benefits establishments received.106 At the time, it was common practice for ASCAP and BMI to send agents into the field actively looking for infringing parties to sue as a source of income.107 In spite of the fierce opposition by the two copyright powerhouses however, the House ultimately amended the CTEA to include the Fairness in Music

98. Id. at 10.
99. Karjala, supra note 95, at 23.
100. Karjala, supra note 95, at 23.
101. Karjala, supra note 95, at 10.
103. Karjala, supra note 95, at 12.
104. Karjala, supra note 95, at 12–13.
105. Patry, supra note 54.
106. Patry, supra note 54.
107. Patry, supra note 54.
Licensing Act of 1998, which exempted the need for licensing fees in certain types of establishments, forever dooming jukeboxes to obscurity. In fact, the increase was only brought up by Representative Sensenbrenner of Wisconsin, who noted that it would provide "a very generous windfall to the entertainment industry by extending the term of copyright for an additional twenty years." Ultimately, both the House and the Senate passed the CTEA with a voice vote, implying that there was very little opposition to the bill.

According to Congress, it passed the CTEA for two main reasons. First, U.S. copyright must be extended because it is "one of our most significant trade surpluses." Second, Congress felt it had to balance out the U.S. copyright term with that of its European counterparts. Representative Coble also noted that consumers would benefit by the extended term, since copyrighted works tend to "attract investors who can exploit the work for profit."

However, the battle over the CTEA had not yet run its course. With the promulgation of the CTEA, copyright protection for works published prior to 1978 retroactively increased by twenty years, totaling ninety-five years from their date of publication. This left internet entrepreneurs, such as Eric Eldred, whose livelihood depended on the public domain usage of formerly copyrighted material, without recourse other than exorbitant licensing fees.

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108. See id. Ironically, while Representative Bono did not support this amendment to the CTEA, he had been spurred into politics in the 1980s by the legal pitfalls he ran into while trying to start a restaurant. Sonny Bono—Biography, Yahoo! Movies available at http://movies.yahoo.com/movie/contributor/1800057596/bio (last visited June 2, 2011).


112. Karjala, supra note 110.

113. Karjala, supra note 110.

114. Karjala, supra note 110.

115. Karjala, supra note 110.


117. Eldred, 537 U.S. at 186.
Eldred’s publishing business depended on certain works entering the public domain in 1998. Following the passage of the CTEA, however, those works would now be withheld from the public domain until 2018. Joined by both commercial and noncommercial parties, who relied on new public domain material, Eldred filed suit against the government claiming the CTEA was unconstitutional. Eldred’s arguments claimed that: (1) Congress had violated the “limited times” formulation of the Copyright Clause by retroactively extending copyright terms, (2) any copyright law must be subject to scrutiny under the First Amendment to ensure a proper balance between free speech and copyright interests, and (3) the doctrine of public trust requires the government to show public benefit when transferring public property to private parties, even in the case of future public property.

The district court opinion, issued by Judge June Green in 1999, summarily rejected all of Eldred’s arguments, agreeing with the government’s position that Congress had the power to extend the terms as long as it wished, provided the terms were of finite duration. The court found that in light of its interpretation of Harper and Row Publishers, Inc. v. Nation Enterprises, First Amendment scrutiny should not apply to copyright cases, and similarly, that the concept of public trust was inapplicable to copyright.

Eldred appealed the district court decision to the D.C. Circuit, dropping his public trust argument in favor of strengthening his argument that retroactively extending copyright terms does not “promote the Progress of Science and useful Arts.” Eldred argued that such “grandfather” laws do not serve the quid pro quo formulation inherently required by intellectual property rights. Once again, the court rejected Eldred’s arguments. However, a strongly worded dissenting opinion by Judge David Sentelle agreed with Eldred that the CTEA was unconstitutional because it violated the “limited times” requirement of the Copyright Clause. Judge Sentelle wrote that Supreme Court precedent requires a defined outer limit to congressional power, and if the CTEA is not unconstitutional, then theoretically Congress

118. Id.
119. Id.
120. Id.
121. Id.
122. Eldred, 537 U.S. at 186.
123. Id.
124. Id. at 186–187.
125. Id. at 187.
126. Id.
127. Eldred, 537 U.S. at 198.
could continue to retroactively extend the copyright term for past works without limit.\footnote{128}

Eldred filed a final appeal to the Supreme Court, which heard his case in 2002.\footnote{129} In light of Judge Sentelle’s dissent and several recent Supreme Court opinions, Eldred reshaped his argument, emphasizing that the Court had held past statutes unconstitutional for exceeding the limits of Congressional power, and since the wording of the Copyright Clause was expressly limited, it was no exception.\footnote{130}

However, the Court disagreed with Eldred’s premise and ruled 7–2 that the CTEA was constitutional.\footnote{131} In the opinion written by Justice Ginsberg, the Court found that there was precedent for allowing the retroactive extension of copyright duration based on the Copyright Acts of 1790, 1831, 1909, and 1976.\footnote{132} The Court held that while the Constitution expressly required copyright duration be for a limited time, as long as that limit was not “forever,” then any limit approved by Congress was constitutional.\footnote{133} The Court also took into account that both the Copyright Act of 1976 and the CTEA had been passed with the intention of matching existing copyright law in Europe to avoid losing substantial royalties for American companies.\footnote{134} The Court refused to contemplate Eldred’s argument that copyright law must be balanced with First Amendment free speech standards.\footnote{135}

Justice Breyer, a well-known copyright professor and scholar before his career as a jurist, wrote a powerful dissenting opinion.\footnote{136} He examined the historical record and showed that from the beginning, copyright had been intended to serve the public interest rather than private.\footnote{137} Breyer argued the CTEA effectively created perpetual copyright protection, which severely undermines the public interest.\footnote{138} He pointed out that an artist is highly unlikely to be more inclined to create a new work because he knows that his grandchildren will receive royalties.\footnote{139} Breyer rejected the government’s contention that royalties received by artists allow them to produce more

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\begin{itemize}
  \item \footnote{128}{Id.}
  \item \footnote{129}{Id. at 186.}
  \item \footnote{130}{Id. at 189.}
  \item \footnote{131}{Id. at 198.}
  \item \footnote{132}{Eldred, 537 U.S. at 204.}
  \item \footnote{133}{Id.}
  \item \footnote{134}{Id. at 205–206.}
  \item \footnote{135}{Id. at 218–19.}
  \item \footnote{136}{Id. at 242.}
  \item \footnote{137}{Eldred, 537 U.S. at 247.}
  \item \footnote{138}{Id. at 243.}
  \item \footnote{139}{Id. at 255.}
\end{itemize}
work, asking, “How will extension help today’s Noah Webster create new works 50 years after his death?”

B. Criminalizing Piracy with the DMCA

Created in 1967, the World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations, whose task is “to encourage creative activity, to promote the protection of intellectual property throughout the world.” WIPO is largely self-funded through the hundreds of millions of dollars in fees that it collects every year through its global IP application and registration systems. Since its establishment, WIPO follows its mandate by writing treaties relating to IP policy that member nations can subsequently agree to sign. Unfortunately, WIPO has long been perceived as another victim of the persisting problem of what some parties perceive as undue influence within the UN, particularly as it relates to the heavily criticized North-South divide. Because of this perception, the U.S. and other developed countries avoided working with WIPO for many years after its creation. However, after much debate, the U.S. bowed to international pressure, choosing to sign and implement two new treaties written by WIPO in 1996. Congress passed its method of enforcement in 1998 with the promulgation of the Digital Millennium Copyright Act (DMCA).

140. Id.


144. Member states in the UN all receive one vote regardless of their real-world influence or level of industrialization, which has led to sharply contrasting policy goals between the richer “Northern” states above the equator and the poorer “Southern” states below. See Shravanti Reddy, Watchdog Organization Struggles to Decrease U.N. Bureaucracy, GLOBAL POLICY FORUM (Oct. 29, 2002), available at http://www.globalpolicy.org/component/content/article/177/31843.html.

145. Id.


147. Id.
Congress intended the DMCA to serve as a solution to perceived rampant copyright infringement, or "piracy," taking place on the Internet.\textsuperscript{148} More specifically, it established a series of new legal rules and associated penalties that were unprecedented in the history of copyright.\textsuperscript{149} The DMCA contained an "anti-circumvention rule," which criminalized the circumvention or defeat of technological measures that limit unauthorized access to copyrighted works, whether or not infringement of the copyright actually occurs.\textsuperscript{150} Also, it created an even broader "anti-trafficking rule," which prohibits trafficking in and providing means to defeat such technological access-control measures, including criminal penalties for a violation of the rule.\textsuperscript{151} In addition, and more broadly still, the DMCA contained a second anti-trafficking provision, prohibiting trafficking in technological measures that control the uses of copyrighted works.\textsuperscript{152}

The DMCA heightened the penalties associated with copyright infringement on the Internet, while simultaneously including a "safe harbor" provision at the fervent behest of Internet Service Providers (ISPs) across the country.\textsuperscript{153} Intended to protect ISPs from charges of secondary copyright infringement, the provision protects ISPs from suit if they immediately remove or block any content purported to be infringing.\textsuperscript{154} Although it arguably succeeded in preempting costly litigation, this new "notice and takedown" regime has not been bloodless. Copyright holders, who naturally would prefer to have absolute veto power when it comes to online content, have faced off in court against parties determined to defend their First Amendment free speech rights in several high profile cases.

C. The Fight Against "Piracy"

With the widespread adoption of the Internet, particularly among college campuses, a new phenomenon called peer-to-peer ("P2P") networks quickly rose in popularity.\textsuperscript{155} These P2P networks allowed users with little


\textsuperscript{149} Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2010).

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Id.

\textsuperscript{153} Copyright Infringement and Remedies, 17 U.S.C. § 512 (2010).

\textsuperscript{154} Id.

\textsuperscript{155} Antionette D. Bishop, \textit{Illegal P2P File Sharing on College Campuses—What’s the Solution?}, 10 \textsc{Vand. J. Ent. & Tech.} L. 515, 516 (Campus P2P network popularity was in part based on the fact that campus intranets allowed for very high bandwidth, or download speeds, several years prior to widespread cable internet access.).
expertise to share digital files rapidly with perfect reproducibility. However, copyright holders, emboldened by the powerful new weapons granted by the DMCA, took the battle to service providers and users like never before. The early 2000s saw a string of hundreds of lawsuits against individual file sharers, a phenomenon unheard of before the passing of the DMCA. Organizations such as the RIAA issued dozens of suits at a time against individuals, often times college-aged or younger, for millions of dollars apiece. The RIAA's strategy was identical each time. It would order the ISP to reveal the infringing subscriber's IP address. Then it would send a demand letter offering to settle the case for the statutory minimum of $750 per infringed copyright. If the user failed to settle, the RIAA would file suit against the user for up to $150,000 per infringed copyright. Although few of the RIAA-"pirate" cases went to trial, those few resulted in verdicts for the RIAA with surprisingly high damages.

However, as time passed and the legal fees climbed higher, the RIAA realized that this enforcement method was losing money. It was also losing the respect of the public, who castigated the RIAA for arbitrarily slapping alleged infringers with suits that they did not have the resources to defend for behavior identical to that indulged in by millions every day. In late 2008, the RIAA announced they would cease filing lawsuits against individuals and

156. Id.
161. Id.
164. Id.
instead target the creators of file sharing programs such as P2P networks. Most recently, the RIAA filed suit against LimeWire, a popular P2P network, for vicarious copyright infringement. LimeWire’s defense followed the line of reasoning of the famous VCR case, Sony Corp. v. Universal Studios, Inc., in that it raised substantial non-infringing uses. However, LimeWire lost this suit in 2010 and eventually settled the next year.

Although criminal charges exist under the DMCA, it is still an extremely rare event with the RIAA has yet to bring them in court. However, Adobe Systems, the multibillion dollar software company, was not so reluctant when it decided to issue a complaint against Dmitry Sklyarov in 2001. Sklyarov was a Russian programmer employed by the Russian company ElcomSoft, which created a software program enabling users to regain lost passwords for their e-book files. Shortly after giving a presentation at a trade show in Las Vegas, the FBI arrested Sklyarov and took him into federal custody on suspicion of violating the DMCA provision prohibiting distribution of a product designed to circumvent copyright protection measures. Sklyarov’s was one of the first and most widely publicized criminal copyright infringement cases in the U.S., and as such it received widespread media attention. After considerable efforts by various groups on the Internet in support of his release, Adobe finally dropped all charges against Sklyarov in exchange for his testimony. Despite the outcome, this episode served to

165. Id.; The RIAA Has Stopped Filing Lawsuits . . . Only They Haven’t Quite, and They’re Not Going to Stop Just Yet, Either, ANDY ON THE ROAD (Dec. 25, 2008), http://andyontheroad.wordpress.com/2008/12/25/the-riaa-has-stopped-filing-lawsuits%E2%80%A6%C2%A0only-they-havent-quite-and-theyre-not-going-to-stop-either/.


167. Sony Corp. of Am. v. Universal City Studios, 104 S. Ct. 774 (1984). In this context, non-infringing uses means the sharing of uncopyrighted files. While LimeWire admitted that a majority of the files shared by users were copyrighted, it argued that a substantial fraction of the file sharing was not copyrighted content. Id. at 516.


170. Id.

171. Id.

show the public just how swiftly the DMCA’s version of justice could be implemented.

D. The Google Era

In many ways, Google represents the new digital era in which we find ourselves. Its highly successful business model enabled it toboom from a small startup to a multibillion dollar company with tens of thousands of employees in less than a decade. Google’s business model is dependent on the idea that the vast majority of all information will one day exist on the Internet. Its stated goal is to organize all the world’s information, and by organizing it, it will thus add value. This is no small feat, as the amount of new information created every year is increasing exponentially. However, this same business model, driven primarily by Google’s unprecedented Internet search capabilities, has skirted the edge of copyright law and beyond—at least according to copyright holders. Google’s cases are illustrative, not for their specific impact on the question of optimal copyright duration, but rather for exploring the more fundamental idea that the nature of copyright has changed with the onset of the digital age while the law has remained stagnant or even regressed. Furthermore, the Google cases offer an enlightening comparison as to how existing law is applied to large corporations versus individual users.

Perfect 10, an adult men’s magazine, filed suit against Google in 2004 for two counts of direct copyright infringement. The main issue at trial was whether Google’s creation and use of thumbnail images in its image search feature qualified as copyright infringement. The district court applied the four-part fair use test and ruled that Google indeed infringed on Perfect 10’s copyright because its usage was commercial in nature and it overlapped with a preexisting Perfect 10 market—selling thumbnail images


175. Id.; Google’s Mission is to Organize the World’s Information and Make it Universally Accessible and Useful, GOOGLE, http://www.google.com/about/company/ (last visited Mar. 28, 2012).

176. See, e.g., RAY KURZWEIL, THE SINGULARITY IS NEAR 10 (2005). (This idea is exemplified by Moore’s Law, which posits that computing power doubles every two years. Ray Kurzweil further argues that nearly human progress is increasing exponentially rather than linearly, including information production.).


178. Id.
for use on cell phones. Google appealed the case and the resulting injunction to the Ninth Circuit, arguing in part, that the thumbnails fell under the fair use defense. The court agreed with Google, overturning the district court by finding that the thumbnails were highly transformative, offering much greater functionality than the original image. The court also observed that Google's image search offered a highly valuable service to the public, "which should not be jeopardized just because it might be used in a way that could affect somebody's sales."

More recently, in 2007, Viacom brought suit against YouTube, and vicariously against its owner Google, for "brazen" and "massive" copyright infringement by allowing users to upload thousands of videos of which Viacom claimed ownership. Google argued that the "safe harbor" provision of the DMCA protected it from the charges of contributory and vicarious infringement. In 2010, the court ruled in Google's favor, finding that although the company had general knowledge that users had uploaded some copyrighted material, it was unreasonable to expect it to know which clips were infringing. The court found that requiring websites to police every uploaded video "would contravene the structure and operation of the DMCA."

At first blush, the Google cases seem to indicate a shift in copyright law favoring fair use and less onerous restrictions. However, taken with the P2P cases and continuing lawsuits against individuals for infringement at what used to be the outer edge of copyright protection, the landscape of copyright law reveals an ever-changing swamp of rulings and new laws that favor media conglomerates. Rather than address the confusion, Congress is currently considering a bill that would extend copyright to fashion design. Furthermore, the

179. Id. at 843
180. Perfect 10 v. Amazon.com., 508 F.3d 1146, 1154 (9th Cir. 2007).
181. Id. at 1165.
184. Id.
185. Id. at 529.
186. Id. at 523.
187. Mike Masnick, The Many Ways In Which Fashion Copyrights Will Harm The Fashion Industry, TECHDIRT.COM (Aug. 25, 2010), http://www.techdirt.com/articles/20100823/02293810724.shtml (Experts fear that attempting to regulate the fashion industry will unnecessarily complicate the creative process and instigate expensive litigation, causing consumers to pay higher prices and driving down profits.).
executive branch has established a committee to consider how best to enforce existing copyright law—a direction that clearly favors Big Media—rather than examining its effectiveness with regard to the constitutional purpose of copyright law.188 Clearly, the ship that is U.S. copyright law is rapidly steaming ahead into unknown waters.

IV. Analysis

A. The Flawed Concept of Copyright

Originally, copyright was designed simply to incentivize authors to write. It represents one method of resolving the conflict between the need for book revenues high enough to secure adequate production and book prices low enough to encourage widespread dissemination of what is written.189 Created in an era when literacy was low and the availability of reading material was scarce at best, copyright represented the government’s effort to encourage the populace to educate themselves. The Framers understood, just as we do today, that the level of education in a society can affect everything from crime rates to gross domestic product and everything in between. Its effects, whether positive or negative, may last for generations. Thus, copyright was a compromise.

In hindsight, copyright appears to have succeeded in spurring the production of masterpieces and inspiring a more educated populace. However, that does not mean that its continued efficacy should never be questioned. Furthermore, as Justice (then professor) Breyer wrote in his influential article, The Uneasy Case for Copyright, “although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it.”190 Justice Breyer argued vigorously that copyright has always been an imperfect solution, and before we set about strengthening a wall of protection around creative works, we should diligently test the bedrock upon which it is built.

There are two basic arguments for copyright: moral (noneconomic) rights, and the economic inducement to publication.191 Moral rights are concerned with the idea that authors deserve some compensation for their hard work. The former Register of Copyrights noted that the secondary purpose of copyright is “to give authors the reward due to them for their contribution


189. Breyer, supra note 5, at 283.

190. Breyer, supra note 5, at 284.

191. Breyer, supra note 5, at 284.
to society.”192 However, it is common sense that this reward need not come in the form of some property right in their creation. Indeed, many authors and artists have contracted to assign their copyright in a work to an employer automatically, yet they require no other incentive besides their salary to create the work in the first place.

Although it may seem counterintuitive, in any organized and prospering society, few workers will ever receive salaries that approach the total value of what they produce.193 There is nothing immoral about this type of system, since consumers benefit from lower prices and society benefits from overall growth.194 Furthermore, outside the realm of copyright, it is quite uncommon for a normal salaried or hourly worker to be paid for work completed long before. Typically, an employee’s paycheck reflects the most recent period of labor, while future paychecks are based on future labor. Thus, to speak of the “fruits of one’s labor” should not automatically imply that the author deserves more compensation than his persuasion cost.195

The moral theory of copyright also encompasses the idea that creative work is an author’s property. However, intellectual property differs from real property and chattel in several important respects. Normally, property rights are assigned because it is the most efficient way to divide a limited supply, whether it is signing a lease or buying books from the bookstore. Ideas, on the other hand, are infinitely divisible and endlessly expressible. Like the air we breathe, property rights are not necessary to prevent congestion of ideas or the expressions thereof.196 This should be apparent from the sheer volume of information that we produce every year, greater than our predecessors ever dreamed and increasing exponentially every year.

If property rights in creative works are not morally justified, then they must at least be justified by the economic argument that they both incentivize the continued creation of works and satisfy consumer demand. However, this is clearly not the case. In an economic analysis, one can infer market power and the resulting inefficiency from profit margins. There are many copyright-heavy companies that have seen enormous profit over the years, but the market for textbooks is particularly instructive. Textbook authors receive a double dose of revenue since typically, they are paid by their academic institution for the time spent writing the textbook and they also receive royalties for its sale. While the market for textbooks is growing, the competition within each specific field of study is severely limited, usually comprising just a few choices. Furthermore, publishers tightly control the supply of

193. Breyer, supra note 5, at 283.
194. Breyer, supra note 5, at 286.
195. Breyer, supra note 5, at 286.
196. Breyer, supra note 5, at 289.
textbooks and are quick to cause editions, just a few years old, to go out of print in exchange for a new edition. Clearly the most efficient market solution, and the solution most favorable to the supposed goal of copyright—increasing education by the dissemination of writings—would be to sell the copyrights on older textbooks to second run publishers for sale in poorer educational systems. However, because the copyright duration can easily last over a century for new textbooks, there is no impetus to do so. Thus, textbook publishers are able to take advantage of the copyright system to their maximum benefit while schools, students, and the public are left holding the bag.

B. Advocating Copyright Extension for Private Gain

In view of the failure of the moral and economic arguments, it is difficult to remain stoic amid the seemingly blind adherence to a very old system. Without empirical proof that copyright continues to benefit society, perhaps, as Justice Breyer surmised, “the case for copyright... rests not upon proven need, but rather upon uncertainty as to what would happen if protection were ever removed.”197 Since the basic argument for copyright is weak, there ought to be a heavy burden on those who seek to extend the duration of copyright protection.198 As distinguished historian Baron Macaulay advised Parliament in 1841, copyright protection “ought not to last a day longer than is necessary for the purpose of securing the good [of increased production].”199

However, despite the loud and consistent scholarly opinions that a longer copyright term will not serve the goals of copyright, the period of protection has slowly risen from its humble beginnings of fourteen years to an average of almost a century. Such a long duration runs counter to almost every conceivable rationale for how copyrighted works ordinarily are created and managed in the real world. Only one book in a hundred is still in print after fifty-six years.200 Furthermore, with few exceptions, publishers base their publication decision on whether the work will earn a net return within only a few years.201 After the first several years of revenue stream, the only purpose of a copyright is to drive in royalties through third parties licensing the work. Yet, a vanishingly small percentage of copyrighted work is ever

197. Breyer, supra note 5, at 322.


199. Breyer, supra note 5, at 323 (citing Macaulay, Speeches on Copyright 23 (C. Gaston ed. 1914)).

200. Breyer, supra note 5, at 324.

201. Breyer, supra note 5, at 325.
licensed in the first place, and even for works that were once popular, the chance of being licensed decreases into negligibility within a few decades.\textsuperscript{202}

There are two reasons why copyright duration has steadily risen over the years and will continue to do so unless decisive action is taken. First, due to the essential group dynamics of a vocal minority, the owners of valuable copyrights are able to organize and fund extraordinary lobbying efforts to influence Congress in their favor. Most often these lobbying tactics, and the subsequent bill proposals, are not well-publicized and are merely glossed over by the public without an understanding for what is at stake. In fact, the relatively recent passage of the CTEA was the first copyright extension act that received real media attention, and it even passed through Congress without any real debate on the justification for increasing the copyright term in the first place. The majority, in this case the consuming public, is much more difficult to educate and organize due to the low likelihood of realizing substantial individual benefit from a policy change in their favor. These large groups are much more likely to be plagued by apathy, ignorance, and freeloaders. As law professors Kal Raustiala and Chris Sprigman noted, “The result is that Congress hears, loudly and often, from those who favor stronger protection [of copyrights]. Congress does not hear nearly as often from those who take the opposite view.”\textsuperscript{203} Even a comparatively large effort to stop the CTEA, led by Dennis Karjala, was thwarted not on the issue itself, but by the clever branding tactics of media conglomerates. By creating the term “piracy” and labeling those that fight the rise of copyright law as supporting piracy themselves, the copyright minority controls public perception and swings the key votes in Congress towards their cause.\textsuperscript{204}

The second reason why copyright duration has risen, and will continue to do so in the near future, is simpler to explain, but no less important: copyright holders have nothing to lose and everything to gain. For major media companies such as Disney, Viacom, and Universal Studios—owners of some of the most valuable copyrights in existence—there is an enormous incentive to keep their copyrights out of the public domain for as long as possible. Every year of continued ownership of valuable copyrights essentially amounts to free money: while those copyrights continue making money, they require no new work except the paperwork necessary to enforce the copyright.

Even owners of less-famous copyrights have no incentive to allow their work to ever go into the public domain. As long as there is still money to be made from a copyright, the copyright owner’s sole interest lies in extending

\textsuperscript{202} Since the passage of the Copyright Act of 1976, virtually every expression of an idea is copyrighted from the moment it is created, without requiring notice.

\textsuperscript{203} Mike Masnick, If Fashion Copyright Harms So Many, Why Is Congress Pushing For It? (Sep. 1, 2010), TECHDIRT.COM http://www.techdirt.com/articles/20100831/01164910828.shtml.

\textsuperscript{204} \textit{Id.}
the copyright protection for as long as possible. Indeed, many artists, such as the late Sonny Bono, have lobbied for far longer copyright protection. Bono's wife, Congresswoman Mary Bono Mack, suggested a right to copyright protection lasting "forever minus a day" in order to circumvent the Constitutional prohibition on perpetual intellectual property rights. Although the CTEA only extended the copyright duration on preexisting copyrights for about twenty years, Bono may have gotten his wish after all by helping set a precedent that allows Congress to legally increase the copyright term every time the oldest copyrights are set to expire. The hard truth of the matter is that no works copyrighted after 1923 have yet entered the public domain. Furthermore, there is a very real chance that the virtually worthless public domain may never be replenished with new material. Like clockwork, every twenty years when the same "generation" of valuable copyrights is getting ready to expire, lobbyists convince Congress to pass a new bill extending copyright duration yet again. According to this schedule, we should see a new proposal for copyright extension before 2018.

C. Why the Public Domain Matters

Of course, Big Media cannot be considered morally at fault for successfully extending U.S. copyright duration multiple times. At the end of the day, it is simply individuals trying to maximize their career by making more money for their company. However, by extending the copyright duration for every copyrightable work, Big Media and Congress have hamstrung the public domain and handicapped the way the Internet can affect our lives. In fact, with the combination of the CTEA and the more recent DMCA, the past decade has amounted to "something of an intellectual land grab, presided over by legislators and lawyers for the media industries."207

However, fearing that the continued strengthening of copyright in the name of stopping "piracy" will have disastrous consequences for society, a protest movement known as the Copy Left is gathering strength.208 The Copy Left movement, joined by scholars and activists around the country, sees the public domain as a worthwhile prize. Professor James Boyle views the public domain as a necessity for social and cultural progress as opposed to a socialist luxury. He remarks that, "our art, our culture, our science depend on this public domain every bit as much as they depend on intellectual


208. Id.
property.”

Central to the Copy Left’s purpose is the salvation of the Internet, which they view as far from achieving its true potential. The Internet has been enormously successful as a tool for interacting with media and re-engaging with culture. Through the power of the Internet, we are able to shed the “broadcasting model” of passively absorbing the programs Big Media puts in front of us. However, it should come as no surprise that as we enter an unprecedented digital era without a renewing public domain—and unprecedented access to creative works—we should see a dramatic increase in litigation, fees, and strife.

Lawrence Lessig, a professor at Stanford Law School and counsel for the plaintiff in Eldred v. Ashcroft, is attempting to change all of this. Lessig is responsible for a movement taking place on the Internet called the Creative Commons, which allows artists to use a different, less-restrictive method of protection separate from copyright law. Using the Creative Commons, the artist has the power to specify exactly what level of permission the public has to use his work. While there is room for improvement, the Creative Commons has been a resounding success both as a standalone copyright system and a social experiment. However, it cannot replace copyright law; meaningful change can only occur when Congress takes a step in a new direction.

D. The Futility and Injustice of Existing Copyright Law

Although the Google cases may seem to represent a success for the Copy Left, this view is deceptive. At this point, it would be more accurate to say that Google has certain unique standards applied to it, while the rest of the alleged “pirates” have much harsher standards. This is due, at least in part, to the vast resources that Google has at its disposal to defend itself against infringement cases, but it is also a symptom of the courts’ inability to find justice for the individual in the midst of the movers and shakers of the copyright world.

However, even Google is facing a costly legal battle in the form of its Google Books project, which aspires to collect all the world’s books into one reference source, somewhat like a library index system with a preview option. The Authors Guild and major members of the Association of American Publishers are attempting to quash Google’s project by arguing that it does not constitute a fair use. This would seem to be a highly analogous situation to the Perfect 10 case, but at an even more fundamental level.

209. Id.
210. Id.
211. Id.
212. CREATIVE COMMONS “FREQUENTLY ASKED QUESTIONS,” http://wiki.creativecommons.org/FAQ#What_are_Creative_Commons_licenses.
Google Books works identically to how its general search engine works: by combing through millions of books looking for matches in the search terms, then giving you a sneak preview of the results. Theoretically, if a court found that Google Books is a violation of copyright, then giving users a sneak preview of copyrighted website content must be considered the exact same type of violation. Indeed, some question whether Google should be able to make billions of dollars merely by organizing other people’s information without sharing the profits with the copyright holders. This answer is dependent on how the courts view Google’s transformative use of the subject matter, i.e., whether Google has added enough value to constitute a creative work on its own.214

However, Google is just a single example of how the law of copyright is currently in a large state of flux. Fundamental questions are being asked that the public should already know the answer to if they are to avoid copyright infringement. Based on the sheer amount of possible copyright infringement that happens every day and goes on without a chance of being caught and punished, it is clear that the law is not suited for the “crime.” Furthermore, it is not clear that copyright holders are actually being injured badly enough to warrant such harsh penalties. The jury is still out on the extent to which the average “pirate” harms the business of media conglomerates.215 However, one thing that nobody can disguise is that despite any recent economic downturn, the members of Big Media still rank among America’s wealthiest corporations. In light of the massive difference in power between the average consumer and Big Media—as well as the fact that Big Media practically wrote recent copyright law themselves—it may be time to consider alternatives to the existing system. Rather than attempting to continually patch up the gaps in the current law with more and more statutes written for the sole purpose of favoring the big guy over the little guy, perhaps it is time to reevaluate where we stand relative to the fundamental goal of copyright law: inspiring creativity and promoting education.

E. The Burdens of Free Speech

Copyright has the capacity to promote free speech. Although it is a mechanism of government, copyright can spur creation by underwriting a community of authors and publishers who are not beholden to the govern-

214. At the time of publication, Google is defending Google Books in lawsuits around the world. In March 2011, a district court rejected a settlement offer between Google and numerous publishing entities, claiming that the deal was too expansive and would be unfair to copyright owners. See, e.g., Patricia Hurtado & Don Jeffrey, Google, Publishers Seek More Time To Reach Book-Scan Accord (June 1, 2011), http://www.bloomberg.com/news/2011-06-01/google-publishers-discussing-options-for-book-scan-accord-lawyer-says.html.

215. Fundamentally, there is the question of whether an infringer would ever have purchased or licensed the work if infringing had not been possible.
From the very beginning, copyright has been tied to the ideas of freedom of speech and freedom of the press. The Supreme Court has asserted that the First Amendment aspires to the “widest possible dissemination of information from diverse and antagonistic sources.” Indeed, the only reason copyright law is able to coexist with the rights promised by the First Amendment is because of its traditional free speech guarantees of fair use, limited duration, and the idea that protection only extends to the tangible form.

Copyright fulfilled this function well in the days when books were among the only copyrightable works. It created order among the book publishing entities, preventing unfair competition from black market publishers by sharply delineating and limiting the scope of copyright protection. At the same time, the first Congress aimed to encourage audiences and subsequent authors to freely incorporate existing works in any manner imaginable as long as it was outside the owner’s domain. However, as intellectual property rights gradually became associated with conventional property rights and media companies became larger and more influential, copyright shifted away from its original purpose to favor copyright owners at the public’s expense.

The ability to sample, critique, and supplement previous expressions is an essential element of everyday life. Few authors or artists dare to claim that they were not influenced or inspired by another’s work. No man or woman is an oasis of creativity, living in the wilderness apart from all human contact. On the contrary, as a part of society we are constantly and irrevocably wrapped up in an infinitely complex series of stories and ideas upon which everything we know is based. As copyright scholar Jack Balkin notes, freedom of speech is our ability to “participate in culture through building on what we find in culture and innovating with it, modifying it, and turning it to our purposes.” Copyright was intended to address where we draw the line between legal and illegal usage. However, with the passing of each new law that line has moved steadily into the hands of copyright owners. Under current copyright law, an artist or user may be prevented from “effectively conveying a message, pursuing deeply held beliefs, expressing artistic inspiration, participating in a cultural tradition, or even promoting the progress of science.”

The problem of the gradual shift of copyright towards the influence of copyright owners is compounded by the nature of expression in the digital age. The freedom granted by the pervasiveness of the Internet is a powerful

216. Netanel, supra note 4.
217. Netanel, supra note 4 at 6.
218. Netanel, supra note 4 at 6.
220. Netanel, supra note 4 at 43.
221. Netanel, supra note 4 at 13.
tool, enabling a user to access an entire culture’s worth of content with the click of a mouse. It also offers the unrivaled ability to sample, remix, critique, and modify in order to create a new work and make a new statement. It is merely a byproduct of society that the best way to get a message across is often by appropriating a well-known pop culture reference—usually the copyrighted content of mass media.

F. Balancing the Interests of U.S. Copyright Law

Ironically, an optimized solution for modern day copyright law is remarkably similar to the system established by the Copyright Act of 1790. It involves going back to the core principles of the nature of copyright and a more realistic balancing of interests between copyright owners, the public and future authors. Upon application to the government by the artist or author, which could be done online, the creative work would be uploaded to a government database and a copyright and corresponding identification number would be given out for each individual creative work. Much like the current system used in managing patents, every copyrighted work in the country could be constantly tracked and updated. This would take away some of the mystery of having to constantly guess whether a work is copyrighted or not—and greatly shorten the time consuming hunt for the copyright owner—by creating a reliable system of constructive notice. In this way, it would also serve as a logical supplement to the function of the Library of Congress.

Copyright would be limited to works of a potentially digital nature, such as pictures, novels, graphics, and other documents. Works which are too “un-copyable” to submit for registration, such as statues, sculptures, fashion designs, or other inherently non-digital works, would be denied copyright registration and may not seek redress in the courts through copyright law. However, tort law is still available for cases of misrepresentation of non-copyrightable works.

The copyright duration would last for exactly ten years from either the date of publication or the date of application, whichever is first. At the end of this ten year period, the author would be free to renew the copyright for another ten year term for a substantial fee. However, this right to renew would be non-conveyable and could only be exercised by the actual living author. Following this second term, all copyrights should be extinguished and the work moves into the public domain. Thus, an artist is incentivized to create, use, and license his work to the fullest extent during his lifetime and during the twenty years of possible copyright protection if he so chooses, but he is also free to abandon the work after ten years if it fails to make money.

Under the current copyright regime, which has withheld works from ever entering the public domain by perpetually extending the copyright term,
optimizing copyright duration for the digital age

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it takes at least a century (if ever) for any work to enter the public domain. This has stifled the creativity of the public, harmed the goals of education, and contributed to an overly litigious copyright system. However, under a copyright regime optimized for the fast-paced post-digital age, the public domain would be constantly refreshed by new and therefore still meaningful material.

Similar to patent law, this new copyright system would emphasize an intent to receive copyright protection. With an up-to-date database of all copyrighted works—entirely funded by renewal fees—the public would have instant access to information regarding who owns a copyrighted work and when certain works will enter the public domain. Such a database would benefit both copyright owners, who could easily be contacted by potential licensees, and artists, who are able to avoid copyright infringement while gaining access to an endlessly renewing public domain of work.

V. Conclusion

If copyright law is to remain a viable means of encouraging education and creativity in the digital age, then changes in the law need to be made. However, unlike past amendments to copyright law, these changes should benefit society as whole and not merely copyright owners. Through case law and ever expanding statutory law, artists have lost many of the freedoms of creative expression that they once held. There are critical First Amendment free speech concerns that must be addressed by Congress, particularly in the realm of fair use and the idea/expression dichotomy. In a pattern we see echoed every day, artists and users are going to create no matter what the law says. The millions of alleged copyright infringements that occur every year attest to the fact that the current law is simply unworkable. Thus, one important step in fixing copyright law will be to create workable rules that can be consistently enforced against violators while also serving free speech considerations.

Furthermore, in refining the scope of copyright protection, it is also vital that the duration of protection be optimized for the current Internet-driven environment. Early thinkers such as Jefferson and Macauley were advocates of the “not a day more than is necessary” school of thought, while owners of valuable copyrights, such as Sonny Bono, tend to prefer extreme durations lasting past their lifetimes and, preferably, “forever minus a day.” It is not surprising that copyright owners and the public tend to have markedly different ideas for the ideal copyright duration. Due to a natural imbalance of power between these two competing interests, a balanced government-run solution is required.

Mark Twain is sometimes heralded as an early supporter for extended copyright duration. He once famously stated:

My copyrights produce to me annually a good deal more money than I have any use for. But those children of mine have use for that. I can take care of myself as long as I live. I know half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years’ extension,
because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don’t know anything and can’t do anything. So I hope Congress will extend to them that charity which they have failed to get from me.223

Although some people mistakenly take Twain seriously in this passage, most people who read it, particularly after reading Twain’s books, can sense an air of playful irony in his words. He is mocking the copyright system for completely exceeding the mark necessary to inspire creation and rewarding artists’ heirs with rights beyond all reason, thereby coddling them. Twain saw, just as Justice Breyer does today, how unlikely it is for an artist to be inspired to create by the prospect of a one-in-a-million shot of giving his grandchildren money that they did not earn and will not deserve. Just as there is no inherent injustice in an artist not receiving payment exceeding his incentive cost, there is likewise no higher purpose served by giving non-artist owners of copyrights—be they inheritors or copyright collectors—the benefit of a work created by someone else.

The amount of media and the speed at which new media is produced is increasing at an exponential rate, while the period of relevancy is decreasing. In other words, culture is accelerating, just as it has for hundreds of years. These facts, and the changes that they are sure to bring in the coming decades, make the current duration of protection unreasonable, unenforceable, unwieldy, and unrealistic. Furthermore, the currently bloated duration of copyright protection is without a “moral leg” to stand on. Changes to copyright law are necessary and morally justifiable, and that change can begin with a reevaluation of the term of copyright protection. In plotting the course for how our children and grandchildren will interact with culture in the future, it is vital that we look to the unbiased reasoning of the past for a realistic and elegant solution for the present.

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223. Ironically, the Mark Twain Foundation claims a copyright on Mark Twain’s recently published autobiography, released on the 100th anniversary of his death. According to the law, the unpublished works of authors who died before 1940 are now public domain. Mike Masnick, Is Mark Twain’s “New” Autobiography Covered By Copyright? (Oct. 22, 2010), at http://www.techdirt.com/articles/20101022/0135811534/is-mark-twain-s-new-autobiography-covered-by-copyright.shtml (last visited June 2, 2011).