

March 25, 2005

Proceedings before the US. Copyright Office
Notice of Inquiry on “Orphan Works”

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Comments of:

CREATIVE COMMONS AND SAVE THE MUSIC

SAVE THE MUSIC and CREATIVE COMMONS welcome this opportunity to provide comments to the Copyright Office, and, ultimately, to the U.S. Congress, on the problem posed by Orphan Works¹ and to submit the attached proposal.

¹ As discussed in greater detail in Part A(II) *infra*, SAVE THE MUSIC and CREATIVE COMMONS define an “Orphan Work” as any copyrighted work that is out-of-print or otherwise not commercially exploited, and where the rightsholder is difficult, after reasonable efforts, or impossible to find.

SAVE THE MUSIC, a group that wants to archive a mostly orphaned genre of music, and CREATIVE COMMONS, an organization that provides tools for copyright owners to signal what rights they reserve and what uses they approve, strongly believe the Orphan Works problem is a serious one—one that impedes productive uses of works and merits a legislative response. We believe that our experiences with Orphan Works allow us to offer relevant and useful insight into the problem the current system poses and why it cannot be solved without a change in the law. We believe that there is a workable, fair solution to this problem that may readily be implemented without threatening either the interests of copyright owners who wish to prevent use of their work, or the compliance of the United States with its treaty obligations.

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I. INTERESTS OF SAVE THE MUSIC AND CREATIVE COMMONS IN THIS PROCEEDING

A. SAVE THE MUSIC < <http://savethemusic.com/>>

1. SAVE THE MUSIC’s Mission

SAVE THE MUSIC (STM) is a project of the Internet Development Fund, a California 501(c)(3) non-profit organization dedicated to the preservation of Jewish cultural music through its digitization and placement on the Internet. Daniel and Roman Ajzen founded STM in 1998 as a result of research conducted for a high school family history project. In just seven years, STM has become the leading collector of Yiddish LP's in the world, archiving over 8,000 records. Upon receipt, STM re-masters the recordings and makes them available for streaming through its website, where it also provides historical information, lyrics, translations, sheet music, and other resources. STM complements its archivist activities with forums for current artists and a virtual

bulletin board to announce performances and recent releases. STM also occasionally sponsors concerts and other activities.

STM does not charge for access to the content on the web site and depends entirely upon donations for all its activities. STM has received donations of records, labor, and money from every continent and has volunteer representatives in nineteen cities worldwide.

2. SAVE THE MUSIC’s Experience of the Orphan Works Problem

STM repeatedly encounters problems identifying the appropriate rightsholder for many of the works it would like to make publicly available. For example, as stated, along with the recordings themselves, STM has considerable copyrighted non-audio holdings such as music sheets, lyrics, books, drawings, letters, and newspapers. Practically all of these materials were produced within the last 75 years. Many were produced by small publishers who can no longer be found and from whom clearance cannot be obtained. STM would like to use these materials to provide the background knowledge and history necessary to properly understand the music. Many of these primary sources frame the issues and context of the music far better than any explanation or description drafted by STM can and are essential to STM’s mission.

Another problem STM faces is that most of the recordings and materials it wishes to archive were produced overseas. For example, the vast majority of the musical recordings in STM’s holdings are foreign works that were published before 1970 and were free of U.S. copyrights—until the Uruguay Round Agreements Act of 1994 removed these works from the public domain and “restored” them to copyright. Many of these musical recordings were issued by small foreign labels that have since disappeared. As a result, many of these works are Orphan Works and are essentially unusable.

STM is a small organization with a very small budget for its archiving work. Because of its reliance on donations, STM does not have the financial capacity to retain an attorney to investigate the copyright history of each of its thousands of songs.² The efforts of lay volunteers are constantly stymied because many of the record companies that issued Yiddish-language recordings in the past have long since gone out of business and there is no way to determine who currently holds those copyrights. In other words, STM often faces the unenviable choice to either spend a large sum on an attorney hoping she can find the copyright owners or to forgo obtaining rights entirely, thereby exposing itself to crushing liability if it uses the work. The complexity of the process has forced STM to effectively postpone the digitalization of a large percentage of its holdings. Thus the problem of Orphan Works has hindered STM’s mission of documenting, preserving, and spreading Jewish cultural music and other materials and denies the public the benefit of the cultural value of these works.

To illustrate these points, we offer these specific examples of works that STM would like to make available, but for which it has not been able to locate the rightsholder:

- *Yiddishe Lider* – (“Yiddish Songs”). *Yiddishe Lider*, a book written in Yiddish and published in Argentina soon after the Second World War, contains first-hand accounts of life in the Nazi concentration camps. Some of these narratives are truly masterful pieces and are a testament to the indestructibility of the human spirit. STM would like to use some of the narratives to illustrate the range of emotions experienced by prisoners in the camps. However, despite STM’s best efforts, it has been unable to locate the rightsholder

² STM is submitting these comments jointly with CREATIVE COMMONS with generous and one-off *pro bono* assistance. Given the number of orphan works STM encounters and their complex and often international copyright history, it is not feasible for STM to secure *pro bono* assistance each and every time it needs to investigate the copyright history of songs it wishes to preserve.

for this work: the publishing house is defunct and STM could not locate any records indicating who, if anyone, now holds the rights to the book. As a result, STM has been unable to share its contents with the world and because of similar problems with other works from that time-period, development of the Holocaust section of STM’s website is on hold.

- *The Partisan’s Hymn*. STM would like to pair the accounts of concentration camp life in *Yiddishe Lider* with perhaps the most important Yiddish song of all time, *Zog nit Kayn Mol (Never Say or The Partisan’s Hymn)*. According to scholars, *The Partisan’s Hymn* was the anthem and rallying cry of the Jewish resistance during WWII and is an affirmation of the Jewish will to survive:

Never say that you are going on your last way
Though leaden clouds may be concealing skies of blue -
Because the hour we have hungered for is near;
And our marching steps will thunder: We are here!
Because the hour we have hungered for is near;
And our marching steps will thunder: We are here!

Even today *The Partisan’s Hymn* is played at funerals of Jewish martyrs and retains a fundamental position in Jewish culture. Sixty years after the end of WWII, at a time when the Jewish people are again facing serious threats from the rise of anti-Semitism and Islamic fundamentalism, STM believes its message of resistance, perseverance, and hope remains as important and relevant as ever.

STM envisions an entire section dedicated to this song, its performers, and its history. The proposed section will contain numerous musical versions, lyrics, music sheets, and considerable historical background. It will be the anchor of STM’s Holocaust content. As one would expect for such an important song, many different versions have been recorded over the years. Dozens of these were published overseas and are thus

subject to copyright protection under the Uruguay Round Agreements Act. In particular, STM plans to use a version sung by the Polish Army Orchestra and produced by the Lira Record Company in Poland just after the end of World War Two. STM possesses none of the accompanying materials for this record, such as the album cover or slip sheet, and consequently has very limited information with which to find the copyright owner. STM has unsuccessfully conducted Internet and library searches for additional information, and has been unable to even find another copy. Though it is possible additional copies exist in Poland, STM does not have the resources to investigate further. This record is significant because it was one of the few conciliatory efforts after the war between Jews and Poles and demonstrates the relationship between each group’s resistance efforts. But the prospect that STM will obtain clearance for this work and many others like it is not good, for in addition to the normal difficulties attendant to obtaining copyright clearance, STM now has to go through the process of identifying rightsholders in countries all over the world. The cost, both in money and time, of locating far-flung rightsholders makes pursuing clearance prohibitively expensive. Currently, only the largest and best funded organizations can even afford to attempt to track down the copyright owners; for a non-profit organization like STM, it is practically impossible.

- *Ludwig Satz Sings His Most Famous Yiddish Theatre Classics*. STM’s mission is not only to preserve Jewish music, but also to make clear its importance to today’s culture--thereby ensuring its future relevance. To this end, STM plans a section to illustrate Yiddish music’s influence on general American culture. *Ludwig Satz* is an anthology of songs from Yiddish musicals in the 1940’s, 50’s, and 60’s. Many of these songs later served as inspirations for songs in Broadway musicals and many of the writers,

composers, and singers went on to work in Broadway. By tracing the careers of those involved in *Ludwig Satz*, STM hopes to show the breadth of Yiddish culture and its relevance to wider American culture.

The Greater Recording Company published this recording in the United States in 1973; it is thus under copyright protection. However, despite STM’s best efforts, it has been unable to locate the rightsholder for this recording. After failing to find any trace of the Greater Recording Company or the rightsholder, STM attempted to find some leads in the property’s title history, but it was to no avail. STM also spoke with several performers who were active during the company’s existence to see if they had any information, but that too proved unsuccessful. At this point, STM was confronted with the choice between hiring a professional or simply not using the songs. Unfortunately, STM had no real choice but the latter. The difficulties STM has encountered in obtaining copyright clearance for this and similar works have led it to postpone development of its section on the intertwining of Yiddish and American culture.

3. The Current System Frustrates Both SAVE THE MUSIC’s Creative Vision and Copyright’s Purpose

STM is participating in this proceeding to urge the Copyright Office and Congress to amend the current system so that the organization can make these valuable and disappearing cultural resources available without fear that it will be sued. STM has experienced the difficulties posed by Orphan Works and strongly believes that a more user-friendly system must be developed. STM’s encounters with Orphan Works arise because its collection was mainly produced by small, independent recording companies. Many of them moved in and out of the marketplace quickly and did not leave clues regarding what happened to them or their copyrights. Nevertheless, works created by these companies do not lose their cultural value

simply because their owner cannot be located. The current system deprives creators and archivists like STM of the opportunity to reintroduce them to the world. With the advent of the Internet, resuscitating old songs and introducing them into popular consciousness is now possible but the complexities of the law prevent STM from sharing some of the bright lights of Jewish culture. STM would happily secure permission to use these works if it could find the owners. It is very frustrating for STM to have a specific creative vision and realizable goals yet be restrained from pursuing them by copyright rules that benefit neither the rightsholder nor the public at large. STM has learned that the current rules for Orphan Works impede its ability to share its content despite its best efforts and intentions.

B. CREATIVE COMMONS <<http://creativecommons.org>>

1. The Mission of CREATIVE COMMONS

CREATIVE COMMONS, a 501(c)(3) nonprofit based in San Francisco, offers from its website to the general public a set of technical and legal tools, free of charge, that empower creators to signal how they want their works used beyond the one-size-fits-all rules built into current copyright law, and enable users to find works where the creator has signaled that certain uses are permitted.

One tool is a suite of standardized copyright licenses that authors, artists, and publishers can use to virtually “stamp” their online works with an alternative copyright notice. In contrast to the traditional copyright notice – “(c) 2005. All rights reserved.” -- the CREATIVE COMMONS copyright notice reads “(cc) 2005. Some rights reserved.” As the language implies, the CREATIVE COMMONS form of notice is meant to draw the average Internet user’s attention to the fact that the stamped work is available on terms somewhat less restrictive than

current copyright law would otherwise impose. The notice itself contains a hyperlink that leads to a short summary of the legal terms associated with the stamped work: “Anyone is free to copy my photograph,” for example, “provided they give me credit as the artist, and provided they do not profit from their use.”³

This “human-readable” legal summary then links to a fuller, more traditional – and legally binding – copyright license, drafted by CREATIVE COMMONS and lawyers from the Silicon Valley law firms Wilson Sonsini Goodrich & Rosati and Cooley Godward LLP. The “lawyer-readable” license spells out in detail what freedoms the user enjoys and what conditions govern that use.

The CREATIVE COMMONS “Some Rights Reserved” notice also contains mark-up language that, though invisible to the human eye, acts as a *technological* notice to search technologies. This “machine-readable” version of the copyright notice, which is expressed at the source-code level of the web page, facilitates the proper functioning of CREATIVE COMMONS’ second free tool: the CC smart search engine

<<http://search.creativecommons.org>>.⁴

This engine scours the web for pages marked with the (cc) virtual stamp, indexes them, and then lists results by (1) file format type, (2) keyword, and (3) the legal freedoms and restrictions the copyright holder has associated with the work. Type “Eiffel Tower” into the

³ CREATIVE COMMONS’ tools offer creators the ability to construct a license with a range of different attributes. The main attributes are: Attribution or no Attribution, Commercial or Non-commercial Use, Sampling or No Sampling, Derivatives or No-Derivatives and Share-Alike (where the derived work is required to be licensed under the same terms as the original).

⁴ The CC search engine is available at CREATIVE COMMONS’ home page and also via a special search box in the Firefox Internet browser. Yahoo! has also recently released a customized search engine to enable users to easily locate CREATIVE COMMONS-licensed works according to their specific criteria. <<http://search.yahoo.com/cc>>

dialog box, for example, specify “image” format, and click the “noncommercial use” button, and the user sees a list of all the CREATIVE COMMONS-licensed photographs of the Eiffel Tower available under a noncommercial license.

The one-two punch of the machine-readable copyright licenses, on the one hand, and smart copyright search engines, on the other, vastly reduces unnecessary transaction costs between producers who want to share some uses of their content and consumers looking for royalty-free content and who are willing to accept certain restrictions on their use.

CREATIVE COMMONS’ marking and searching technologies have unearthed an unmet demand far larger than even the organization anticipated. CREATIVE COMMONS first made the CC licenses available in December of 2002. One year later, there were over 1 million web pages carrying the “(cc) Some Rights Reserved” notice and license, according to a Yahoo! link-back search. Today, there are over 10 million web pages under the CC licenses. What this shows is that a large number of creators do not believe that the restrictions that current copyright law imposes are appropriate for their particular works. Creators that choose a CC license are signaling that something less than full-bore copyright is best for them. And this demand for “Some Rights Reserved” licenses is not limited to the United States. CREATIVE COMMONS has built an international network of lawyers in over 50 countries; today it offers the CC licenses in 12 different languages, adapted to the laws of 15 different jurisdictions. Adopters of the licenses include authors and producers as varied as the Massachusetts Institute of Technology, Rice University, the Public Library of Science, Flickr.com (home to over half a million CC-licensed photographs), musicians David Byrne and the Beastie Boys, Brazilian Minister of Culture Gilberto Gil, filmmaker Robert Greenwald, federal appeals court judge Richard Posner, and more.

2. The Success of CREATIVE COMMONS Suggests a Solution to the Orphan Works Problem

Creative Commons is participating in this proceeding to urge the Copyright Office and Congress to act to fix the Orphan Works problem, because its experience suggests that a market solution is not sufficient to solve this problem. The most significant lesson arising thus far from the experience of CREATIVE COMMONS is that clear author signaling about rights – what rights an author wishes to reserve, and what uses an author is willing to allow – lends valuable assistance to copyright’s overarching objective of encouraging the creation and dissemination of copyrighted works. Current copyright law is just like a “no trespassing” sign on land – a user must assume that she cannot use a work unless she first obtains the owner’s express permission. But for many works, the cost of seeking permission for each individual use will prevent desired uses altogether. CC licenses allow authors to provide information to the public that is the copyright equivalent of a sign on real property allowing certain uses – a sign, for example, that says “welcome to our store between the hours of 8 a.m. and 5 p.m.” Thus, authors who wish to allow certain uses may effectively communicate their desires to would-be users using a CC license.

This is the model for a solution for Orphan Works – a solution that facilitates clear signaling that some uses are permitted or that the copyright owner no longer cares what use is made. However, the private, author-driven approach taken by CREATIVE COMMONS cannot be used directly to solve the problem of Orphan Works. The CREATIVE COMMONS approach depends upon the existence of an active rightsholder – i.e., someone who is motivated to invest in educating herself about the “Some Rights Reserved” approach, and to utilize a CC license for her work. By their very nature, Orphan Works lack an active rightsholder. For many works that have never been, or are no longer, commercially exploited, rightsholders are not sufficiently

motivated or no longer exist⁵ to educate themselves about and use a CC license. In addition, many rightsholders of Orphan Works lack the motivation to comply with the voluntary registration provisions of current copyright law. As a result, would-be users of Orphan Works often face insurmountable difficulties in identifying rightsholders and seeking permission, and CC’s licensing model does not solve this problem.

Although CREATIVE COMMONS licenses cannot solve the problem of Orphan Works, the organization believes they do point to a solution. The problem with Orphan Works is that potential users cannot determine if a rightsholder who cannot be found is one who has abandoned a work to any subsequent uses or one who would disapprove a potential use of the work. And the potentially high cost of miscalculation has a chilling effect on most small organizations, libraries, and archives. This chilling effect on creativity and innovation is wildly disproportionate to the benefit conferred on the very few non-active owners who would disapprove uses of their work. A set of legal rules that would oblige rightsholders to signal whether they wish to permit uses of works (in exchange for some statutorily-established compensation and access to certain other remedies) or whether they wish to retain their full set of copyrights would provide some certainty to organizations like STM. In addition, and importantly, such a tool would likely release a flood of similar information locked up by a system that does not now produce much useful information about ownership and what owners desire. CREATIVE COMMONS believes that its success in creating and deploying a private signaling tool lends significant weight to its contention that the solution to the Orphan Works problem is a *statutorily-created signaling tool* that will produce information about ownership,

⁵ Rightsholders are often impossible to find because they are corporate entities that no longer exist, as is likely in the case of the publisher of the song *Yiddishe Lider* and the Greater Recording Company that held the rights to *Ludwig Satz Sings His Most Famous Yiddish Theatre Classics*, discussed above, *supra* Part 1.A.

allow owners to express their intentions regarding their works, and enable uses of Orphan Works that are unused now. The registry proposal contained in Section III of these comments describes the changes to current copyright law that CREATIVE COMMONS believes are best suited to effectively and fairly addressing the Orphan Works problem.

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II. THE ORPHAN WORKS PROBLEM IS A SERIOUS ONE THAT MERITS A LEGISLATIVE RESPONSE

A. The Simultaneous Increase in the Scope of Copyright Protection and the Elimination of Registration and Renewal Requirements Means that Most Works are Orphan Works

An Orphan Work is—broadly speaking—any copyrighted work that is out-of-print or otherwise not commercially exploited, and where the rightsholder is hard (after reasonable efforts) or impossible to find. Under current U.S. law, those who wish to use an Orphan Work—to copy it, distribute it, perform or display it, or use it as the building block of a new work—must ask the rightsholder for permission. But the current U.S. copyright system does not keep records of copyright ownership that are complete, current, or accessible. So would-be users can’t find the owners of Orphan Works, even when they’d be willing to pay to use them. In many cases the works were abandoned because they failed to produce (or no longer produced) any income. In most cases, rightsholders, once found, are willing to have their work used, often without compensation or for a nominal royalty. But the cost of identifying rightsholders means that many desired uses are never made.

This is a serious problem for at least two reasons. First, *most copyrighted works are orphans*. Recent historical research suggests that during the 186-year period (from 1790 to 1976) where U.S. copyright law required would-be copyright owners to affirmatively claim copyright,

the authors of less than half of the works otherwise eligible for copyright bothered to register their works with the Copyright Office, or to mark published copies with copyright notice, as the law required. All of these works moved into the public domain the moment they were published. And, importantly, of the subset of works that were copyrighted in the first place, between 85 and 90% fell out of copyright early because rightsholders failed to re-register (i.e., to “renew”) their copyrights, as the law required up to 1976. So the data show that historically most works were not valuable enough for owners to provide up-to-date ownership information to facilitate use. See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 Stanford Law Review 485 (2004) (attached).

Second, *the scope of our current copyright law makes the problem worse*. Under current U.S. law, copyright arises whenever creative expression is “fixed” in a tangible medium. As the result of a series of changes to the copyright laws that began in 1976, U.S. copyright no longer requires registration, notice, or renewal—we are now living under an “unconditional” copyright system that attaches the full term of copyright to all works, whether copyright is relevant to an author’s ability to exploit a particular work or not. So everything from doodlings on a pad to the latest blockbuster movie is protected by copyright at the moment it is “fixed”, without the author being required to take any affirmative steps to protect it. All of the works that would otherwise have fallen out of copyright under the former “conditional” system—either because of failure to register or give notice, or because of failure to renew—remain in copyright for the (increasingly long) full term granted under the law. All of these works are orphans, and any filmmaker, archivist, writer, academic, musician or other person who wishes to use any such work faces the risk of copyright infringement liability. To avoid that risk, users need to find owners and ask for permission. But because the copyright system doesn’t keep ownership records, owners are often

hard to find or no longer exist and obtaining permission is therefore often prohibitively expensive or impossible.

B. The Case-by-Case Approach has Failed in Canada and Japan and Should Not Be Adopted in the United States

SAVE THE MUSIC and CREATIVE COMMONS believe that the copyright laws should be changed to make it easier for people to use Orphan Works. As described in the Copyright Office’s Notice of Inquiry,⁶ there are, broadly speaking, two possible approaches. A typical “case-by-case” approach would allow use of a particular work only after a would-be user provides evidence that he has met certain criteria in searching for the work’s owner, without result, and a panel or court finds the search “reasonable”. A “categorical” approach would set up rules that separate Orphan Works from other works, and allow use of Orphan Works without the need to ask for permission or the risk of copyright infringement lawsuits.

SAVE THE MUSIC and CREATIVE COMMONS *favor the categorical approach*. The case-by-case approach has been tried in Canada and Japan. In both those countries, persons wishing to use an Orphan Work apply to a government panel for a license. The panel determines, for each work for which use is sought, whether the would-be user has made a “reasonable” attempt to locate the owner; if the search is deemed reasonable and an owner cannot be found, the panel sets a license fee. Unfortunately, because the panel engages in case-by-case adjudication, the standards for what constitutes a “reasonable” search, and the fee set for

⁶ The Copyright Office did not mention in its NOI the Preservation of Orphan Works Act that passed the Senate last year and is again before Congress this year as part of the Family and Entertainment Act of 2005. For the sake of completeness, STM and CREATIVE COMMONS note that, in their view, this bill falls well short of providing any effective remedy for the Orphan Works problem because it only entitles libraries and archives to make copies of works consistent with Section 108 of Title 17 of the United States Code and then only within the last 20 years of the applicable term of copyright.

the license, vary. The process is time-consuming and unpredictable. As a result, it is rarely used. The Canadian system, for example, has issued only 143 licenses since 1990.

III. THE PROPOSAL

A. An Appropriate, Well-tailored Response Would Be to Establish a Registry to Signal Whether Works are Orphaned or Not

1. Proposal for Published Works

SAVE THE MUSIC and CREATIVE COMMONS recommend that Congress amend the copyright law to require that holders of copyrights in *published works* who wish to retain the full scope of remedies that current copyright law provides *register* their works within a 25-year period following publication.

All works—except for computer software—will enjoy a 25-year period of full copyright protection without the need to register. Because the economic life of computer software often is much shorter than 25 years (and is almost certain to be much shorter than the full term of copyright), rightsholders in software will be required to register their works within five years.⁷

For published works that are registered within the prescribed period, rightsholders will retain for the full term of copyright the ability to obtain injunctions and actual and statutory damages against infringers—whatever current law allows

Failure to register within a 25-year period following publication (or five years for computer software) does not vitiate copyright, but moves the work into “orphan” status. Once a work is deemed an “orphan”, it may be used without the need to ask permission, and for a nominal fee payable under a *default license* applicable to all Orphan Works. No injunctions are available against use under a default license.

⁷ The Copyright Office and Congress might wish to identify other types of works where the term for commercial exploitation is short, and set appropriate deadlines for registering the work.

It is important to emphasize that failure to register a work in the Orphan Works Registry would not remove the work’s copyright protection; it would, rather, serve as a signal that the unregistered work was an orphan, and, therefore, that the rightsholder was no longer exploiting the work through any of the channels – customized licensing, infringement damages, injunctions – that the copyright laws currently offer. Rightsholders who fail to register their works would be choosing to exploit their works through a lower-cost system of one-size-fits-all default licenses with no need to identify a rightsholder and ask permission. In this lower transaction cost environment, many uses of Orphan Works that are impossible now will be made possible.

The default license fee will be payable to an “Orphan Fund”, where owners who did not register, and who discover uses of their work after the fact may identify themselves and claim any monies paid to the fund for use of their works. Penalties should be imposed for false claims against the Orphan Fund.

A search of the registry would be enough to constitute the “reasonable” inquiry required to determine that a work is orphan – such an approach eliminates the need for judges to set standards case-by-case for a reasonable search and eliminates uncertainty for users. Registrants will be required to keep contact information current. If a registrant transfers ownership of a copyright, whether through sale, gift, or devise, the transferee will be required to re-register, or the work will move into orphan status if the person listed in the registry is unreachable, or cannot provide the current rightsholder’s contact information..

The law should also re-install a *renewal* requirement at 50 years into the copyright term. Again, the purpose of renewal would not be to vitiate copyright, but to move works in the registry for which renewal is not sought into orphan status. Non-renewed works would be usable according to the same rules for default licenses that apply to unregistered works.

The databases for registration and renewal need not be administered by the U.S. Copyright Office. The copyright registration and renewal system should be structured similarly to the Internet domain name registration system. The government’s role will be limited to establishing the legal rules and technical protocols according to which copyright registration and renewal occur. Private firms will be chartered to run competing databases, and to solicit registration and renewal information. Competition will drive down costs and complexity.

The registration and renewal requirements would apply *prospectively*. Similar requirements would also apply *retrospectively*, but would be implemented only after a period during which rightsholders of currently unregistered works would be given an opportunity to register, and thereby to retain the full scope of copyright remedies. Current rightsholders would be given a period of five years from the effective date of legislation implementing the proposal, or 25 years from publication, whichever is greater, to register their works. Works for which registration is not completed during this period would be deemed Orphan Works and would be made available for use under the default license.

2. Proposal for Unpublished Works

The registry system outlined above that applies to published works would create significant burdens if it were applied to unpublished works: it would require, for example, the author of an unpublished email to register that work if he desired to retain the full scope of copyright remedies. For that reason, a “notice” system should apply to unpublished Orphan Works.

For the works of natural authors, the notice system will only apply upon the death of the author. If a death date cannot readily be determined, the law should presume an author’s death 75 years after creation of the work in question. The notice system is limited to the works of dead

authors in recognition of the privacy interests individuals have in their own unpublished writings. Those privacy interests attenuate substantially upon the author’s death.

For the works of corporations, the notice system will apply 10 years after a work’s creation.

Authors and their heirs may retain their full rights in unpublished works (outside the notice system) by registering them any time before three years following the author’s death, or during the 10-year period applicable to corporate works. Rightsholders in unpublished but registered works will retain the full set of copyright remedies offered under current law.

For unpublished and unregistered works, a would-be user shall be entitled to make a use if he (1) confirms the death of the author (or that the date of the work’s creation is within the statutory presumption) for the works of natural authors, or the date of the work’s creation for the works of corporate authors; (2) confirms the expiration of the three-year period for registration for the works of natural authors or the 10-year period for the works of corporate authors; and (3) posts a notice of intent to use for a period of six months in a centrally-administered “Claim Your Orphan” website (such postings will include a capsule description of the work, and an image of a portion of the work sufficient to permit recognition – e.g., for text, an image of the title page; for film, a still of a title frame, or a short piece of streaming video). From time to time, the titles and capsule descriptions of the works noticed on the Claim Your Orphan website shall be published in the Federal Register.

Use may commence upon the expiration of the notice period. A nominal fee shall be payable under the same default license rules that apply to published works.

IV. AS PROPOSED HERE, A ORPHAN WORKS REGISTRY WOULD NOT INTERFERE WITH U.S. OBLIGATIONS UNDER THE BERNE CONVENTION OR THE TRIPS ACCORD

Finally, none of the changes to copyright law proposed here would create a prohibited copyright formality under either the Berne Convention or the TRIPs Accord, and therefore nothing suggested in this proposal would affect the compliance of the United States with these international agreements.

Both the Berne Convention and the TRIPs Accord prohibit the imposition of formalities on the works of foreign authors if those formalities interfere with the “enjoyment and exercise” of copyright. Nothing contained in this proposal would interfere with copyright’s “enjoyment and exercise”. Failure to register a work in the Orphan Works Registry would not remove the work’s copyright protection; it would, rather, serve as a signal that the unregistered work was an orphan, and, therefore, that the rightsholder was no longer exploiting the work through any of the channels – customized licensing, infringement damages, injunctions – that the copyright laws currently offer. Rightsholders who fail to register their works would be choosing to exploit their works through a lower-cost system of one-size-fits-all default licenses with no need to identify a rightsholder and ask permission. In this lower transaction cost environment, many uses of Orphan Works that are impossible now will be made possible.

Importantly, whether the default license applies to any particular work is within the control of the rightsholder. Accordingly, a particular rightsholder’s decision to rely on the lower-cost default license, rather than the very high-cost rules that current copyright law imposes on all rightsholders, is not a forfeiture of rights. And it does not detract from the United States’ promise under the Berne Convention and the TRIPs Accord to protect the enjoyment and exercise of the copyrights of foreign authors. If anything, the creation of an Orphan Works Registry would *promote* the enjoyment and exercise of copyright by allowing rightsholders whose works were unable find a market under current high transaction cost copyright rules to

find a market in a lower transaction cost environment that better suits the economics of most creative works.

For a fuller explanation of why the Orphan Works Registry, and the default licenses associated with it, do not detract from U.S. adherence to the Berne Convention or the TRIPs Accord, *see* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *Stanford Law Review* 485, 539-545, 551-568 (2004) (attached).

V. CONCLUSION

The Orphan Works problem is a serious one that has a significant impact on access to information for purposes of research, teaching, learning, and artistic creativity. SAVE THE MUSIC and CREATIVE COMMONS believe this proposal will solve the problem without affecting U.S. treaty obligations. It will allow SAVE THE MUSIC to make available culturally significant materials that are of current public interest without incurring substantial costs to track down owners and without fear of litigation. A change of law is needed because the problem lies with inactive rightsholders who are by definition, not likely to opt in to a voluntary system. And, as the experience of CREATIVE COMMONS has illustrated, a signaling solution where creators opt out of copyright’s “all rights reserved” in favor of “Some Rights Reserved” has enabled many thousands of authors to more effectively communicate the scope of permitted uses to be made of their works. Such private arrangements cannot solve the Orphan Works problem, but they do point the way toward a solution – a statutorily-established signaling mechanism, which we have described in the proposal set forth above.

Again, we commend the Copyright Office for conducting this important inquiry into the problem of Orphan Works, and we look forward to the opportunity to discuss our proposal with you further.

REFORM(ALIZ)ING COPYRIGHT

Christopher Sprigman*

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* Fellow, Center for Internet and Society, Stanford Law School. The author would like to thank Lawrence Lessig, Richard Epstein, Terry Fisher, Graeme Dinwoodie, Glenn Brown, Lauren Gelman, Jennifer Granick, Elizabeth Rader, Mark Lemley, Laurence Helfer, Abner Greene, Brett Frischmann, Yuko Noguchi, Goodwin Liu, Kal Raustiala, Justin Hughes, Jim Pastore, and the participants in the Center for Internet and Society’s Speaker Series for their helpful discussions and comments. Special thanks to Robert Harlan, Sonia Moss, Anthony Bliss, Don Krummel, and, especially, Darien Shanske and Joe Gratz for their substantial assistance with historical materials.

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INTRODUCTION

The recent debate between those who oppose the current trend of expanding the duration and breadth of copyright control over creative works and those who welcome it has focused on large and abstract questions like the optimal duration of copyright,¹ whether extension of subsisting copyrights is constitutional,² the degree to which technology has either facilitated or inhibited control of copyrighted content,³ and the effect that such control has on free speech, the public domain, and future creativity.⁴ The debate has produced an insightful literature and a few creative (but thus far unsuccessful) lawsuits.⁵ It has not, however, substantially altered the direction of recent

1. See, e.g., Brief of Amici Curiae George A. Akerlof et al., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Economists' Brief]; WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 210-53 (2003).

2. See, e.g., Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19 (2001); Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323 (2002).

3. See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

4. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* (2004) [hereinafter LESSIG, *FREE CULTURE*]; LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001); Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in *COPY FIGHTS 1* (Adam Thierer & Clyde Wayne Crews eds., 2002); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law 1900-2000*, 88 CAL. L. REV. 2187 (2000); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

5. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003); Complaint, *Kahle v. Ashcroft*, No. C04-01127 (N.D. Cal. filed Mar. 22, 2004), available at <http://cyberlaw.stanford.edu/about/cases/Civil%20Complaint%203-22-04.pdf> (last visited Oct. 4, 2004) [hereinafter *Kahle*].

developments in the law, which continues to move in the direction of increased control.

This Article presumes that the trend toward greater control will continue. I will argue, however, that a few relatively modest and realistically implementable changes to the copyright laws could help address some of the legitimate concerns of the copyright critics while preserving the basic structure of the law that copyright proponents argue has served us well. Curiously, it is a few relatively small changes to copyright *procedure*, and not to the substantive rights granted by copyright, that may allow the law to reach this desirable end.

Copyright formalities. For most of our history, U.S. copyright law has included a system of procedural mechanisms, referred to collectively as “copyright formalities,” that helped to maintain copyright’s traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw. From the first copyright statute in 1790, Congress required that authors register their copyrights, give notice (by marking published copies with an indication of copyright status such as the “©” symbol, as well as other information about copyright ownership), and (perhaps most importantly) renew their rights after a relatively short initial term by reregistering their copyright. Failure to comply with these requirements either terminated the copyright (in the case of nonrenewal) or prevented it from arising in the first place.

Taken together, these formalities created data about the existence and duration of copyright for the work in question, and about who owned the copyright. Formalities also facilitated licensing by lowering the cost of identifying rightsholders, moved works for which copyright was not desired into the public domain, and encouraged the use of public domain works by lowering the cost of confirming that a work was available for use.

Deform(aliz)ing copyright. However, in a process that began in earnest with the Copyright Act of 1976⁶ and culminated in successor legislation like the Berne Convention Implementation Act,⁷ the Copyright Renewal Act,⁸ and the Copyright Term Extension Act,⁹ Congress pared back, and in some instances entirely discarded, copyright formalities. Under current law, copyright arises the moment an original piece of expression is fixed in a

Complaint]; First Amended Complaint, *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. filed Feb. 18, 2003), *available at* <http://cyberlaw.stanford.edu/about/cases/Amended%20Complaint.pdf> (last visited Oct. 4, 2004).

6. Pub. L. No. 94-553, 90 Stat. 2541 [hereinafter 1976 Act].

7. Pub. L. No. 100-568, 102 Stat. 2853 [hereinafter BCIA].

8. This Act is part of the larger Copyright Amendments Act of 1992. *See* Copyright Amendments Act of 1992 §§ 101-102, Pub. L. No. 102-307, 106 Stat. 264, 264-66 (1992) [hereinafter CAA].

9. Pub. L. No. 105-298, 112 Stat. 2827 (1998) [hereinafter CTEA].

“tangible medium of expression.”¹⁰ Registration and notice, though encouraged,¹¹ are not required as conditions of protection. Renewal is gone altogether.

Beginning with the 1976 Act, then, the United States moved from a “conditional” copyright system that premised the existence and continuation of copyright on compliance with formalities to an “unconditional” system in which a reduced set of voluntary formalities plays only a minor role. Richard Epstein has aptly characterized these changes as “copyright law . . . flipped over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not.”¹² That is a fundamental shift in any property rights regime, and one that, in the copyright context, represented a break with almost two centuries of practice.

The advent of unconditional copyright has nonetheless generated little comment in the academic literature—perhaps because the very term “formalities” signals that the former requirements were trifling, ministerial, or more bothersome than helpful. To the extent the issue has been discussed at all, commentators have generally approved the trend¹³ as a necessary predicate to U.S. accession to the Berne Convention for the Protection of Literary and Artistic Works.¹⁴ The Berne Convention is the most significant international copyright treaty, and it includes a provision prohibiting signatories from imposing copyright formalities as a condition to the protection of works of nationals of other member states.¹⁵

Reformalizing copyright. This Article lays out a scheme for “reformalizing” copyright—i.e., for moving copyright back to a conditional regime—but in a way that accounts for developments in technology and that allows the United States to remain in compliance with its undertakings in the Berne Convention and the subsequent Agreement on Trade-Related Aspects of

10. 17 U.S.C. § 102 (2000).

11. *See infra* text accompanying notes 43-58.

12. Epstein, *supra* note 2, at 124.

13. *See, e.g.*, 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B][1][a] (2004) (observing that Berne’s “enlightened approach to copyright protection is notable for its antipathy to formalities”); Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 38 (1988) (listing, among benefits of Berne accession, elimination of “barbaric forfeitures for lapses in formalities”). *But see* LESSIG, FREE CULTURE, *supra* note 4, at 250 (“Rather than abandoning formalities totally, the response [of the Berne drafters] should have been to embrace a more equitable system of registration.”).

14. *See* Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. All citations in this Article to the Berne Convention are to the Paris Act unless otherwise noted. The Paris Act, to which the United States acceded on March 1, 1989, is the currently effective text of the Berne Convention.

15. *Id.* art. 3(1).

Intellectual Property Rights (TRIPs),¹⁶ which incorporates by reference Berne's standards, including the proscription of formalities.¹⁷

Part I of this Article describes the conditional copyright regime that characterized U.S. law for almost two centuries and explores the role that formalities played in maintaining copyright's traditional balance.

Part II sets out the consequences of our post-1976 move away from conditional copyright and toward an unconditional system. In this Part, I argue that formalities served an important role in filtering out of copyright works for which exclusive rights are not expected to provide a benefit to authors, thereby focusing copyright protection on works for which exclusive rights could be expected to add to the inducement to creative effort that is the primary justification for copyright.

The removal of formalities has had a profound effect on the nature and reach of U.S. copyright law. In fact, although the lengthening of the copyright term has attracted significant attention, and the removal of formalities almost none, the latter arguably represents the more significant change in terms of expanding the domain of copyright beyond works for which application of the law is useful in inducing investment in creative works, and, consequently, reducing copyright's social utility.

It nonetheless may be true that the elimination of mandatory formalities, at least the particular forms that the law imposed before 1976, made sense given the circumstances (principally the desire to gain admission to the Berne Convention) that faced Congress at the time. Very quickly, however, those circumstances have changed. The growth of the Internet, and, more broadly, of digital technologies, has opened up new possibilities for public access to and use of creative works that did not exist when Congress was removing formalities from copyright law. Before the digital age, the cost of copying and distribution had more effect on the ability of most people to access, use, and transform creative works than did the copyright laws. But now digital distribution is cheap and digital copying is essentially free. Today copyright law has emerged as the principal barrier to the creative reuse of a large amount of material that under the former conditional copyright regime would not have been subject to copyright in the first place. The majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted. For works that are not producing revenues, continued copyright protection serves no economic interest of the author. But in an

16. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs].

17. TRIPs Article 9 incorporates Articles 1-21 of the Berne Convention, with the exception of Article 6bis (which concerns moral rights).

unconditional copyright system, commercially “dead” works are nonetheless locked up. They cannot be used as building blocks for (potentially valuable) new works without permission, and the cost of obtaining permission will often prevent use. In such instances copyright is radically unbalanced: its potential benefits are depleted, and it therefore imposes only social costs.

Part III of the Article explores how reformalizing copyright might restore the balance between incentives and access that the old conditional system maintained. The Article does not, however, argue for unilateral re-adoption of old-style formalities by the United States. Such a move would fail because, among other problems, it would cause the United States to fall out of compliance with Berne and TRIPs, thereby removing the United States from the international copyright and trade systems. Part III offers two alternative paths to reformalization.

The reciprocity principle. The most direct route is to change Berne to permit—but not require—signatory nations to reformalize their domestic copyright laws and to apply those formalities to foreign as well as domestic works. Toward that end, this Article proposes revisions that remove Berne’s current prohibition of formalities. In place of the previous ban, the revised Berne Convention would adopt a “reciprocity principle” requiring that all Berne jurisdictions that impose formalities (1) permit foreign authors to comply with formalities in their national laws by complying with formalities either in their home country or in the work’s country of first publication or registration and (2) adhere to a set of standards set out in Berne that are designed to make different countries’ formalities “interoperable.”

These relatively small changes to Berne could, if properly implemented, support a system that allows authors (or publishers) to comply with formalities that may be imposed in any Berne nation simply by complying with formalities in their home country. Thus, Berne nations would realize the benefits of reformalizing their domestic law without creating significant transaction costs that would deter rightsholders from publishing their works in multiple jurisdictions.

New-style formalities. It is likely, however, that changes to the current text of the Berne Convention are not possible in the near term. That should not cause us to give up on formalities. Rather, that should lead us to ask whether we can formulate a set of “new-style” formalities that would capture as many of the benefits of the former system as possible while not depending for their effectiveness on forfeiture of copyright. If formalities of this type could be reintroduced into U.S. law, they would nudge our copyright laws back toward their utilitarian past while preserving our place in the international copyright system.

Toward that end, this Article proposes a system of formalities that, although nominally voluntary, are de facto mandatory for any rightsholder whose work may have commercial value. Noncompliance with the new-style

formalities would subject works to a perpetual and irrevocable “default license,” with royalties set at a very low level, thus effectively moving works into the public domain. Although compulsory licenses often are criticized on the ground that they demand that a price be set for the rights at issue without a market mechanism, the default licenses that would be implemented in the set of new-style formalities would not be susceptible to this criticism. Rather than setting a price for the rights in a copyrighted work, these licenses would merely establish a threshold—i.e., that the rights were valuable enough to merit the relatively trivial investment required to comply with formalities.

Such a system of new-style formalities would replicate the important work that our pre-1976 conditional copyright system was able to do: filtering commercially valueless works out of copyright and focusing the system on those works for which it could potentially do some good. Additionally, as we shall see, it is unlikely that a set of new-style formalities based on default licenses would run afoul of the antiformalities provision of the Berne Convention.

I. THE TRADITIONAL CONTOURS OF “CONDITIONAL” COPYRIGHT

A. *Formalities in the Early Copyright Statutes*

Viewed from the perspective of our current law, where copyright arises the moment a piece of creative expression is fixed in a tangible medium,¹⁸ the early U.S. copyright laws are remarkable for the variety of hurdles that an author was made to clear to gain and maintain the protection of the law. The Copyright Act of 1790,¹⁹ the first statute enacted under the authority established in the Constitution’s Intellectual Property Clause,²⁰ granted rights only to U.S. authors (and their executors, administrators, and assigns) limited to the “printing, reprinting, publishing and vending” of their maps, charts, and books.²¹ The term of protection was quite short: the term of copyright in the 1790 Act was fourteen years, with a fourteen-year renewal if the author survived to the end of the initial term.²² Most importantly for present purposes, the 1790 Act required compliance with a fairly demanding series of formalities,

18. *See supra* text accompanying note 10.

19. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) [hereinafter 1790 Act].

20. U.S. CONST. art. I, § 8, cl. 8. This clause is often referred to as the Patent Clause, the Copyright Clause, or the Intellectual Property Clause. Although the term “intellectual property” was unknown at the time of the Constitution’s framing, and although the concept of intellectual property covers more ground than just patents and copyrights, I have chosen the third formulation to refer to the congressional power in this clause, because it is the only formulation that captures both types of exclusive rights authorized in the clause.

21. 1790 Act, *supra* note 19, § 1. The 1790 Act gave authors no exclusive right to derivative works, or to public performance or display of their works.

22. *Id.*

both as a condition precedent to receiving copyright protection and as a prerequisite to maintaining protection past an initial term.

First, the 1790 Act conditioned protection on the author's *registration* of his work with the clerk's office of the district court where the author resided.²³ The registration condition applied to all works—even those previously copyrighted under pre-1790 state copyright law. These works were required to be reregistered in order to gain federal protection.²⁴

Second, within two months thereafter, the author was required to give *notice* of his copyright by publishing proof of registration in a newspaper for at least four weeks.²⁵ In 1802, in an enactment described as "supplementary" to the 1790 Act, Congress required, in addition to newspaper notice, that any author seeking to obtain copyright "give information" by *marking* each copy of his work with a prescribed copyright notice.²⁶ The statute required the same proof of registration published in the newspaper notice to be inserted in all published copies of books "at full length in the title-page or in the page immediately following the title."²⁷ Marking according to the prescribed form was also required on all charts and maps. In all cases, the information required included the identity and location of the author and the date of copyright.²⁸

Third, the author was required to *deposit* a copy of the work with the Secretary of State within six months of publication.²⁹

Fourth, as previously mentioned, a surviving author was permitted to *renew* the copyright for an additional fourteen years. Renewal required the

23. *Id.* § 3.

24. See William J. Maher, *Copyright Term, Retrospective Extension, and the Copyright Law of 1790 in Historical Context*, 49 J. COPYRIGHT SOC'Y U.S.A. 1021, 1023 (2002). Interestingly, Maher's examination of bibliographic records from the period 1790 to 1800 reveals that only twelve works subject to preexisting state copyright law were reregistered under the 1790 Act—a tiny fraction (1.74%) of the works registered during that period. *Id.* at 1025. Moreover, at the time of their reregistration, only three of the works dated from before 1784. *Id.* Although nine of the twelve states that had copyright laws prior to 1790 required works to be registered as a condition of protection, most of the state registration records from this period have been lost, so it is impossible to say how many works were registered under state copyright and were eligible for reregistration under the 1790 Act. See G. Thomas Tanselle, *Copyright Records and the Bibliographer*, 22 STUD. BIBLIOGRAPHY 77, 82-84 (1969). Nonetheless, the very low absolute number of works reregistered following the 1790 Act (i.e., reregistration of works that were previously subject to state copyrights that were preempted by the 1790 Act) is consistent with much more expansive recent data, discussed *infra* at text accompanying notes 124-134, showing that copyrighted works have, on average, a short commercial life before their value is fully depreciated.

25. 1790 Act, *supra* note 19, § 3.

26. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (1802).

27. *Id.* § 1.

28. *Id.*

29. 1790 Act, *supra* note 19, § 4. Responsibility for accepting registration and deposit was later moved to the Librarian of Congress. See Act of July 8, 1870, ch. 230, §§ 85, 109-110, 16 Stat. 198, 212, 215 (1870).

author to reregister the copyright and to publish proof of reregistration in a newspaper. Both actions were required to be taken within the final six months of the first term.³⁰

Given the complexity of these formalities, the cost of compliance was not trivial, and the consequences of noncompliance were severe. Failure to comply would result in copyright failing to arise (registration), being unenforceable (notice, deposit), or being subject to early termination, with entry of the work into the public domain (renewal).

Thus, at its inception the American copyright system required compliance with a series of formalities that included registration, deposit, and notice via both marking and published announcement. The system also demanded reregistration (renewal) as a prerequisite for enjoyment of the full term of protection—a term which was very short, judged from the perspective of today’s extended copyright periods.

This emphasis on formalities established in the Founders’ copyright statutes stayed almost entirely intact through the revisions of the copyright law enacted in 1831³¹ and 1909.³² The 1831 Act extended the initial term of copyright to twenty-eight years,³³ but kept the registration, deposit, and notice requirements of the 1790 Act,³⁴ as well as the requirement that copyright owners renew their copyrights to secure the benefits of a second term.³⁵ In a supplemental enactment in 1834, Congress strengthened the registration requirement by requiring, for the purpose of maintaining an accurate record of copyright ownership, the *recordation* of “all deeds or instruments in writing for the transfer or assignment of copyrights.”³⁶ Failure to record a transfer within sixty days meant that the transfer would be judged “fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without notice.”³⁷

Like the 1831 Act, the 1909 Act retained the registration,³⁸ notice,³⁹ and renewal⁴⁰ requirements—though it lengthened the renewal term from fourteen to twenty-eight years⁴¹ and softened the registration requirement somewhat.⁴²

30. 1790 Act, *supra* note 19, § 1.

31. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831) [hereinafter 1831 Act].

32. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976) [hereinafter 1909 Act].

33. 1831 Act, *supra* note 31, § 16.

34. *Id.* §§ 3-5.

35. *Id.* § 2.

36. Act of June 30, 1834, ch. 157, 4 Stat. 728 (1834).

37. *Id.*

38. 1909 Act, *supra* note 32, § 1.

39. *Id.* §§ 1, 19-21.

40. *Id.* § 24.

41. *Id.* § 23.

And there copyright came to rest, until its major revision—and the beginning of the move from conditional to unconditional copyright—in 1976.

B. *From Conditional to Unconditional Copyright*

Our former *conditional* copyright regime extended copyright protection only to those who took affirmative steps to claim copyright protection by registering their works, marking them with notice of copyright, and renewing their rights at the end of an initial term. In contrast, our current *unconditional* copyright regime grants copyright protection to all “fixed” creative works, whether or not the author or his assigns takes any affirmative steps to claim copyright protection. Unconditional copyright grants protection whether or not the work is registered, marked, or renewed. Protection is automatic and indiscriminate, regardless of the will of the author or his assigns.

1. *Voluntary registration and notice*

Of course, formalities have not disappeared entirely: current law relies on voluntary formalities and offers significant inducements to compliance. Registration creates a presumption of “constructive notice” that a work is under copyright,⁴³ which is useful to a plaintiff in an infringement action. More broadly, registration is a prerequisite to the initiation of an infringement action,⁴⁴ at least for works of U.S. origin. (Because a flat ban on enforcement of an unregistered copyright was believed to violate the Berne Convention,⁴⁵ there is no registration prerequisite to bringing suit for infringement of a work of foreign origin.) Current law also limits recovery of statutory damages and attorney’s fees to instances of infringement occurring after registration⁴⁶ and

42. The 1909 Act allowed protection to attach upon “publication of the work with the notice of copyright,” *id.* § 12, so following 1909 it was publication with notice, rather than registration, that served as the formality that gave rise to copyright. Following publication, however, the Act required that the author “promptly” deposit copies of the work with the Copyright Office, *id.* § 13, and, although the statute is not clear on this point, Professor Nimmer has noted that authors were required to submit an application for registration along with the deposit. 2 NIMMER & NIMMER, *supra* note 13, § 7.16[A][2][b]. Rightsholders were barred from bringing a lawsuit for infringement of the copyright until they had complied with the registration and deposit formalities. 1909 Act, *supra* note 32, § 12. In addition, the Register of Copyrights was authorized to make a demand for deposit; failure to promptly comply (within three months from any part of the United States except for “outlying territorial possessions,” and within six months from anywhere else) would result in fines and the voiding of the copyright. *Id.* § 13.

43. 17 U.S.C. § 410(c) (2000).

44. *Id.* § 411.

45. See *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 572-73 (1986) [hereinafter *Final Report*].

46. 17 U.S.C. § 412 (2000).

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disallows the defense of innocent infringement for works imprinted with notice of copyright.⁴⁷

The law provides a somewhat weaker scheme to incent voluntary recordation of transfers of copyright ownership—recordation of transfers creates a presumption of constructive notice but is not a prerequisite to an infringement action, and failure to record does not limit infringement damages.⁴⁸

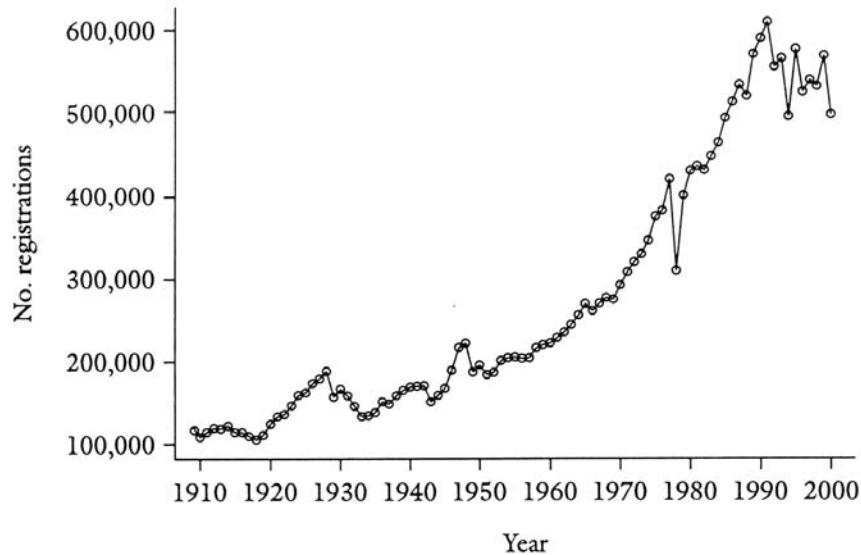
However substantial these inducements may be for owners of valuable copyrights who foresee the possibility of infringement litigation, they are not a replacement for mandatory formalities. The current system of voluntary formalities creates no incentive for compliance for the large number of rightsholders who do not expect their works to produce significant revenue. For these rightsholders, any disadvantage that noncompliance may create in infringement litigation is irrelevant.

Data on the rate of copyright registration confirms what logic suggests. Figure 1 graphs the annual number of registrations for the period 1910-2000.⁴⁹

47. *See, e.g., id.* § 401(d).

48. *Id.* § 205(c). The law continues to require deposit, but punishes failure to comply with a fine, rather than with forfeiture of the copyright. *Id.* § 407(d).

49. LANDES & POSNER, *supra* note 1, at 236.

FIGURE 1: COPYRIGHT REGISTRATIONS (EXCLUDING RENEWALS),
1910-2000

This graph, which has been taken from a study of U.S. Copyright Office data by William Landes and Richard Posner, shows that the gross number of registrations had been increasing sharply from the end of World War I through 1991. After 1991, however, the number of registrations stabilized at a level approximately twenty percent lower than that reached in 1991, despite very significant growth in the overall economy between that year and 2000 (a rate of growth that doubtless was mirrored, if not exceeded, by the increase in the nation's "expressive output").⁵⁰ The number of registrations should have continued to grow after 1991, perhaps at an even greater rate than it had in the prior decades, yet it dropped in 1992 and has failed to increase since.

Some portion of these missing registrations is comprised of authors who, because they see no realistic prospect of commercial return from their works and do not foresee infringement litigation, are not moved by the law's current inducements to register. Under the pre-1976 conditional copyright system, their works would have moved immediately into the public domain, where they were usable without the need to ask permission and could potentially serve as building blocks for future works that might find commercial success. In our post-1976 unconditional regime, however, many of these works are effectively dead. They are copyrighted, and therefore are usable only with permission. But the cost of obtaining permission is far from trivial. The would-be user first must

50. *Id.* at 235.

locate a rightsholder, and then negotiate for rights. The cost of negotiating a license may be high when neither the licensor nor the licensee has any information from other market transactions that would help establish the value of a license. But many would-be users will never get to the negotiation stage: the cost of identifying rightsholders, without the benefit of a registry, and often without any reliable indication of current ownership from the work itself (either because the work is not marked with notice or because rights have been transferred without recordation), will often be enough to deter the use.

Perhaps the best illustration of the difficulties users face in identifying rightsholders is the admission of the major record companies in the Napster litigation that they were unable to produce a complete list of the copyrighted works they claimed to own.⁵¹ Similarly, a visit to the website of the Harry Fox Agency, the organization set up by the music publishing industry to administer the collective licensing of musical copyrights, reveals that the agency has lost track of hundreds of music publishing companies to whom it may owe royalties.⁵² If record companies and the music publishing industry's own licensing agency are unable to quickly and cheaply identify the rightsholders to whom they should be sending royalty checks, the overall cost to users of doing so, especially in the case of works that are not commercially successful, is likely to be substantial.

Indeed, it is not surprising that the record companies apparently invest so little in maintaining careful records; many of the works that they own are worth too little, in terms of expected future revenues, to merit the expense required to keep track of them. The situation in books is probably worse: a study by Jason Schultz of data in annual book catalogs suggests that only a tiny fraction of the total number of books ever published is still in print—"for example, of 10,027 books published in the U.S. in 1930, only 174 [i.e., 1.7%] were still in print in 2001."⁵³ Publishing companies with enormous back-catalogs of out-of-print books may find that the cost of negotiating licenses for many uses outweighs expected revenues. Their back-catalogs are, therefore, effectively dead.

In sum, the transaction costs imposed by a system of unconditional copyright prevent many uses that may otherwise have been made. For unregistered works—and probably for many registered works as well⁵⁴—the current system imposes costs without producing countervailing benefits in the form of revenues to rightsholders.

51. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000) (recounting record companies' contention that "it would be burdensome or even impossible to identify all of the copyrighted music they own"), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

52. See Harry Fox Agency, Inc., HFA Is Looking for These Publishers, at <http://harryfox.com/public/infoUpdateList.jsp> (last visited Oct. 30, 2004).

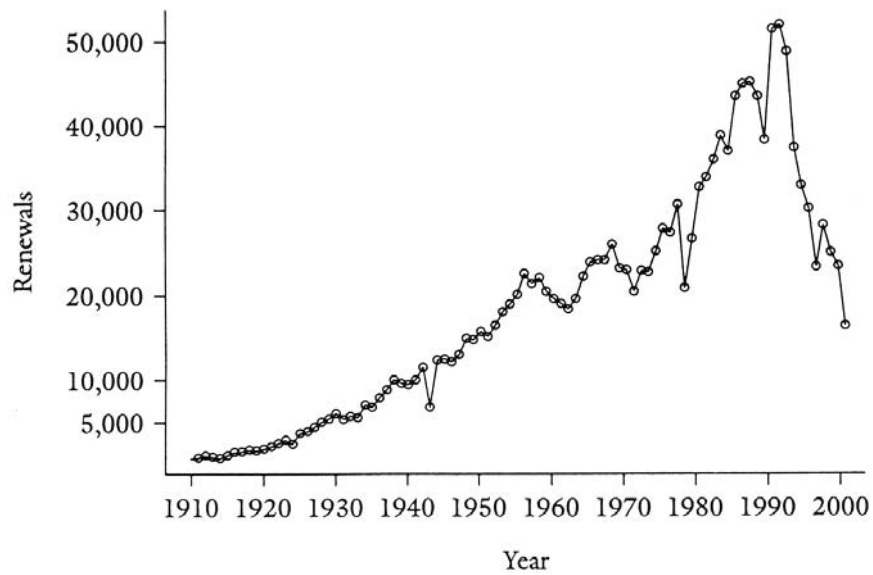
53. LANDES & POSNER, *supra* note 1, at 212 (explaining results of study).

54. See *infra* p. 501.

2. *Renewal*

Unlike registration and notice, which live on as ghosts, the renewal term is well and truly dead. Under current law, all works dating from 1978 or later are protected for a “unified” term, which is currently set for individual works at life of the author plus seventy years, and for corporate and anonymous works at ninety-five years.⁵⁵

FIGURE 2: COPYRIGHT RENEWALS, 1910-2000



55. 17 U.S.C. §§ 302-304 (2000 & Supp. II 2002).

FIGURE 3: RATE OF COPYRIGHT RENEWAL, 1910-2000

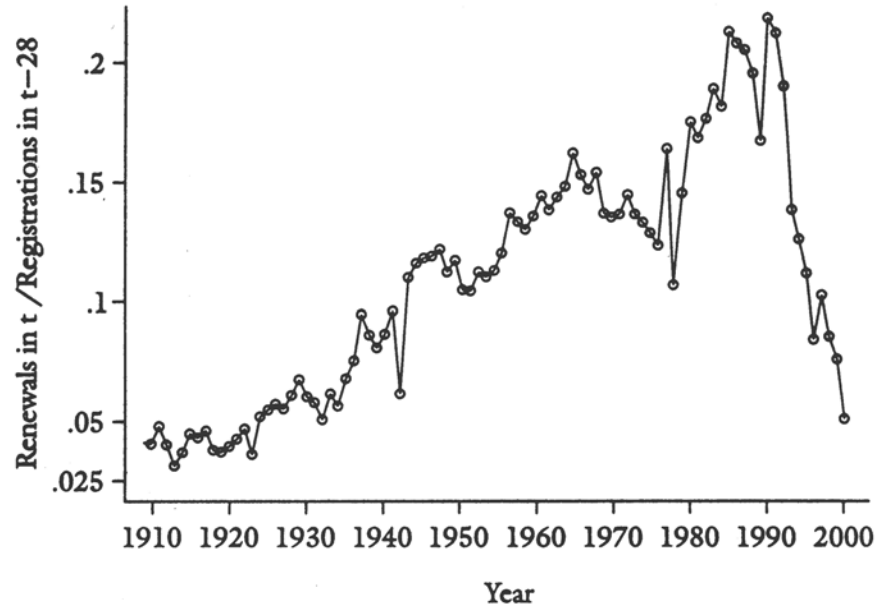


Figure 2 graphs the annual number of copyright renewals for the period 1910-2000; Figure 3 graphs the annual *rate* of copyright renewal—i.e., the number of renewals each year as a percentage of the total number of works for which the initial term was due to expire.⁵⁶ Both graphs show what one would expect: after renewal for pre-1978 works became automatic in 1992,⁵⁷ both the total number of renewals and the rate of renewal plummeted.⁵⁸

56. These graphs are, like Figure 1, drawn from LANDES & POSNER, *supra* note 1, at 236, and are based on Copyright Office data collected by those authors.

57. CAA, *supra* note 8, § 102.

58. That renewals did not fall to zero is due to provisions of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993), and the Uruguay Round Agreements Act (URAA) § 514, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994), which together restored the copyright of certain foreign works that had fallen into the public domain for failure to comply with mandatory formalities. These foreign works are restored “for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.” 17 U.S.C. § 104A(a)(1)(B) (2000).

II. FORMALITIES AND THE “TRADITIONAL CONTOURS” OF CONDITIONAL COPYRIGHT

A. *Recording Ownership*

To understand the role that formalities have traditionally played in copyright law, and the consequences of our move from conditional to unconditional copyright, it is helpful to think about formalities as they function in a different and perhaps more familiar context: real property.

When you buy a house, you record the transfer of title. You do so because the law requires you to, but if you take a moment to think about the reasons for the law, you will probably grasp fairly quickly that compliance is in your best interest. By recording your title, you will be able to prove your ownership when you eventually wish to sell the house. Indeed, you were probably only willing to buy it in the first place—and were able to convince the bank to grant you a mortgage—because you were able to confirm, through a title search, that the person who sold it to you actually held valid title and therefore had the right to convey the property.

In the case of real estate transactions, records of ownership are ordinarily maintained by local governments. The requirement that title be recorded is a form of government regulation, but no one complains, in this particular context, that government is interfering in the “free market” for real estate. For most people, their house is their biggest investment. Many would not be willing to make that investment without a clear record that the seller actually owns the house offered for sale. In this case, a regulatory scheme that creates a centralized record of ownership is a rational response to a fundamental characteristic of real estate—its expense, which makes would-be buyers uneasy unless ownership is transparent.

Formalities played an analogous role of recording ownership for the intangible form of property in literary and artistic works that we refer to as copyright. While the U.S. Copyright Office, which maintains the copyright registry, has never succeeded in making it as reliable or as easy to search as a typical real estate title registry, it was nonetheless the case that, back when registration was mandatory, the copyright registry allowed many would-be users of a creative work to determine quickly and inexpensively whether the work in question was indeed subject to copyright, and, if so, from whom to seek a license.

As in the case of real estate, formalities have been implemented in the copyright context because they address a special characteristic of the particular type of property at issue. The property interest protected by copyright is intangible—unlike real estate or personal property, the property embodied in copyright has no unique physical existence. A painting, a book, a compact disc containing an audio recording: all are physical objects, but the expression fixed

in each of them may, absent the workings of the law, freely be copied and ownership of copies transferred. Therefore, although the question of who owns a particular copy of a book presents no more difficulty than does ownership of any particular piece of personal property, the question of who owns rights in the expression contained in the book most often cannot be answered simply by understanding who owns the book. The registration, notice, and recordation formalities created the information about ownership that mere possession of a copyrighted work could not.

1. “Signaling”

Ownership in the copyright context may be less transparent than in the case of personal or real property, but the question of ownership is nonetheless a very important one to our copyright system for at least two reasons. The first is that the rights granted by the copyright laws are, unlike rights in most other forms of property, temporary. Of the various limitations that the Constitution’s Intellectual Property Clause imposes on Congress’s power to grant copyrights and patents, none is more visible than the dictate that exclusive rights may be granted only for “limited times.” This limitation, and others in the clause, are designed to balance the need to give authors and artists incentives to create with the equally important imperative, in a society committed to free expression, that public access to creative works not be impeded by government-granted monopoly. So the author (or his assign) is given a period of exclusive ownership during which he is free to profit from his work to whatever extent his exclusive right will allow. At the end of this period, however, the work reverts to the public, making it available as the raw material for future acts of creativity.

Of course, if this balancing act is to work, would-be users need to know when ownership of a copyrighted work began and when it will end. By creating information about ownership and the term of protection—both at the inception of copyright (registration, notice), and later (recordation, renewal)—copyright formalities fulfilled the important function of signaling that works had moved from the private market to the public domain. As such, formalities were important in ensuring that the “limited times” requirement was operative at the level of individual works.

2. *Maximizing private incentives*

Ownership is also important for reasons that have to do not so much with maintaining the copyright balance, but with fully realizing the first element of that balance—i.e., copyright’s role in spurring creation of new works. Often, copyright owners profit by allowing others to exploit their works through licensing arrangements. Indeed, because exploitation of creative works often

requires significant investment that authors may be ill-placed to undertake, licensing is a crucial mechanism for transferring rights from authors to those entities—such as film studios, book publishers, and record companies—best able to exploit them.

Because licensing is efficient, intellectual property policy generally seeks to encourage it. Of course, licensing will be more prevalent if the transaction costs of negotiating a license are low; historically, copyright formalities helped to lower the transaction costs of licensing. They did so by creating information about ownership and the term of protection, which simplified the process of identifying licensors and also clarified the length of the term of exclusive ownership that would be the subject of a license.

B. *Formalities as a Copyright “Filter”*

Formalities constructed a record of ownership, but they served another, arguably even more important, function: allowing authors and artists to distinguish between works for which they desired copyright protection and those for which they did not. Formalities performed this “filtering” function in two ways.

1. *Registration and notice*

Until the 1976 Act, the registration and notice requirements served as initial conditions for which noncompliance meant copyright either did not arise or was unenforceable. Although these initial obligations were easily satisfied, many published works were neither registered nor marked with copyright notice, indicating that the authors did not desire the protection that the copyright laws would otherwise provide—i.e., that they did not project a net present value for royalty revenue from their work that exceeded the relatively trivial costs of complying with the formalities. Thus the registration and notice formalities imposed an initial filter separating works with significant potential commercial value for which authors desired protection from other works for which protection was irrelevant. The latter class of works moved immediately into the public domain, where it was freely usable by others (most importantly as the building material for new works) without fee or the need to ask permission. Furthermore, because of the notice formality, the public domain status of many works was readily recognizable under the pre-1976 rules, even without the need to consult a registry.

How important was this initial filter? In an age where a popular book or record can return many millions of dollars for its copyright owner, it may be difficult to understand why any creator would fail to comply with inexpensive and relatively simple formalities and allow a work eligible for copyright to fall into the public domain. But there are hints in the historical record suggesting

that noncompliance was common. This next section looks at the available historical data and attempts to quantify the effect of the initial filter.

Data on the effect of the registration formality: 1790-1870. Prior to the 1976 Act, all unpublished material was subject to perpetual common law copyright. The relevant question, then, is what percentage of *published* material was registered and made subject to copyright. The fact that a particular work was published suggests that it had some value, and one would assume that a relatively significant percentage of published works would be registered for the purpose of gaining protection under federal copyright. Yet a 1987 study by James Gilreath and Elizabeth Carter Wills of records assembled by the Library of Congress found that of the more than 15,000 maps, charts, and books (including pamphlets) that were published in the United States between 1790 and 1800, only 779 were registered and thus protected by copyright—a registration rate of approximately 5%.⁵⁹ William Maher, in a recent reexamination of the Gilreath/Wills study, finds that the earlier study made several errors that inflated the registration rate. Maher's recalculation, using more complete bibliographic materials, suggests that the registration rate during that early period was even lower—3.28%.⁶⁰

The Gilreath/Wills and Maher studies may both understate the rate of registration. Both studies count some published works from this period that were of foreign origin, and thus not eligible for protection under the 1790 Act. And neither study accounts for the loss of some early copyright records.⁶¹ But even if the Gilreath/Wills and Maher studies offer only rough approximations, they suggest that a small percentage—probably at most only between 10% and 20% of works eligible for copyright protection—were registered in the decade following the 1790 Act.⁶²

59. See James Gilreath, *Editor's Preface* to FEDERAL COPYRIGHT RECORDS 1790-1800, at ix, ix (James Gilreath ed. & Elizabeth Carter Wills compiler, 1987).

60. See Maher, *supra* note 24, at 1024 n.8. Using additional information obtained from ROGER BRISTOL, SUPPLEMENT TO CHARLES EVANS' *AMERICAN BIBLIOGRAPHY* (1970), about the number of works published in the United States, and correcting for duplicate copyright registrations in Gilreath's records, Maher arrives at a larger number of published works (20,829) and a smaller number of copyright registrations (684).

61. Gilreath, *supra* note 59, at ix; Maher, *supra* note 24, at 1023-27. Further, in relying on the number of total texts found in CHARLES EVANS, *AMERICAN BIBLIOGRAPHY* (1941), Maher is repeating some instances where Evans double-counted and included foreign texts. The recent online version of *American Bibliography* (available at <http://infoweb.newsbank.com> to users with a password), which includes the supplement to *American Bibliography* (a password-protected description of which is available at http://infoweb.newsbank.com/iw-search/we/Evans/?p_action=help), provides a lower total number for texts produced in 1790-1800 (12,303) than Maher's.

62. There is some anecdotal evidence that the percentage of published works subject to copyright remained low, although probably not as low as at copyright's inception. In a 1961 report to Congress, the Register of Copyrights stated that "most of the great mass of published material" did not bear a copyright notice, indicating that many authors were

I could not find any existing study that calculates a rate of copyright registration for any period following 1800. I therefore attempted my own post-1800 calculation. What follows is a study of data regarding the registration rate through 1870, which is the latest date for which data exists allowing estimates of both total copyright registrations (the numerator in my calculation) and total published copyrightable works (the denominator).⁶³

Construction of both the numerator and the denominator posed significant difficulties. First, for the period between 1790 and 1870, only the copyright registrations for 1790 through 1800 have been indexed and published.⁶⁴ Though catalogued, the registrations for 1800 through 1870 have not been precisely quantified, subdivided by type or date, or published.⁶⁵ Compounding the challenge, over the period in question (1801-1870), imprints (1803), music (1831), and photographs (1865) were added to the types of items that could be copyrighted.

What I did have was a well-regarded estimate of 150,000 for total registrations for the period between 1790 and 1870.⁶⁶ This number may be too low, because some records have been lost, or too high, because not all copyrighted items were actually published.⁶⁷ Given an inability to correct for these factors, and given that they are likely to be relatively small and at least partially offsetting, we will use 149,221 as our numerator—150,000 total registrations for 1790 through 1870, minus 779 registrations for 1790 through 1800—in our attempt to quantify the impact of the registration requirement for the period from 1801 through 1870.

simply not interested in securing copyright at all. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 62 (Comm. Print 1961); *see also* H.R. REP. NO. 94-1476, at 143 (1976) (explaining that the copyright notice requirement serves four principal functions: “(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting; (2) It informs the public as to whether a particular work is copyrighted; (3) It identifies the copyright owner; and (4) It shows the date of publication.”).

63. I received invaluable assistance from Joe Gratz and Darien Shanske in conducting historical research for this Article. Though the discussion of our findings makes reference to the author in the singular, this stylistic convention is adopted to ensure clarity and ease of reading, and not to suggest that the author conducted the research independently.

64. This was done in FEDERAL COPYRIGHT RECORDS 1790-1800, *supra* note 59.

65. *See* ALICE D. SCHREYER, THE HISTORY OF BOOKS: A GUIDE TO SELECTED RESOURCES IN THE LIBRARY OF CONGRESS 94 (1987).

66. The estimate is from Martin A. Roberts, *Records in the Copyright Office of the Library of Congress Deposited by the United States District Courts, 1790-1870*, 31 PROC. BIBLIOGRAPHICAL SOC'Y AM. 81, 94 (1937). It is cited as authoritative by SCHREYER, *supra* note 65, at 90; *see also* U.S. COPYRIGHT OFFICE, 106TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2003, at 62 n.1 (2003); Tanselle, *supra* note 24.

67. Roberts, *supra* note 66, at 87, 92.

Calculation of the denominator—total published works between 1801 and 1870—is more complex. The period from 1790 to 1800 lent itself to quantification for two principal reasons: first, because of the existence of a well-respected source for total imprints, Evans's *American Bibliography*, and second, because only maps, charts, and books could be copyrighted. The Evans bibliographic collection was continued only through 1846.⁶⁸ Though there is a credible source for total copyrightable music titles produced in our period (i.e., 1831, when music became copyrightable, through 1870),⁶⁹ I could not find comparable sources for prints, maps, or photographs. Still, even taking the data we do have, the impact of the registration requirement appears considerable: from 1801 through 1870 we have records of 196,683 imprints and an estimate of 163,500 music titles, as compared to 149,221 total registrations, or 41.43% of published works being copyrighted. Thus, for the first seventy years of the nineteenth century, the data suggests that less than half of all published works were copyrighted.⁷⁰

However, there are several areas of uncertainty that might cause this percentage to be incorrect. First, there are several potentially significant factors that make the 41.43% figure appear likely to be too high. Most obviously, because we only have a number for imprints through 1846, the denominator is almost certainly too small. There are several ways to correct for this data deficiency. Simply continuing the number of imprints recorded annually from 1847 through 1870 at the same level of production as 1846 gives a total of 383,475 imprints, making the percentage copyrighted drop to 27.28%. Continuing the trend in text production in this way is very conservative, given what we know about the growth of the publishing industry at this time⁷¹ and

68. For 1801 through 1819, there is AMERICAN BIBLIOGRAPHY: A PRELIMINARY CHECKLIST (Ralph R. Shaw & Richard H. Shoemaker compilers, 1958). For 1819 through 1846, there is A CHECKLIST OF AMERICAN IMPRINTS (Richard H. Shoemaker et al. compilers, 1964).

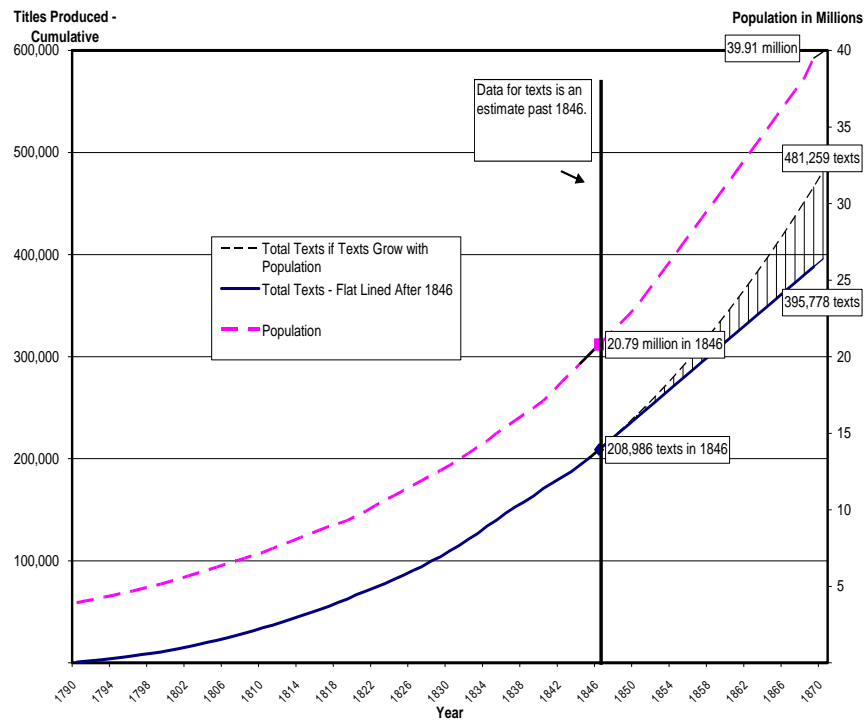
69. D.W. Krummel, *Counting Every Star; or, Historical Statistics on Music Publishing in the United States*, 10 ANUARIO INTERAMERICANO DE INVESTIGACION MUSICAL 175, 182 (1974).

70. Because this figure includes some registrations for prints, maps, and photographs in the numerator, but does not include any provision for these works in the denominator, it overstates the rate of registration by some unknown, but likely small, amount.

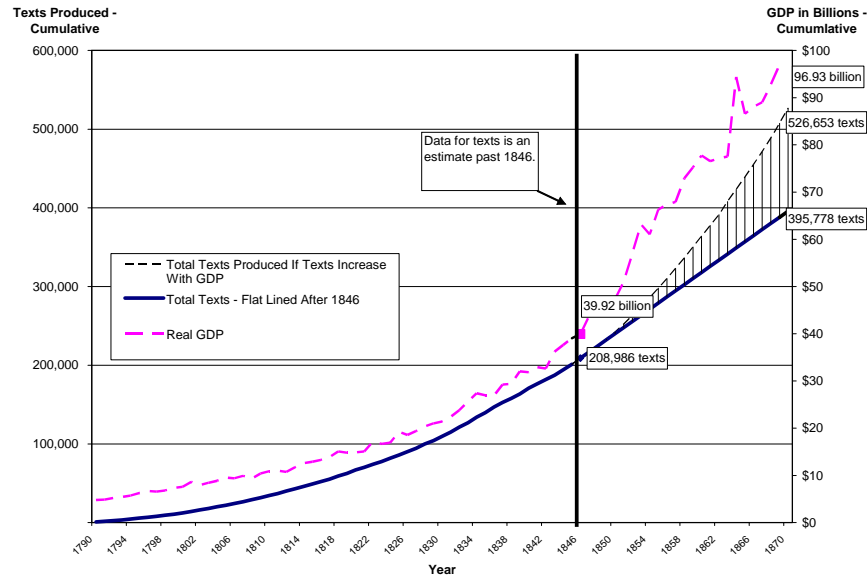
71. The period between 1845 and 1857 is described as “the greatest boom the business had ever witnessed.” 1 JOHN TEBBEL, A HISTORY OF PUBLISHING IN THE UNITED STATES 245 (1972). Between 1850 and 1870, the total value of all printing and publishing in the United States increased from \$14,812,227 to \$80,939,756. Downing Palmer O’Harra, Book Publishing in the United States 1860 to 1901, Including Statistical Tables and Charts to 1927, at 112 (1928) (unpublished M.A. thesis, University of Illinois) (on file with author) (citing the 1905, 1914, 1921, and 1925 editions of the U.S. Census Bureau’s *Census of Manufactures*). Though these raw figures do not account for inflation and, as noted by O’Harra, collection methods probably improved over the period (further inflating the total growth), *id.* at 111, the overall trend is clear.

how much both population and GDP grew over this period—the latter made especially significant by the extent to which the data recorded by Evans and his successors tracks growth in both GDP and population. If instead of our assumption of no growth in annual text production, we correlate the annual production of texts with growth in population, then total texts leaps to 468,956, and the percentage copyrighted falls further to 23.59%; if tied to GDP growth, total texts would be 514,350, and the percentage copyrighted falls still further to 22.01%.

FIGURE 4: TOTAL TEXT PRODUCTION AND U.S. POPULATION GROWTH⁷²



72. For information on texts, see A CHECKLIST OF AMERICAN IMPRINTS, *supra* note 68; AMERICAN BIBLIOGRAPHY: A PRELIMINARY CHECKLIST, *supra* note 68; EVANS, *supra* note 61. For population and GDP information, see Louis D. Johnston & Samuel H. Williamson, Source Note for US GDP, 1789-2002 (2003), at <http://www.eh.net/hmit/gdp/GDPsource.htm> (last visited Sept. 9, 2004).

FIGURE 5: TOTAL TEXT PRODUCTION AND U.S. GDP GROWTH⁷³

It is important to note that one cannot assume that Evans's successor collections actually succeeded in cataloging all imprints for 1790 through 1846; it is almost certainly the case that those collections undercounted significantly, especially for more ephemeral items like pamphlets. I have not found an estimate of the likely undercount, but it may be considerable. For example, Clarence Brigham's survey of extant booksellers' catalogs identifies twenty-five out of sixty-seven total that were not included by Evans, a 37% undercount.⁷⁴ The tendency for the bibliographic references to undercount would understate the denominator of our calculation and thus artificially inflate the estimate of the percentage of published works copyrighted.

The denominator would increase even more dramatically (and the percentage of works copyrighted would drop further) if there were a way of calculating the total number of copyrightable items within a periodical, since authors were required to secure the copyrights for their articles before publication, as Oliver Wendell Holmes, Sr., learned to his dismay.⁷⁵ In general, the numbers we have for periodicals in these collections undercount even the

73. The information regarding U.S. GDP in Figure 5 comes from Johnston & Williamson, *supra* note 72.

74. Clarence Brigham, *American Booksellers' Catalogues, 1734-1800*, in *ESSAYS HONORING LAWRENCE C. WROTH* 31 (1951).

75. See *Mifflin v. R.H. White Co.*, 190 U.S. 260 (1903); *Holmes v. Hurst*, 174 U.S. 82 (1899).

titles of periodicals, let alone the articles within them.⁷⁶ There were approximately 1200 American newspapers in 1833 and 3000 in 1860.⁷⁷ As for periodicals, there were a few hundred in 1833 and more than a thousand in 1860.⁷⁸ Since there were no periodicals counted in the bibliographic collection for 1820 through 1846, these copyrightable items are not taken into account in the measure of the number of total imprints (i.e., in the denominator of our calculation).⁷⁹ To give some perspective of the undercount, if there were as few as a thousand periodicals published per year on average between 1820 and 1870, and if each of these periodicals contained two copyrightable articles per year, then periodicals alone would have accounted for all of the 150,000 copyright registrations between 1790 and 1870.

We might expect another potentially large increase in the denominator (i.e., another large drop in the percentage of works copyrighted) if we were able to reliably count copyrightable commercial work product (such as labels) produced during the relevant period. These works were copyrightable from 1803 and clearly were registered and deposited in significant enough numbers to arouse indignation in the Librarian of Congress.⁸⁰ In 1873 there were 2520 prints deposited, which shows a general awareness that these objects could be copyrighted, but this is likely a small portion of the total output of these works in that year, considering the country's population was then already 43 million, with an economy of \$119 billion.

There are also factors that would tend to decrease the denominator and thus increase our estimate of the percentage of works that were copyrighted. Evans and his successors included government publications in their lists, which were not copyrightable. More significantly, works by foreign authors were not copyrightable until after 1890, and these works comprised a large portion of American production. Here, too, there is no hard data, but there is a clear overall trend, namely toward a majority of works being written by American

76. Evans lists newspapers and periodicals once for each year of publication, while Shaw and Shoemaker (1801-1819) list them only once and Shoemaker et al. (1820-1846) do not list periodicals at all. See A CHECKLIST OF AMERICAN IMPRINTS, *supra* note 68, at v; AMERICAN BIBLIOGRAPHY: A PRELIMINARY CHECKLIST, *supra* note 68, at ix.

77. FRANK LUTHER MOTT, AMERICAN JOURNALISM 216 (rev. ed. 1950).

78. *Id.* Another source puts the total number of American periodicals in 1872 (just after the end of our period) at 8110. M.B. Iwinski, *La Statistique Internationale Des Imprimés*, BULLETIN DE L'INSTITUT INTERNATIONAL DE BIBLIOGRAPHIE 1, 66 (1911).

79. See A CHECKLIST OF AMERICAN IMPRINTS, *supra* note 68, at v.

80. Specifically, the Librarian complained in 1872 about the deposit of "printed labels, with or without pictorial embellishment, designed for use on cigar-boxes, patent medicines, and other articles of manufacture." ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS EXHIBITING PROGRESS OF THE LIBRARY DURING YEAR ENDED DECEMBER 1, 1872, at 4 (1872). This is confirmed by Roberts, who attests to seeing records of "patent medicine labels, cigar-box linings, photographs, and all the other miscellanea which the copyright laws were called to protect." Roberts, *supra* note 66, at 92; see also Tanselle, *supra* note 24, at 86.

authors by the 1840s.⁸¹ An assumption that 50% of total texts were of foreign origin is conservative, as that figure is not only at the upper end of contemporary estimates, but also does not take into account that a disproportionately large percentage of the total number of texts in the denominator were produced in the final two decades of the period in question—i.e., at a time when works by American authors comprised the majority of works published in the United States. A brief inspection of the three bibliographic collections suggests—although an exact identification of all foreign works is impossible from the data provided—that foreign authors do not make up nearly half of the works recorded.⁸² I have not found any similar estimates of the percentage of music publication that was the work of foreigners. Even discounting the total number of titles (both texts and music) by 50% and using the most conservative method for calculating the number of imprints between 1846 and 1870 (i.e., the flatline method), 54.56%, or just

81. One contemporary source put the percentage of foreign works and reprints at 45% between 1830 and 1842 and 30% in 1853. NIKELUS TRÜBNER, TRÜBNER'S BIBLIOGRAPHIC GUIDE TO AMERICAN LITERATURE, at xxiii-iv (1855). Trübner's numbers for 1853 are cited without comment by Tebbel. 2 TEBBEL, *supra* note 71, at 23. Another contemporary source puts the percentage of foreign works in 1835 at about 40%; however, this source also states that in 1833 there were "one-third more foreign than original" books. ROSALIND REMER, PRINTERS AND MEN OF CAPITAL 149 (1996) (citing 2 BOOKSELLER'S ADVERTISER AND MONTHLY REGISTER OF NEW PUBLICATIONS AMERICAN AND FOREIGN 2 (1836)). Another contemporary source for the 1850s also apparently confirmed Trübner, finding percentages of original American titles to be roughly 61%, 58%, and 73% for the years 1853, 1854, and 1855, respectively. See CLARENCE GOHDES, AMERICAN LITERATURE IN NINETEENTH-CENTURY ENGLAND 42 n.66 (1944) (citing SAMPSON LOW, THE AMERICAN CATALOGUE OF BOOKS vi (1856)). Certainly the trend was toward American authors; Tebbel summarizes as follows:

The first half of the nineteenth century witnessed the steady swing away from British to American authors, notwithstanding the immense popularity of Scott and Dickens. In 1820, the ratio had been thirty American to seventy British; in 1856, it was eighty American to twenty British. While these figures may not be quite accurate, they disclose the trend unmistakably.

1 TEBBEL, *supra* note 71, at 221. Tebbel follows another contemporary source here, Goodrich, who states that the balance shifted toward American authors in the 1840s. 2 S.G. GOODRICH, RECOLLECTIONS OF A LIFETIME 389 (1856); see also Aubert J. Clark, The Movement for Intellectual Copyright in Nineteenth Century America 38-39 (1960) (unpublished Ph.D. dissertation, Catholic University of America) (on file with author) (doubting that the percentage of American bestsellers that were pirated between 1800 and 1860 was as high as 50%). For the years 1890 through 1916, books by foreigners averaged 44% (for the twenty years that complete information was collected). 2 TEBBEL, *supra* note 71, at 710 (citing FRED E. WOODWARD, A GRAPHIC SURVEY OF BOOK PUBLICATION, 1890-1916 (U.S. Bureau of Educ., Bulletin No. 14, 1917)).

82. This was also confirmed by my inspection of all the California imprints catalogued in Robert Harlan, *Printing for the Instant City: San Francisco at Mid-Century*, in GETTING THE BOOKS OUT 137 (Michael Hackenberg ed., 1985). Only around one percent were of foreign origin. No doubt this number is lower than the number nationwide, as San Francisco publishers were clearly focused on providing works of local interest and many reprints appeared within periodicals.

more than one in two copyrightable works, were actually copyrighted for the period 1801 through 1870.

Examination of specialized collections. This global estimate is corroborated by evidence drawn from specialized bibliographic collections from the end of our period. Almost two decades ago, Professor Robert Harlan assembled and analyzed a uniquely comprehensive collection of 2571 works published in San Francisco from 1850 through 1870.⁸³ He found that the San Francisco publishing industry, in a period when the book publishing industry was much more advanced than it was for much of our broader 1801-1870 time frame, produced 632 books (defined as works over forty-nine pages), 202 broadsheets, and 1737 pamphlets and other ephemera.⁸⁴ Harlan has notes for 2053 of these works, recording whether individual works bore copyright notice. Harlan found that only 13.48% of these published and copyrightable texts were copyright noticed.⁸⁵ The percentage is higher for certain categories, such as collections of laws and cases (86.05%), almanacs and directories (74.42%), and books generally (56.34%). Of all remaining items, i.e., texts of forty-nine pages or less, only 3.95% were copyright noticed.

A review of some of the works studied by Harlan found that the works not copyright noticed were neither all ephemeral nor obviously different from or of less value (either commercial or cultural) than the works that were noticed. For example, *A Practical Illustration of the Movements of Hurricanes, with Plain Directions How They May Be Avoided* (eight pages, with diagrams, 1862) was not copyright noticed, while *The Law of Storms: The Various Phenomena by Which Their Approach Can Be Ascertained with Certainty, and Practical Directions to Mariners for the Avoidance of Their Fury* (nineteen pages, 1869) was noticed. *The Miners' Own Book: Containing Correct Illustrations and Descriptions of the Various Modes of California Mining, Including All the Improvements Introduced from the Earliest Day to the Present Time* (thirty-two

83. Statistics provided by Professor Robert Harlan (July 28, 2004) (results of study examining San Francisco imprints from 1850 through 1870) (on file with author).

84. Harlan, *supra* note 82, at 154. Harlan adds that he doubts as many as one in four examples of job work (e.g., labels) published in San Francisco during the period has survived, even though the number of ephemera in his collection outnumbers books by over three to one. *Id.* at 145. The copyright registration records for California for the period 1851 through 1862 are available; these records indicate that only about 56% of all the works copyrighted in California for this period (293 items) were texts. CALIFORNIA IMPRINTS, 1833-1862, A BIBLIOGRAPHY 480-504 (Robert Greenwood ed., Seiko June Suzuki & Marjorie Pulliam compilers, 1961). Examples of job work copyrighted include labels for the "Eureka Compound for Fever & Ague" (1852) and "Fish's Infallible Hair Restorative" (1861), and a blank of a membership certificate from the Committee of Vigilance for San Francisco (1856). So a substantial amount of copyrightable work most likely has been lost and cannot be counted in the denominator of any registration rate calculation.

85. The percentage reflects 198 copyrighted items out of 1469 total copyrightable items. The figure for total copyrightable material is probably too low, as it was reached using very strict criteria to determine which items would have been copyrightable.

pages, 1858) and *Sketches of the Washoe Silver Mines* (twenty-four pages, 1860) were not copyright noticed,⁸⁶ but *Guide to the Colorado Mines* (sixteen pages, including map, 1863) was noticed.

Most sermons were not copyright noticed, but liberal cleric Laurentine Hamilton, founder of the Hamilton Free Church,⁸⁷ did notice his sermons.⁸⁸ Joseph Josselyn, M.D., did not notice his medical work "*Man, Know Thyself!*": *A Treatise upon Sexual and Other Diseases* (forty-seven pages, 1866), while the *California Illustrated Family Medical Almanac* was noticed and registered (1858). Not all works on law are copyright noticed. For example, James William Shaw's pamphlet *Land Titles in San Francisco* (sixteen pages, 1862) was not noticed. Useful educational tools, though also often copyrighted, were not always. For instance, Bernhard Marks's textbook *Normal Tract on Numeration and Notation* (fifteen pages, 1869), was noticed; John Martin Spalding's more polemical *Common Schools in the United States Compared with Those in Europe: Being a Review of the Work of Joseph Kay, Esq., on the Results of Primary Schools in Different European Countries* (thirty-two pages, 1860) was not noticed.⁸⁹

Interestingly, in examining Harlan's data, I found several works that had been copyright noticed between 1851 and 1862 but were not recorded in the transcribed copyright records discussed above.⁹⁰ Harlan found the same phenomenon occurring when he examined the output of one of the major California publishers of this period, the Anton Roman firm. Of the sixty-five works Roman published from 1860 through 1870, forty-five, or 69% of the total, were copyright noticed, but of these Harlan could find only twenty-six, or

86. Interestingly, DeGroot's map of the Washoe Mines was registered (item #203, 1860).

87. For background information on Laurentine Hamilton, see First Unitarian Church of Oakland, *Welcome to the First Unitarian Church of Oakland*, at <http://uuoakland.org/history.htm> (last visited Oct. 31, 2004).

88. Charles Wadsworth, for instance, did not notice his many sermons when published as pamphlets, but his publisher, Anton Roman, did notice a collection of his sermons even though at least two (and probably most, if not all) of the sermons in the collection had already been published as pamphlets and were thus in the public domain.

89. A 1963 Practising Law Institute monograph on copyright law by Barbara Ringer and Paul Gitlin was published without notice and immediately entered the public domain. See BARBARA A. RINGER & PAUL GITLIN, *COPYRIGHTS* (1963). Ringer was perhaps the person most familiar with copyright formalities at that time; when the book was published, she was Assistant Register for Examining at the U.S. Copyright Office. (She would later serve as Register of Copyrights between 1973 and 1980.) It is exceedingly unlikely that the chief examiner for the Copyright Office responsible for enforcing the notice formality mistakenly omitted notice from her own monograph on copyright law, and it is likely that many other such omissions were deliberate.

90. For example, the *Marysville Directory for the Year 1855* is copyright noticed, but not registered, even though the same publisher's *Directory for Sacramento for 1853-54* is registered. Also, LEWIS SHEARER, *A DIGEST OF THE DECISIONS AND OPINIONS OF THE SUPREME COURT OF THE STATE OF CALIFORNIA* (1859) is noticed, but not registered.

40% of the total, actually registered in the records now at the Library of Congress.⁹¹ So Roman apparently was making decisions not only regarding which works to copyright notice, but regarding which should be actually registered.

For the period after the centralization of copyright records in the Library of Congress, there is definitive information on the total number of copyright registrations by type. Unfortunately, because of the lack of bibliographic studies, calculating total production of copyrightable items after 1846 becomes impossible. Yet strong indications remain of the continued impact of the registration requirement after 1846, even in an increasingly commercial society. I conducted a survey of the holdings of the Bancroft Library at the University of California, Berkeley, for San Francisco publications for the year 1908 and found that 20.95% of works were copyrighted, with a significantly higher percentage of books copyrighted (34.09%) and a much smaller percentage of the remaining, more ephemeral items copyrighted (11.48%).⁹² Though the San Francisco publishing industry declined considerably after 1870,⁹³ the works that were published, including those not copyrighted, could be of considerable political—especially local political—importance. For instance, *The Treatment of the Exempt Classes of Chinese in the United States: A Statement from the Chinese in America* by Poon Chew Ng (fifteen pages), *Shame of the Relief; Being an Expose of the Disgraceful Methods of the Relief Committee During the Dark Days Following San Francisco's Great Disaster* by Mary Kelly (fifteen pages), and *In the Shadow of the Gallows, an Innocent Man Condemned to Die: Resume of the Case of William Buckley, Who Will Die*

91. Statistics provided by Professor Robert Harlan (July 28, 2004) (on file with author). There are some more suggestive examples from Harlan's data of individuals making decisions regarding which works to notice. The California Immigrant Union copyright noticed its informational work entitled *All About California, and the Inducements to Settle There* (seventy-four pages, 1870), but not its political works, such as *Arguments in Favor of Immigration with an Explanation of the Measures Recommended by the Immigrant Union* (twenty-six pages, 1870) or *Common Sense Applied to the Immigrant Question: Showing Why the "California Immigrant Union" was Founded and What It Expects to Do* (sixty-four pages, 1869). Jacob Leon Stone does not notice his *Reply to Bishop Colenso's Attack upon the Pentateuch* (one hundred eleven pages, 1863), but does notice *Slavery and the Bible; or Slavery as Seen in its Punishment* (forty-eight pages, 1863). In general, political statements were not noticed, which makes sense, since often the whole point was to publicize a point of view, often unpopular, such as George C. Bates's published speech entitled, *Address of Geo. C. Bates, Esq., Which He Was Prevented from Delivering at Sacramento, on Saturday, April 19th, 1856, by a Mob*.

92. For this survey I compared the records of the Bancroft Library with the published copyright records for 1908.

93. Harlan, *supra* note 82, at 162. This sample is much thinner, with a total of 105 copyrightable items.

on the Gallows Unless Governor Gillett Interferes by Frank J. Murphy (fifty-six pages) were not copyrighted.⁹⁴

I also conducted a survey of the poster collection of the Hoover Institution Archives at Stanford University. The posters collected tended overwhelmingly to concern political issues. Of all the posters in the collection from before 1976 (a total of 5756), less than a third, at the most, were copyrighted.⁹⁵

Copyright office data. Although it cannot alone quantify the rate of registration, Copyright Office data on the annual number of copyright registrations does suggest that the rate of registration is responsive to relatively small changes in registration fees. This suggests, in turn, that many authors do not project a significant net present value for their works, and consequently place a low value on copyright protection.

Referring back to Figure 1, which graphs the annual number of registrations for the period from 1910 to 2000, the data shows that registrations more than quintupled during this period, reflecting both economic and population growth. The absolute number of registrations fell briefly after 1976 (as one might expect, given the shift in that year from mandatory to voluntary registration), but quickly began to rise again, reaching a peak in 1991. After 1991, however, the number of registrations began to decline; by 2000, registrations had declined by almost twenty percent from the 1991 peak. Landes and Posner argue that the post-1991 decline is likely related to increases in the registration fee imposed during that period: the fee increased from \$10 to \$20 in 1991, and increased again to \$30 in 2000.⁹⁶ These relatively trivial increases in the cost of registration, and the contemporaneous changes in the rate of registration, represent a kind of natural experiment suggesting that, at the beginning of the copyright term, many authors place a low net present value—as low as \$20 or \$30 plus the similarly trivial cost of complying with the deposit, notice, and renewal requirements—on their works.⁹⁷ More recent

94. The campaign was apparently successful, based on the later publication of another pamphlet, *The William Buckley Case: Convicted of Murder and Sentenced to Be Hanged, Released from Prison by Governor Jas. M. Gillett on October 16, 1909* (1910). The Buckley case was not one of a simple murder but was connected with larger labor issues, as Buckley was accused of killing a strikebreaker.

95. Specifically, 4162 did not have a date, which is a conservative proxy for lack of notice (the presence of a date is not tantamount to notice). Based on a sample of fifty posters, we found no examples of a poster properly noticed without a date, though technically, post-1909, this would have been possible for some posters.

96. LANDES & POSNER, *supra* note 1, at 235. Landes and Posner note that another factor potentially contributing to the decline in registrations may be that “since 1989 registration has no longer been a condition for bringing an infringement suit for foreign works protected [under] the Berne Convention.” *Id.* at 235 n.40. However, because foreign works constitute a small percentage of works registered in the United States, the total exemption of foreign works from voluntary registration is a relatively unimportant determinant of registration rates.

97. Note that the consequences of failing to register a copyright are more limited post-

data confirms that the number of registrations has remained flat at a level below its 1991 peak. In 2003 the Copyright Office registered 534,122 works;⁹⁸ in 2002, 521,041 works;⁹⁹ in 2001, 601,659 works.¹⁰⁰ These figures confirm that the basic dynamic of the 1992-2000 period has persisted: unlike prior to 1991, when registrations had been rising at a significant rate, registration growth has ceased following the increase in fees.

The registration requirement thus encouraged authors to assess the value of their works prior to first publication. If the author expected the work to have a commercial value in excess of the time-adjusted cost of complying with registration and other formalities, he would take the steps necessary to obtain copyright protection. But if the costs of protection exceeded the expected revenues from copyrighting, the author would not register the work.¹⁰¹

In sum, this initial filter separating commercially valuable works from commercially valueless works helped focus the pre-1976 copyright regime in a way that maximized the incentive value of copyright while reducing the social costs. It makes sense to exclude from copyright the many works for which (in the author's judgment) protection is unlikely to provide more than trivial returns, for in those cases the primary effect of copyright is to burden subsequent use without countervailing private or public benefits.

1976. Failure to register in the post-1976 unconditional regime does not move a work into the public domain, which raises the possibility that the decline in registrations after 1991 is the result of many rightsholders delaying registration until an infringement occurs. It is only after registering a work that a U.S. rightsholder may initiate an infringement suit. 17 U.S.C. § 411 (2000). However, failure to register at the work's inception still imposes a penalty: a rightsholder may recover neither statutory damages nor attorney's fees for the period of nonregistration. *Id.* § 412. Given the difficulty of proving actual damages in an infringement suit, and the possibility that infringement may go undetected for long periods, the rightsholder who waits until detecting infringement to register his work risks forfeiting a substantial share of the infringement damages he might have recovered had he registered at the beginning of the term. Accordingly, any rightsholder who, at the inception of a copyright term, forecasts a substantial net present value for his work is likely to register. Accordingly, the correlation between the post-1991 decline in registrations and the concomitant fee increases holds, even though registration no longer is equivalent to complete forfeiture of rights.

98. U.S. COPYRIGHT OFFICE, *supra* note 66, at 62.

99. U.S. COPYRIGHT OFFICE, 105TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002, at 8 (2002).

100. U.S. COPYRIGHT OFFICE, 104TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2001, at 2 (2001).

101. If an author (or, perhaps more relevantly, a publisher) foresees little commercial value for a particular work, that work may be neither registered nor published, in which case the federal copyright term would not commence under pre-1976 law. *See* 1909 Act, *supra* note 32, §§ 10-11. Rather, the work would have been subject to perpetual common law copyright. However, under post-1976 rules, fixation in a tangible medium, not publication, is the trigger for copyright. *See supra* text accompanying note 10.

In our current unconditional copyright system, we have discarded this initial filter, and, as a result, copyright burdens the creative process in ways that it did not previously. For works that lack significant commercial value but nonetheless have some cultural significance—as, for example, an exemplar of some historical trend in politics, literature, or the arts—unconditional copyright raises the cost of copying the work for noncommercial or scholarly uses by at least the value of the time spent identifying the rightsholder and seeking permission.

An example of this problem would be an academic study of the advent and explosive growth of Internet “weblogs.”¹⁰² Imagine that the author wished to use a large number of weblog postings as source material for his analysis. Unless the subject weblogs signaled freedom of use through a publicly noticed free license,¹⁰³ the academic who wanted to include a large number of weblog posts in his study would be obliged either to clear rights to each post (or at least each post from which he wanted to draw more than limited quotations), or to trust his fate to the vagaries of the fair use doctrine.¹⁰⁴ The burden of clearing rights for a large number of sources would make the academic project much more expensive.

Similarly, unconditional copyright also burdens potentially valuable transformative uses by raising the cost of using commercially valueless source material as building blocks for derivative works that take the original, improve on it, and find a market for the final product. Examples abound of derivative works that enjoy commercial success far surpassing their source material. One

102. A weblog (sometimes shortened to “blog”) is a website, usually of noncommercial origin, that uses a dated log format updated on a daily or very frequent basis to provide information about a particular subject or range of subjects. Weblog content may be written by the blog’s owner, gleaned from other Internet or non-Internet sources, or contributed by users. A weblog may consist of the “postings” of the blog’s owner, or may accept postings from users. For examples of popular weblogs, see Slashdot, at <http://slashdot.org> (last visited Sept. 9, 2004), a user-driven blog focused on issues of interest to the computer programming community, or TalkingPointsMemo, at <http://talkingpointsmemo.com> (last visited Sept. 9, 2004), a political weblog authored by Joshua Micah Marshall, a Washington, D.C., journalist.

103. Some weblogs do precisely that. *See, e.g.,* Bag and Baggage, at <http://bgbg.blogspot.com/> (last visited Oct. 11, 2004) (weblog of appellate and intellectual property lawyer Denise Howell). *See infra* text accompanying notes 115-123 for discussion of Creative Commons, an organization that has developed special licenses to allow the public free use of copyright-protected works.

104. For a large and diverse set of examples of uses of copyrighted material that might conceivably be deemed “fair” but have nonetheless drawn allegations of infringement and demands to cease and desist, see Electronic Frontier Found. et al., Chilling Effects Clearinghouse, at <http://www.chillingeffects.org> (last visited Sept. 9, 2004). The need for both would-be users and rightsholders to engage in expensive legal analysis of the four indeterminate factors that together comprise the statutory test for fair use, 17 U.S.C. § 107 (2000), is itself a cost imposed with significantly greater frequency in an unconditional copyright regime.

relatively recent instance is the song “Superman,” a hit in 1986 for the Athens, Georgia, band R.E.M. “Superman” had originally been released in 1969 by The Clique, an obscure Houston, Texas, group. The Clique’s version of the song was not a hit (in fact, it was the “B side” to The Clique’s only hit single, “Sugar On Sunday”), and the band released only one album which, by the time R.E.M. recorded its cover, had long been “out of print.” Due, however, to the popularity of the R.E.M. cover version of “Superman,” a compilation recording of The Clique’s work was reissued in 1998.¹⁰⁵

Reworkings of musical performances are addressed by the provision of the Copyright Act imposing compulsory licenses for “mechanical rights”—i.e., an automatic license that gives artists the ability to record and distribute their own versions of musical compositions for a fee set by statute.¹⁰⁶ But for derivative works other than new performances of musical compositions, an author wishing to use even the most obscure and commercially valueless material must identify a rightsholder and ask permission. The necessity of identifying rightsholders and negotiating rights raises the cost of creating derivative works. Consequently, output of potentially valuable derivative works will fall under an unconditional copyright regime, in comparison to a conditional regime in which commercially valueless source materials are filtered out of the copyright system at their inception.

Although the utility of the registration and notice formalities seems obvious, they have more often been viewed, on balance, as a hindrance. A 1904 report by the Register of Copyrights makes that point, lamenting that “a system has gradually grown up under which valuable literary rights have come to depend upon exact compliance with the statutory formalities which have no relation to the equitable rights involved, and the question may very well be raised whether this condition should be continued.”¹⁰⁷ Criticism of formalities and tales of hardship arising from accidental noncompliance abound in the historical copyright literature.¹⁰⁸

105. See ARTISTDirect, Inc., The Clique: Biography, at <http://store.artistdirect.com/music/artist/bio/0,,415704,00.html?artist=The+Clique> (last visited Oct. 11, 2004).

106. 17 U.S.C. § 115 (2000). The compulsory license provision requires that notice be given to the licensor within thirty days of making the recording and before any distribution occurs. But, in a proviso that is especially relevant here, § 115(b)(1) provides that “[i]f the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office.”

107. THORVALD SOLBERG, LIBRARY OF CONGRESS, REPORT ON COPYRIGHT LEGISLATION 25 (1904).

108. See, e.g., *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights*, 89th Cong. 68 (1965) (statement of Abraham L. Kaminstein, Register of Copyrights) (“The [1909 Act] contains a number of highly technical requirements concerning copyright notice, registration, and deposit, and the recording of assignments which are not only burdensome and difficult to understand but which, in too

There are two principal responses to the “unintentional noncompliance” objection to formalities. The first is that failure to comply with formalities is “endogenous”—i.e., failure to comply with mandatory formalities is evidence that the value of the work in question is less than the cost of educating oneself about and complying with a particular formality.¹⁰⁹ Because a person in possession of rights to a valuable work has an incentive to educate himself about the steps required to perfect and maintain those rights, we need not concern ourselves with noncompliance—it is not evidence of a failure of the system of formalities, but a signal that the prospect of obtaining or maintaining rights in the work is not valuable enough to merit the required investment in compliance.

Of course, many would prefer that noncompliance with formalities reflect an informed decision, rather than a mistake. The second response to the noncompliance problem proceeds from the assumption that we are not willing to ignore noncompliance as “endogenous.” The rate of noncompliance is dependent, to some extent, upon the difficulty of educating oneself about and then complying with a particular formality. Administering registration and renewal through simple online forms would lower the cost of complying with these formalities and reduce the incidence of unintentional noncompliance. Similarly, turning over the task of administering registration and renewal formalities to a number of private firms would, by sparking competition to expand the pool of consumers of “formalities-compliance services,” increase the availability of consumer information about compliance with formalities and further reduce the incidence of unintentional noncompliance. Professor Lawrence Lessig has suggested that private provision of formalities-compliance services could be modeled on the current system for registering Internet domain names—i.e., a central registry maintained by government or a public-private partnership (like the Internet Corporation for Assigned Names and Numbers (ICANN),¹¹⁰ which maintains the main top-level Internet domains (.com, .org, .net)) into which many competing registrars feed the data that is submitted by consumers. (In the Internet context, firms like Stargate.com¹¹¹ and Network Solutions¹¹² compete to offer domain name registration services.) As Lessig notes, competition between competing registrars drives down the cost of registering an Internet domain name and increases the ease with which

many cases, result in a complete loss of copyright protection.”).

109. See LANDES & POSNER, *supra* note 1, at 238.

110. Internet Corp. for Assigned Names and Numbers, ICANN Information, at <http://www.icann.org/general> (last visited Sept. 9, 2004); see also LESSIG, FREE CULTURE, *supra* note 4, at 288-89.

111. See generally Stargate.com Inc., Welcome to Stargate.com, at <http://www.stargateinc.com> (last visited Sept. 9, 2004).

112. See generally Network Solutions, Home, at http://www.networksolutions.com/en_US (last visited Sept. 9, 2004).

registration occurs.¹¹³ There is no reason that competition could not do the same in the context of compliance with copyright formalities.

There is one final observation (not exactly an objection) related to the filtering function of registration and notice. It might be argued that, even in our current unconditional system, authors are free to dedicate their works to the public domain, and therefore rather than reinstall formalities, we should encourage public domain deeding as a method of filtering commercially valueless works out of copyright. But dedication to the public domain is not a substitute for the filtering function that formalities provide in a conditional copyright system. First, there is no provision in our current unconditional regime establishing rules for how dedication may be accomplished, and it has never been conclusively determined under current law that one may irreversibly dedicate a work to the public domain (though dedication has been judicially enforced under pre-1976 law¹¹⁴).

Assuming dedication can be done, it must be accomplished by a license “to the world,” via, for example, a statement imprinted on all copies of a published work that “the author grants a nonexclusive right to any person to use this work in any way.” The process of dedication is thus the mirror image of compliance with registration and notice formalities. In a conditional system, a rightsholder must invest in compliance with formalities to obtain protection. In an unconditional system, a rightsholder must spend time and money on the process of dedication in order to disclaim protection. The conditional system relies on self-interest to filter commercially valueless works out of copyright. The dedication process in an unconditional system relies on altruism, and its effect is therefore inevitably limited.

To be clear, I do not mean to suggest that, in our current unconditional system, public domain dedication should not be encouraged. Dedication is not a complete answer, but it can help, and new ways should be found to make the process more effective. Creative Commons, a project formed by a group of activists, academics, and content creators to give rightsholders choices about how their works may be used in addition to the “all rights reserved” default of the formal copyright law, has been active on this front.¹¹⁵

Creative Commons provides a variety of “some rights reserved” licenses, including licenses allowing free use with attribution,¹¹⁶ noncommercial use,¹¹⁷

113. See LESSIG, *FREE CULTURE*, *supra* note 4, at 289.

114. See, e.g., *Bell v. Combined Registry Co.*, 397 F.Supp. 1241 (N.D. Ill. 1975) (holding that a rightsholder had abandoned the copyright by authorizing others to use it without limitation and writing in his diary that it was a “gift” to the world), *aff’d*, 536 F.2d 164 (7th Cir. 1976).

115. Creative Commons, About Us, at <http://creativecommons.org/learn/aboutus> (last visited Sept. 9, 2004).

116. Creative Commons, Creative Commons Deed: Attribution 2.0, at <http://creativecommons.org/licenses/by/2.0> (last visited Nov. 29, 2004).

use without the right to make derivative works,¹¹⁸ and use with the requirement that the user make freely usable any derivative work created using the original source material (referred to as the “share-alike” license,¹¹⁹ similar in purpose to the “copyleft” movement’s Open Software License¹²⁰ and GNU General Public License¹²¹). Creative Commons also provides a “no rights reserved” public domain dedication license, which provides a perpetual and unconditional license “for the benefit of the public at large and to the detriment of the Dedicator’s heirs and successors,”¹²² as well as a “Founders’ Copyright” license, under which rightsholders agree to dedicate their work to the public domain after either a fourteen- or twenty-eight-year period.¹²³ I will return to Creative Commons later as we consider how to build and implement new-style formalities.

2. *Renewal*

Until it was eliminated by the 1976 Act (for pre-1978 works) and the Copyright Renewal Act (for all other works), the renewal formality served as another filter, one that operated later in the lifecycle of the copyrighted work as an ex post test of commercial viability.

The effect of the renewal requirement was, again, to measure authors’ desire for protection. The mechanism was the same as that for the initial filter of registration, only it measured not whether a work had commercial value at its inception, but whether its value was enduring. Works that retained commercial value at the end of the initial copyright term (first fourteen and later twenty-eight years) were renewed. Authors would not bother, however, to renew works that ceased to profit them at the end of the initial term and for which they held no realistic expectation of future profit. Historically, approximately 15% of works were renewed, meaning that 85% of works moved into the public domain—by consent of rightsholders—after a relatively short term of protection.

117. Creative Commons, Creative Commons Deed: NonCommercial 1.0, at <http://creativecommons.org/licenses/nc/1.0> (last visited Sept. 9, 2004).

118. Creative Commons, Creative Commons Deed: NoDerivs 1.0, at <http://creativecommons.org/licenses/nd/1.0> (last visited Sept. 9, 2004).

119. Creative Commons, Creative Commons Deed: ShareAlike 1.0, at <http://creativecommons.org/licenses/sa/1.0> (last visited Sept. 9, 2004).

120. Open Source Initiative, Open Software License v. 2.0, at <http://www.opensource.org/licenses/osl-2.0.php> (last visited Sept. 9, 2004).

121. Free Software Found., GNU General Public License, at <http://www.gnu.org/licenses/gpl.html> (last visited Sept. 9, 2004).

122. Creative Commons, Creative Commons Public Domain Dedication, at <http://creativecommons.org/licenses/publicdomain> (last visited Sept. 9, 2004).

123. Creative Commons, The Founders’ Copyright, at <http://creativecommons.org/projects/founderscopyright> (last visited Sept. 9, 2004).

Copyright Office data on renewal rates suggests that many authors place a low value on continued copyright protection at the end of an initial copyright term. In a 1961 report based on data subsequent to the 1909 Act, the head of the Copyright Office's Examining Division stated that, for the minority of published works that were registered and for which notice of copyright was given, less than 15% of all copyrights were being renewed.¹²⁴

Landes and Posner, looking at Copyright Office data from 1910 to 2000, arrived at the same average rate of renewal—around 15%.¹²⁵ Figures 2 and 3, above, graph the annual number of renewals and the rate of copyright renewal, respectively, during that period. The data shows that the gross number of renewals grew by a factor of more than ten between 1910 and 1991. But the percentage of works renewed remained low throughout the period. Working from the same data used by the Copyright Office, Landes and Posner estimate the rate of renewal at less than 11% for the period between 1883 and 1964, even though the renewal fee was trivial throughout this period.¹²⁶ The rate of renewal rose somewhat between 1980 and 1990, when it reached its single-year high of 22%. Beginning in 1992, however, the rate began to decline sharply. As noted above,¹²⁷ in 1992, renewal for works copyrighted between 1964 and 1977 became automatic under the Copyright Renewal Act, and the decline in renewal was in large part driven by the elimination of renewal as a formality. But because the 1992 amendments did not eliminate all incentive to renew a work, Landes and Posner argue that the decline in renewal is also likely to be related to increases in the renewal fee, which doubled to \$12 in 1991, rose to \$20 in 1993, and rose again to \$45 in 2000.

If the general rate of renewal is low, renewal rates of certain significant classes of works were even lower: the renewal rate for books has averaged less than 8%, and for graphic arts approximately 3%.¹²⁸ The average renewal rate over this period for music is higher (32%),¹²⁹ which one would expect given the regularity with which even very old songs are reworked with new performers and arrangements. But the renewal rate even for music peaked in 1956 and fell steadily after that. By 1969, the end of the data period for renewals disaggregated by type of work, the renewal rate for music had fallen almost to the historical norm for all works of around 15%.¹³⁰

124. Barbara A. Ringer, *Renewal of Copyright*, in 1 STUDIES ON COPYRIGHT 503, app. at 616-20 (Arthur Fisher memorial ed. 1963).

125. LANDES & POSNER, *supra* note 1, at 236.

126. "The renewal fee was \$1 from 1909 to 1947, \$2 from 1948 to 1965, \$4 from 1966 to 1977, \$6 from 1978 to 1990, \$12 from 1991 to 1992, \$20 from 1993 to 1999, and \$45 from 2000 to the present." *Id.* at 212 n.8.

127. *See supra* text accompanying note 57.

128. *See* LANDES & POSNER, *supra* note 1, at 241-44.

129. *Id.* at 243.

130. *Id.* at 242.

In sum, the renewal data reinforces what the registration data suggests—that the difference between an unconditional and a conditional copyright system, in terms of the scope of the works each system reaches, is profound. In a conditional system, a substantial fraction of copyrightable works is not valuable enough at inception to merit the investment necessary to secure protection. And only a small portion of works retains enough value at the end of an initial term to merit renewal. Using Copyright Office registration and renewal data, Landes and Posner estimate an average annual depreciation rate for copyrighted works ranging between 5.4% and 12.2%,¹³¹ which results in an average expected commercial life for copyrighted works ranging from 8.2 to 18.5 years.¹³² Working from copyrights registered in a single year, 1934, the authors estimate that 50% of the registered works had fully depreciated in just 10 years, 90% in 43 years, and 99% in 65 years.¹³³ These findings are supported by the results of a 1998 study by the Congressional Research Service (CRS), which examined a sample of copyrights renewed after an initial term of twenty-eight years. The CRS study concluded that only 11% of renewed copyrights in books, 12% in musical works, and 26% in motion pictures had some continuing commercial value.¹³⁴

3. *Effect of the renewal formality on the real term of copyright*

The renewal formality made the “real” term of copyright (in contrast to the nominal term set out in the copyright statutes) very short by our current standards. For the subset of works that was not eliminated by the initial (registration and notice) filter and was therefore subject to copyright, the longest effective copyright term prior to the 1976 Act, at an average renewal rate of 15%, was 32.2 years.¹³⁵ Using the highest historical renewal figure for all works, 22% (in 1990), the average term of copyright would be 34.2 years.¹³⁶

Under our current unconditional copyright system, there is no longer any filtering mechanism tailoring the terms of individual works, and, consequently, the real and nominal copyright terms have converged. The 1976 Act switched from a fixed term of years to an indeterminate term for works by individual authors: at first, life of the author plus fifty years, later extended by the CTEA

131. *Id.* at 238-39.

132. *Id.* at 240.

133. *Id.*

134. See EDWARD B. RAPPAPORT, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (Cong. Research Serv. Report 98-144E, 1998).

135. Under pre-1976 law, the longest duration for either the initial or renewal term was twenty-eight years. Accordingly, using a renewal rate of 15%, the average term of copyright equals $(0.15 * 56) + (0.85 * 28)$.

136. Using the highest renewal figure of 22%, the calculation is $(0.22 * 56) + (0.78 * 28)$.

to life plus seventy years. For corporate works—known in the argot as “works for hire”—and anonymous works, the 1976 Act fixed a term of seventy-five years from the date of publication or one hundred years from creation, whichever expired first. The CTEA extended those terms to ninety-five and one hundred twenty years, respectively.

The copyright term is now sufficiently long that the net present value to the rightsholder of a copyright is practically indistinguishable from what it would be under a perpetual term. In an amicus curiae brief submitted to the Supreme Court in support of the petitioners in *Eldred v. Ashcroft*, a group of economists that included Nobel Prize winners George Akerlof, Kenneth Arrow, James Buchanan, Ronald Coase, and Milton Friedman argued that the current, post-CTEA copyright term of life plus seventy years has a net present value that is 99.88% of the value of a perpetual term.¹³⁷

That the copyright term is now effectively perpetual is an odd development in a country whose constitution specifies that copyrights may be granted only for “limited times.”¹³⁸ As will be discussed in greater detail later in this Article,

137. See Economists’ Brief, *supra* note 1, at 8.

138. I am indebted to Tim Phillips for pointing out to me just how odd an effectively perpetual term is given the Founders’ very different conception of an appropriate term. Correspondence between Madison, who crafted the Intellectual Property Clause, and Jefferson suggests that the Founders thought of the proper length of a limited copyright term in quite specific actuarial terms. Having resigned himself to the inclusion of a clause authorizing Congress to create copyrights and patents—a power he initially opposed as liable to lead to the creation of dangerous “monopolies”—Jefferson proposed in a letter (posted from France) of August 28, 1789 that copyrights and patents be limited in duration to a fixed term of years. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON 444, 451 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904). Several days afterward, in two letters dated September 6, 1789, Jefferson proposed a term of nineteen years, based on an actuarial calculation. In his first letter on that date, Jefferson framed the issue as follows:

The question, whether one generation of men has a right to bind another, seems never to have been started on this [the European side] or our [American] side of the water. . . . [T]hat no such obligation can be so transmitted I think very capable of proof. I set out on this ground, which I suppose to be self evident, that *the earth belongs in usufruct to the living*; that the dead have neither powers nor rights over it.

Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 454, 454 (emphasis in original). In an addendum to that letter, Jefferson reduced his principle to a concrete number:

Buffon gives us a table of twenty-three thousand nine hundred and ninety-four deaths, stating the ages at which they happened. To draw from these the result I have occasioned for, I suppose a society in which twenty-three thousand nine hundred and ninety-four persons are born every year, and live to the age stated in Buffon’s table. Then, the following inferences may be drawn. Such a society will consist constantly of six hundred and seventeen thousand seven hundred and three persons, of all ages. Of those living at any one instant of time, one half will be dead in twenty-four years and eight months. In such a society, ten thousand six hundred and seventy-five will arrive every year at the age of twenty-one years complete. It will constantly have three hundred and forty-eight thousand four hundred and seventeen persons of all ages above twenty one years, and the half of those twenty-one years and upwards living at any one instant of time, will be dead in eighteen years and eight months, or

copyright's primary justification in the United States, at least as it has been articulated historically, is as a means of ensuring that creators realize a large enough share of whatever revenue their works may produce to ensure that they are induced to invest in production of creative works. Copyright in the United States has tended to focus on this utilitarian justification, in contrast to a natural rights or "labor desert" paradigm that premises copyright on protection of the author's right to the fruits of his intellectual labor, or to a moral rights paradigm in which copyright serves mainly to protect an author's control over his identity (i.e., personality) as reflected in his creative works.¹³⁹ As Professor Paul Goldstein and others have observed, although at the level of theory one might expect our utilitarian system to operate quite differently from systems in continental Europe that are purportedly based on a mixture of natural and moral rights justifications, in reality copyright systems in the developed world have converged, and now provide a set of protections that approach what one would expect under a natural rights paradigm.¹⁴⁰

Of course, the natural rights justification for copyright does not necessarily demand a perpetual term; such a system might merely impose one that allowed the author to capture substantially all of the fruits of his labor—i.e., one in which the net present value of the term was practically indistinguishable from a perpetual term. That is, as the economists' brief in *Eldred* shows, exactly the kind of term we now have under the U.S. system. But even as our notions regarding the optimal copyright term have shifted closer to the natural rights paradigm, the deeper rationale for the filtering function of copyright formalities is still relevant: requiring compliance with formalities helps to reduce the social costs imposed by granting exclusive rights in expression.

4. *The costs of copyright*

The social cost of monopoly. Any copyright system that grants exclusive rights, whether based in a utilitarian or natural/moral rights conception, imposes a number of different social costs. First, there is an obvious economic cost, which is a specific instance of the general problem of monopoly: If a

say nineteen years.

Then, the contracts, constitutions and laws of every such society become void in nineteen years from their date.

Letter from Thomas Jefferson to Dr. Gem (Sept. 6, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 462, 462-63. The same computation using life tables from 1992 yields a Jeffersonian copyright term of between thirty and thirty-five years. See 2 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES 1992: MORTALITY, pt. A, § 6, tbl.6-1 (1996).

139. See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Carla Hesse, *The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance*, DAEDALUS, Spring 2002, at 26.

140. See, e.g., 1 PAUL GOLDSTEIN, COPYRIGHT § 1.13.2.3 (2d ed. 2004).

particular creative work has a market value, exclusive rights will enable the creator to charge a supracompetitive price. Consequently, access to the work will be denied to those who value it in excess of the competitive price, but less than the supracompetitive price that the monopolist is able to command.¹⁴¹ Copyright, then, creates deadweight losses in markets for expression.

The monopoly costs of copyright, while very real for works that possess significant commercial value, are relatively unimportant to the commercially valueless or exhausted works that conditional copyright filtered out but unconditional copyright locks up. While an unconditional system keeps economically spent works under copyright, the persistence of exclusive rights can do little to raise the price of a piece of expression that is commercially valueless—the rightsholder, in such an instance, may have a notional “monopoly” but lack any power to demand a supracompetitive price.

Copyright’s burdens on speech. Much more important for our purposes are the two types of “cultural” costs imposed by copyright. Copyright imposes a First Amendment cost inhering in the restrictions on free speech imposed when rightsholders are allowed to prevent copying of their works. The recent copyright dispute involving Diebold Election Systems provides an example of a potentially significant First Amendment cost imposed by copyright.

Diebold manufactures electronic voting machines. Sometime in early 2003 a hacker broke into the company’s computer systems and stole a large number of internal e-mails and memoranda. Some of the stolen documents included discussions of software bugs in Diebold voting machines and warnings that the machines may produce unverifiable results and are poorly protected against hackers.¹⁴² In August 2003, an unknown person mailed approximately 13,000 pages of the stolen data to a number of activists concerned with electronic voting, many of whom published the Diebold e-mails and memos, or linked to those documents, on their websites.

In response, Diebold sent dozens of cease-and-desist notices, pursuant to the “notice and take-down” provisions of the Digital Millennium Copyright Act (DMCA),¹⁴³ to website publishers and Internet service providers (ISPs), demanding that they remove the documents from websites and cease linking to

141. For a more fully developed account of the benefits and costs of copyright, see Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 U. PITT. L. REV. 453 (2001).

142. For factual background, see First Amended Complaint, Online Policy Group v. Diebold Inc., No. C 03-04913 JF, 2004 WL 2203382 (N.D. Cal. Sept. 30, 2004), available at http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/First_Amended_Complaint.pdf (last visited Sept. 9, 2004).

143. Pub. L. No. 105-304, 112 Stat. 2860 (1998). The DMCA provides a “safe harbor” provision as an incentive for ISPs to take down user-posted content when they receive cease-and-desist letters such as the ones sent by Diebold. 17 U.S.C. § 512(c) (2000). By removing the content, or forcing the user to do so, for a minimum of ten days, an ISP can immunize itself from any copyright claim. 17 U.S.C. § 512(g)(2)(C).

the documents. Two recipients of the Diebold letters, a group of Swarthmore College students and an ISP providing pro bono Internet hosting to nonprofit organizations, filed suit seeking a declaratory judgment that their publication of the Diebold documents is lawful.

The district court recently issued a summary judgment ruling that suggests Diebold's copyright misadventures may backfire.¹⁴⁴ The case is still pending as of this writing, but the eventual result is less relevant for our purposes than what the facts of the case say about the free speech costs of unconditional copyright. Clearly, copyright incentives have little to do with whether Diebold creates the type of corporate documents at issue in this case. Diebold's employees and contractors create and distribute these documents in the ordinary course of the company's business, and they will continue to do so without regard to their copyright status. In our unconditional copyright system, where the Diebold documents gain automatic copyright protection at the moment of their fixation, the only function of copyright is to allow Diebold to inhibit public discussion of whether its voting machines are reliable. In contrast, in a reformatized system, most of the Diebold documents likely never would be subject to copyright in the first place (because Diebold does not expect to profit from the content itself, it almost certainly would not invest in compliance with formalities) and consequently Diebold would be unable to use copyright law as a means of limiting discussion regarding an issue of the highest public concern.¹⁴⁵

The Diebold dispute shows us that by bringing within the scope of copyright a huge number of works for which its incentive system is irrelevant, our unconditional copyright regime makes the potential conflict between copyright and the First Amendment much more severe than it would be under a conditional regime.¹⁴⁶ This is an important point that no court has ever addressed, but which is quickly becoming salient.

144. *Online Policy Group v. Diebold Inc.*, No. C 03-04913 JF, 2004 WL 2203382 (N.D. Cal. Sept. 30, 2004), available at http://cyberlaw.stanford.edu/about/cases/20040930_Diebold_SJ_Order.pdf (last visited Nov. 11, 2004).

145. Note that under the pre-1976 regime, where federal copyright commenced upon "publication" and perpetual common law copyright applied to unpublished works, Diebold's unpublished corporate memoranda would likely have been subject to common law copyright, and Diebold would still have had a powerful copyright lever. (I say "likely," rather than "certainly," because the pre-1976 rules determining what constituted "publication"—the trigger that terminated state common law copyright and moved a work into the federal system—were the subject of substantial debate and confusion. See William S. Strauss, *Protection of Unpublished Works*, in 1 *STUDIES ON COPYRIGHT*, *supra* note 124, at 189, 198-205. In contrast, under a reformatized version of our post-1976 system, where federal copyright arises upon fixation, documents like the Diebold memoranda would seldom enter the copyright system.

146. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995) (holding that copyright could be used to prevent distribution of Church of Scientology materials). See generally Jed Rubenfeld, *The Freedom*

Copyright “buffering” doctrines and the First Amendment. When considering the potential friction between copyright and the First Amendment, courts (including the Supreme Court in *Eldred*) have often pointed to two doctrines, the idea/expression dichotomy and the fair use defense, that act as buffers preventing copyright from interfering unduly with free speech. Because copyright protects only expression, courts have reasoned, ideas remain free for others to discuss and build upon. And because it is sometimes important, in talking about an idea, to use a particular bit of expression that may be protected, the fair use doctrine operates to allow the use of portions of a protected work for certain purposes—chiefly academic and journalistic criticism, and parody—that are considered necessary to maintaining the vibrancy of political and cultural debate.

Although the *Eldred* Court was not entirely clear on the point, its opinion may be taken to suggest that these doctrines are “traditional contours” of copyright that, left untouched, suffice to protect copyright’s cohabitation with the First Amendment.¹⁴⁷ But the Court’s reliance on these doctrines is almost certain to come under increasing strain. The idea/expression dichotomy makes perfect sense for one medium, written text, where the separation of idea from expression is relatively straightforward. But the dichotomy never applied particularly well to nontextual media, such as music or graphic arts, where the “idea” is difficult, if not impossible, to separate from the expression. As technology shifts creativity toward new media that focus on “sampling,” “remixing,” or “mashing up” bits of film, text, music, and graphic arts, we can expect to see fewer instances where the idea/expression dichotomy can do much to insulate the use of “ideas” from infringement liability.

A similar dynamic is now undermining the fair use doctrine. In the old media world of paper books, celluloid films, magnetic videotapes, and vinyl recordings (or even, until recently, unencrypted CDs), one gained the ability to make a fair use simply by acquiring a copy of the work. Because there were exceedingly few analogues, in the analog world, to today’s digital encryption and rights-management technologies, one was granted access by virtue of possession. But in the digital environment, possession does not necessarily imply the ability to make fair uses. Digital works are often encrypted, and the DMCA imposes civil and criminal penalties for the use—or even the distribution—of technologies designed to circumvent copy controls protecting copyrighted works.¹⁴⁸ Courts in cases like *Universal City Studios, Inc. v. Corley* have held that the right of fair use does not imply a right of access to

of Imagination: Copyright’s Constitutionality, 112 YALE L.J. 1 (2002) (limning copyright’s conflicts with the First Amendment and suggesting limitations to constitutionalize copyright).

147. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

148. 17 U.S.C. § 1201 (2000).

copyrighted works that may be required to make a fair use.¹⁴⁹ That holding threatens to make fair use a mirage as technology shifts creativity from analog to digital media.

Assessing whether fair use includes some notion of fair access is one of the areas where copyright analogies from the analog world break down. Questions of access in the analog world only come up when the access sought is to *someone else's property*. How could it be otherwise, since possession of analog materials necessarily entails access to make a copy? In contrast, the issue we confront in the digital world is access to *one's own property* for the purpose of making fair uses. Put that way, a judicially established right of access would not seem to require much of a logical leap. But to say that there is not currently a judicially established right of access to make fair uses of copyrighted materials is not especially meaningful. In the analog world we lived in until only yesterday (at least in the time frame of the law), the question simply never came up.

For the moment, however, it is clear that if fair use in the digital environment depends on fair access, the opportunities to make fair uses in a world of strong (and legally enforced) encryption are going to be substantially restricted. As with the idea/expression dichotomy, the shift from the analog to the digital environment has altered (or, more precisely, has *constricted*) the “traditional contours” of the fair use doctrine. In the case of fair use, however, the effect is worse, because it is not simply the product of shifting technologies, but of government action—i.e., the DMCA, which prohibits circumvention without providing any exception for fair use access.

So if the idea/expression dichotomy and fair use have been enfeebled, are there other “traditional contours” of copyright that remain vigorous enough to mediate between copyright and the First Amendment? There is—or at least was—a third “buffer” that played a very significant role: copyright formalities. Under conditional copyright, formalities served to limit copyright protection to works that had independent value as expression. Works that lacked expression value ordinarily would not be copyrighted. The purpose of copyright is to incent expression *ex ante*, not to serve as a locking mechanism *ex post*. Copyright formalities created an incentive structure that aligned the material protected under copyright with the overarching justification for the regime. With the disappearance of formalities, perversions of copyright like we observe in the Diebold dispute become not only possible, but inevitable.

Copyright's burden on creativity. In addition to burdening free speech, copyright also imposes costs on future creativity by shrinking the stock of preexisting materials available to future creators for use as building blocks in new works, which reduces consequentially the production of new works.¹⁵⁰

149. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458-59 (2d Cir. 2001).

150. See LANDES & POSNER, *supra* note 1, at 58-60 (providing examples of

Unlike the monopoly problem, copyright's toll on future creativity arises regardless of whether a particular work has a market value.

Individual acts of intellectual creativity may begin with a blank piece of paper, but the creative process itself is cumulative—every creative work builds on materials that already exist. Restraints on the ability to copy an entire work are likely to have only marginal effects on the creation of future works: although many creative works refer to previous works, such reference rarely involves literal copying of the entire predecessor work. But copyright reaches further than wholesale, literal copying. Copyright allows a rightsholder to restrain works that contain elements substantially similar to any more than a trivial portion of the rightsholder's work.¹⁵¹ In addition, the law gives the rightsholder control over derivative works—i.e., works that involve the transformative reuse of original (and therefore protected) elements of the rightsholder's work.¹⁵²

The costs of copyright that we have just reviewed are substantially higher in an unconditional copyright system. Formalities, at least as they operated in the conditional copyright system that existed before the 1976 Act, minimized the costs of exclusive rights while retaining all, or virtually all, of the benefits. They did so by focusing the protections of copyright on those works that were judged by their authors, first at their inception and then again after an initial period of protection, to be the kind of commercially valuable creative material that could, if protected by copyright, potentially provide an economic return. For these works, the incentive effect of copyright was potentially large enough to justify the cost of protection. But for works that are not expected to provide a return for their authors, protection involves only potential costs. Protection for works that authors judge commercially valueless—i.e., the majority of works—is a net loss for social welfare.

C. Formalities and "Utilitarian" Copyright

In addition to their role in focusing copyright (i.e., filtering) and creating ownership information, there is a deeper justification for formalities that ties together much of what has just been said: formalities are an important component of our original constitutional commitment to a utilitarian model of copyright. As we have moved closer to a natural rights paradigm in our copyright practice, the foundations of American copyright at both the constitutional and statutory levels have been obscured. But the original commitments are still there, awaiting the right plaintiff to revive them.

transformative use of preexisting materials in the works of Shakespeare, Yeats, and Eliot, among others).

151. See 2 GOLDSTEIN, *supra* note 140, § 7.2.1.2.

152. *Id.* § 7.4.1.1.

1. *The Intellectual Property Clause*

Why did the “traditional contours” of pre-1976 U.S. copyright law require compliance with so many bothersome formalities? In order to understand the role of formalities in our pre-1976 conditional copyright system, it is helpful first to look at the source of Congress’s authority to enact copyright laws: the Constitution’s Intellectual Property Clause. The clause does not itself require that Congress install any particular formality in copyright laws. Yet it reflects an original understanding of the purpose of copyright that led, in the early copyright statutes and for almost two centuries thereafter, to a system that relied heavily on formalities.

Article I, Section 8, Clause 8 of the U.S. Constitution confers upon Congress authority “[t]o 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.” As the Supreme Court has recognized, the Intellectual Property Clause is “both a grant of power and a limitation.”¹⁵³ But aside from formulating that aphorism, the Supreme Court has done little to limn either the power or the limitation, or to define the judicial role in ensuring that Congress’s copyright lawmaking remains within the boundaries set out by the clause.

The most significant continuing dispute in the interpretation of the Intellectual Property Clause involves the most basic question of interpretation: which part of the clause sets out the enumerated power? Edward Walterscheid has argued that the grant of power resides in the “promote . . . Progress” language, and that that power, moreover, is a general one that authorizes Congress to undertake a variety of schemes, such as the funding of medical research or grants to arts organizations, with the common purposes of encouraging discovery and spreading culture.¹⁵⁴ Walterscheid contends that the second part of the clause (the “exclusive Right[s]” language) was added only for the purpose of making clear that, subject to certain limitations, Congress was authorized to grant patents and copyrights as part of its general power to advance learning.¹⁵⁵

More often, however, it has been argued that the power resides in the “exclusive Right[s]” part of the clause. According to this interpretation, the power granted is specific—i.e., Congress is authorized to grant limited-time exclusive rights for the purpose of advancing learning. The federal

153. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

154. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 *IDEA* 1 (2002).

155. *Id.* at 7.

government's general power to "promote . . . Progress" through other means, if it exists at all in the Constitution, must reside elsewhere.¹⁵⁶

Questions also remain regarding how the clause limits Congress's exercise of its power. The clause limits the copyright grant to the "writings" of "authors"—by virtue of these limitations, there can be no grant of exclusive rights in ideas (as opposed to expression), and no grants to publishers. There is also, as mentioned previously, the "limited times" requirement.

The clause also imposes a more general limitation. In *Eldred v. Ashcroft*, the Supreme Court announced that the "promote . . . Progress" phrase functions as a limitation on Congress's power to enact copyright laws: "The 'constitutional command' . . . is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'"¹⁵⁷

The Court's statement in *Eldred* provides no guidance regarding how judges are to determine whether one of Congress's copyright enactments fails to promote progress. Nonetheless, even the bare statement in *Eldred* undercuts previous views that the "promote . . . Progress" language is merely a statement of purpose that functions neither as part of the congressional power, nor as a limitation of it.¹⁵⁸ More importantly, the Court's statement in *Eldred* aligns its reading of the clause in the copyright context with its well-established approach in patent cases. In the patent context, the Court has long held that the "promote . . . Progress" language imposes a judicially enforceable constraint on Congress's power.¹⁵⁹

If the Supreme Court has left basic questions of textual interpretation unsettled, it has been relatively clear and consistent on an even more basic interpretive issue raised by the Intellectual Property Clause: the theoretical

156. See, e.g., DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 93 (1997) (arguing that the Intellectual Property Clause confers "not a general power to 'promote the progress of science and the useful arts,' but only the power to grant limited exclusive rights in order to accomplish that goal").

157. 537 U.S. 186, 212 (2003) (quoting *Graham*, 383 U.S. at 6).

158. Compare *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (concluding that introductory language does not limit congressional power), and *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) (same), and *1 NIMMER & NIMMER*, *supra* note 13, § 1.03 (arguing that the promote progress phrase "is in the main explanatory of the purpose of copyright, without in itself constituting a rigid standard against which any copyright act must be measured"), with *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (suggesting, in dicta, that the promote progress language may inform the meaning of otherwise ambiguous statutory language: "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose.").

159. See *Graham*, 383 U.S. at 5-6 ("Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."); *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1950) (Douglas, J., concurring) ("Congress acts under the restraint imposed by the statement of purpose in Art. I, § 8.").

foundation of intellectual property rights. It has long been established—at least at the level of judicial rhetoric—that copyright is not a natural right, but one created by positive law.¹⁶⁰

The Supreme Court established that principle in the 1834 case of *Wheaton v. Peters*.¹⁶¹ In that case, Henry Wheaton, the first reporter of decisions of the Supreme Court, sued Richard Peters, his successor, alleging that a set of condensed volumes of Supreme Court opinions (Wheaton's Reports) that Peters had published infringed Wheaton's copyrights. In opposition, Peters pointed out that Wheaton could not assert a valid copyright in the Court's opinions, which is what Peters had republished.¹⁶² The Court agreed with Peters,¹⁶³ and could simply have dismissed Wheaton's case on this ground. But it dealt with this potentially dispositive issue in the last paragraph of its opinion, choosing instead to focus on the much more difficult alternative defenses Peters had raised: (1) that Wheaton could only claim copyright in his published works under federal law, as the right did not exist at common law,¹⁶⁴ and (2) that Wheaton's failure to timely deposit his volumes with the Secretary of State, and to give public notice in a newspaper of that deposit, vitiated any copyright he might otherwise hold under the copyright acts of 1790 and 1802.¹⁶⁵

The Court upheld both of Peters's defenses, holding that the author's copyright in his published works is created by statute and does not exist at common law.¹⁶⁶ Wheaton argued that the use of the phrase "securing . . . exclusive rights" in the Intellectual Property Clause and "securing [to authors] the copies of maps, charts and books" in the founding copyright statute indicated that both the Constitution and the 1790 Act were "securing" to authors a right that already existed at common law, and that continued to exist.¹⁶⁷ The Court rejected that argument: both the clause and the 1790 Act,

160. For a comprehensive summary of the natural rights, utilitarian, communitarian, and other theories of intellectual property, see Justin Hughes, *The Philosophy of Intellectual Property*, in *INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS* 107 (Adam D. Moore ed., 1997).

161. 33 U.S. (8 Pet.) 591, 657 (1834); cf. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 147 *REVUE INTERNATIONALE DU DROIT D'AUTEUR* 125, 141-47 (1991) (tracing mix of utilitarian and authors' rights motivations in early development of both U.S. and French copyright laws).

162. 33 U.S. (8 Pet.) at 619.

163. *Id.* at 668.

164. *Id.* at 625.

165. *Id.* at 634-35.

166. *Id.* at 657 ("The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises [sic] this product by the transfer of his manuscripts, or in the sale of his works, when first published.").

167. *Id.* at 660-61.

the Court stated, refer to inventions (i.e., patents) as well as literary works, and “it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.”¹⁶⁸ Neither the clause nor the 1790 Act provided any reason to distinguish between the source of the exclusive right for inventions versus literary works. The Court also found, in a passage notable more for its forcefulness than its logic, that the language of the 1790 Act established that Congress was creating a right, not sanctioning an existing one:

That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c ‘shall have the sole right and liberty of printing,’ &c. Now if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act.¹⁶⁹

Having found that copyright in published works was a right created by statute, the Court held that noncompliance with the statutory prerequisites—including those, such as deposit and notice, performed subsequent to publication—vitiates the copyright:

[T]he inquiry is made, shall the non performance of these subsequent conditions operate as a forfeiture of the right?

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title.¹⁷⁰

Facing an incomplete factual record, the Court remanded to the circuit court for a determination whether Wheaton had complied with the deposit and notice formalities.¹⁷¹

If the Supreme Court in *Wheaton* made clear that copyright is established by law, rather than merely enforced by it, then the obvious question is “For what purpose has the right been established?” Uniquely among the legislative powers enumerated in Article I, Section 8, the Intellectual Property Clause ties the power to grant patents and copyrights to a specified purpose—the promotion of progress in “science” (by which the Framers meant all forms of knowledge, including literature and the arts) and the “useful arts” (by which the Framers meant patentable inventions). The justification for copyright (and patent) set out in the clause is utilitarian: Congress is authorized to create exclusive rights not as an end in itself, but merely as a means of “promoting

168. *Id.* at 661.

169. *Id.*

170. *Id.* at 664-65.

171. *Id.* at 667.

progress.” The creation of exclusive rights will induce investment in literary, artistic, and scientific work, by, as Abraham Lincoln put it, “add[ing] the fuel of *interest* to the *fire* of genius.”¹⁷² Whether granting exclusive rights is the means best suited to that end is one of the large questions that has produced an interesting debate but is left aside in this Article.

In its occasional encounters with the Intellectual Property Clause, the Supreme Court has spoken in the utilitarian language of incentives and access—though, as Professor Stewart Sterk has pointed out, the Court’s rhetoric has not been entirely consistent.¹⁷³ In *United States v. Paramount Pictures*, the Court wrote that “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”¹⁷⁴ In *Mazer v. Stein*, the Court wrote that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”¹⁷⁵ In *Sony Corp. v. Universal City Studios*, the Court wrote that the exclusive rights granted under the copyright laws “are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward”¹⁷⁶

So at least at a high level of generality—i.e., in the Supreme Court’s *obiter dicta* on copyright’s overall purpose—American copyright law has been set on a utilitarian foundation. This model constructs copyright as a creature of positive law, by which exclusive rights (limited, in their application, by the express constraints set out in the Intellectual Property Clause) may be offered, or withheld, on whatever basis is rationally calculated to benefit the public. Congress, too, has often spoken in the same language. For example, consider this précis of utilitarian copyright from a legislative report on the Copyright Act of 1909:

172. Abraham Lincoln, Second Lectures on Discoveries and Inventions (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953).

173. Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1203 (1996); cf. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”).

174. 334 U.S. 131, 158 (1948).

175. 347 U.S. at 219.

176. 464 U.S. 417, 429 (1984); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Nor primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . .

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.¹⁷⁷

D. *Copyright's Increasingly Uneasy Fit with the Constitution*

If our copyright system were driven purely by the utilitarian concerns that undergird the Intellectual Property Clause, rather than by more concrete political considerations,¹⁷⁸ we might expect our copyright term to be relatively short and formalities to permeate the law. But while Congress and the courts have paid lip service to utilitarian copyright, they have, on a practical level, acquiesced to developments in the law—including the move from conditional to unconditional copyright, the broadening of the rights granted by copyright to cover nearly every conceivable use of the protected work (including the production of derivative works), and the extension of the term to a point that the return to rightsholders is indistinguishable from that produced by perpetual copyright—that together have made our theoretically utilitarian system almost

177. H.R. REP. NO. 60-2222, at 7 (1909). Almost a century earlier, Thomas Jefferson expressed the same idea with characteristic felicity:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. . . . Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.

Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 138, at 326, 333-34.

178. See generally LANDES & POSNER, *supra* note 1, ch. 15 (discussing the political economy of intellectual property law).

indistinguishable from continental European systems that are based on an author's natural rights.¹⁷⁹

The pressing question at this point, given the Supreme Court's recent holding in *Eldred v. Ashcroft*, is, of course, "So what?" With the *Eldred* Court's willingness to cede to Congress the task of reconciling the copyright laws to the demands of both the Intellectual Property Clause and the First Amendment, there seems to be little prospect that the judiciary will arrest copyright's drift away from its utilitarian moorings.

And yet, embedded in the majority's opinion in *Eldred* is a phrase that shows that a sudden collision between the copyright laws and the Constitution is still quite possible. The Court repelled the petitioners' First Amendment claim by holding that "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."¹⁸⁰ The Court is making a historical claim about what the "traditional contours" of copyright have been, and is asserting that because copyright has remained largely within these original metes and bounds, nothing has happened to disturb the Founders' original conception that copyright is consistent with the First Amendment. The Court did much the same in turning away the petitioners' Intellectual Property Clause challenge: "Congress's unbroken practice since the founding generation [of extending both new and subsisting copyrights] thus overwhelms petitioners' argument that the CTEA's extension of existing copyright fails *per se* to 'promote the Progress of Science.'"¹⁸¹ "[A] page of history," the Court said, "is worth a volume of logic."¹⁸²

History may indeed surpass logic as a useful tool in legal analysis, but neither method is particularly useful if you get the basic facts wrong.¹⁸³ The "traditional contours" of copyright have not been altered as much as they have been obliterated—by, among other developments, our recent transition from conditional to unconditional copyright. Before 1976, copyright applied to a minority of works; it now applies to all. Before 1976, the effective copyright

179. See 1 GOLDSTEIN, *supra* note 140, § 1.13.2.

180. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

181. *Id.* at 213-14 (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

182. *Id.* at 200 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

183. Unfortunately, the Court's First Amendment logic is no better than its history. The Court errs by downplaying the First Amendment concern, stating that the inquiry is less exacting where "speakers assert the right to make other people's speeches," rather than their own. *Id.* at 221. But characterizing the claim as "a right to make other people's speeches" misses the core free speech issue posed by copyright extension. The Court frames the issue as focused on pure copying. Much more important is the right to engage in transformative use—i.e., to employ some elements of another's speech for the purpose of building one's own speech. This kind of appropriation and "remixing" is a common way that speech is constructed in our culture, but the Court's framing of the issue pretends that only copying, and not creativity, is at stake.

term for the large majority of works was twenty-eight years; today copyright imposes a uniform term lasting, on average, three times as long. Considering the distance our law has traveled in the evolution from conditional to unconditional copyright, it is difficult at this point to understand which of copyright's "traditional contours" the Court believes remain undisturbed.

It is not enough to look, as the Court did in *Eldred*, at the copyright term in isolation. When one looks more closely at the effects of a series of seemingly minor changes to the copyright law—changes that are unrelated (or at least not facially related) to the copyright term—it is clear that the "traditional contours" of our copyright system went through a disjunction during the move from conditional to unconditional copyright. Of course, it may be difficult just now, considering the result in *Eldred*, to see exactly how the increasing detachment of U.S. copyright law from its constitutional underpinnings could lead to judicial intervention and invalidation of elements of the law. The following are two possible arguments that have been advanced in *Kahle v. Ashcroft*, a lawsuit filed recently in a federal court in California.¹⁸⁴

1. *Term extension without renewal filter*

Copyright's potential collision with the Constitution could take the form of an Intellectual Property Clause challenge to copyright extension that is somewhat narrower—but no less potentially disruptive to the status quo—than that posed in *Eldred*. The argument urges a reevaluation of the historical record, based on an observation about the effect of the renewal formality on copyright extensions that was never raised in *Eldred*.

While Congress had extended the term of subsisting copyrights on several occasions prior to the CTEA, in every case before the CTEA, the subsisting copyrights whose terms were extended were required to pass at some point through the filter of renewal. The 1831 Act extended the initial term of subsisting copyrights from fourteen to twenty-eight years, but within a regime that required copyright owners to renew their copyright to secure the benefits of the maximum term of forty-two years.¹⁸⁵ The 1909 Act likewise extended the renewal term of subsisting copyrights, but the Act expressly limited its effect to works that had been renewed.¹⁸⁶ Even the 1976 Act, which began the march toward unconditional copyright and again extended the term of subsisting copyrights, limited its extension to works that had been renewed.¹⁸⁷

184. *Kahle* Complaint, *supra* note 5. The author is co-counsel for plaintiffs in this lawsuit.

185. *See supra* notes 33, 35 and accompanying text.

186. *See supra* text accompanying notes 38-42.

187. *See* 1976 Act, *supra* note 6, § 304.

Thus, every extension of subsisting copyrights prior to the CTEA conditioned the maximum copyright term upon the copyright holder satisfying a renewal requirement. In contrast, the CTEA's twenty-year extension of subsisting copyrights was granted indiscriminately. But because the renewal requirement survived in American law until the Copyright Renewal Act¹⁸⁸ removed renewal entirely in 1992, the effect of this extension differed dramatically depending upon the period during which the initial copyright was granted.

For registered works published between January 1, 1923, and December 31, 1963, the CTEA extended the term of any subsisting copyright by twenty years. But because the average renewal rate for works published between 1923 and 1963 was just 15%, 85% of the works originally copyrighted during that period had already passed into the public domain. Thus, while the CTEA extended the terms of subsisting copyrights, the filter of renewal had already eliminated the vast majority of copyrights granted during this period from copyright regulation. The burdens of copyright, therefore, were visited only on those works that had passed through the renewal filter—i.e., only those works for which continuing protection could be expected to provide some return for the author to offset the social costs imposed by continued exclusivity.

For registered works published between January 1, 1964, and December 31, 1978, the CTEA extended the term of subsisting copyrights by the same twenty years. But because the Copyright Renewal Act had granted an automatic renewal to all subsisting copyrights not yet in their renewal term, the CTEA extended the copyright term of a class of works in which, according to historical data, approximately eighty-five percent of the copyrights would never have been renewed. In contrast to the situation described above, the CTEA visited the burdens of copyright protection on all works from our recent past, including the majority that would not have passed through the renewal filter. As a consequence, for a large percentage of these works, costs were imposed without the promise of any offsetting benefit.

2. *Formalities as a buffer between copyright and the First Amendment*

In addition to the narrowed Intellectual Property Clause challenge, the plaintiffs in *Kahle* press a related First Amendment attack. The *Eldred* Court rejected the petitioners' First Amendment claim based on a conclusion that the CTEA "ha[d] not altered the traditional contours of copyright protection."¹⁸⁹ But "the traditional contours of copyright protection" in America established a conditional copyright regime. Copyrights were granted, and maintained, only if rightsholders took affirmative steps to secure their rights.

188. CAA, *supra* note 8, §§ 101-102.

189. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

As discussed above,¹⁹⁰ these “traditional contours” of copyright protection served important First Amendment interests. By requiring copyright owners to signal a desire to continue the protection of copyright, the traditional requirement of renewal limited copyright to just those works whose owners had a sufficient continuing interest in restricting use of the works. Other works were available for public use in creating new speech. Likewise, the registration and notice requirements provided clarity by identifying the copyright holder and the term of protection, thus facilitating the spread of knowledge through use of public domain material and licensing of works still under copyright. Like the doctrine of “fair use,” these structural limitations on the scope of copyright’s regulation narrowly tailored the reach of the law to those contexts within which copyright would act as an “engine of free expression.”¹⁹¹ The registration and notice requirements also excluded copyright from those contexts within which the regulation would simply act as a brake on free expression.

These changes to the copyright laws, as they are applied to and affect a large volume of creative work that would never have had its copyrights renewed, do not advance any legitimate government interest. They instead impose substantial burdens on speech without advancing the only legitimate interest the government might have—namely, to continue returns to rightsholders in the small minority of work that continues to have commercial value, in the hope of maximizing incentives to produce creative work.¹⁹² In particular, with respect to works created after January 1, 1964, and before January 1, 1978, these changes have imposed an unconstitutional burden on speech. The term for works created between January 1, 1964, and December 31, 1977, was extended by nineteen years by the 1976 Act. The term was then automatically renewed by the Copyright Renewal Act in 1992. Finally, the term was unconditionally extended by twenty years by the CTEA in 1998. Thus, even though historical data suggests that more than eighty-five percent of these

190. See *supra* text accompanying notes 147-149.

191. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

192. The petitioners in *Eldred* argued that, unlike in the case of prospective term extension, extension of subsisting copyrights could not possibly contribute to increased incentive to invest in the creation of new works. Because existing works cannot be created anew, it makes no sense to throw additional money at owners of subsisting copyrights. The response of the *Eldred* majority to this commonsense observation is perhaps the weakest part of its opinion. Given Congress’s repeated extensions of both new and subsisting copyrights, the Court asserted, authors could reasonably expect to receive “a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time.” 537 U.S. at 214-15. But given that the pre-CTEA copyright term of life of the author plus fifty years already provided a return to the rightsholder that approached one hundred percent of the net present value of a perpetual term, see *supra* text accompanying note 134, it makes no sense to maintain that extension of subsisting copyrights provides any additional inducement to authors.

works would never have had their copyrights renewed, the law automatically extended their terms by sixty-seven years. This is the first category of copyrighted works in U.S. history which has had its term extended automatically without ever passing through the filter of renewal.

Because these changes have altered the “traditional contours” of copyright, they should be evaluated under heightened First Amendment scrutiny. But even under the less exacting rational basis standard, the burdens created by these changes for certain categories of copyrighted works far outweigh any plausible benefits.

E. *Unconditional Copyright and U.S. Accession to the Berne Convention*

The move from conditional to unconditional copyright is bad intellectual property policy. It also threatens to bring copyright into conflict with the Constitution. So what possessed us to do it? There were many factors, including gripes about the difficulties of complying with formalities that were often badly administered by the Copyright Office and the severe consequences (i.e., loss of copyright protection) arising from failure to comply.¹⁹³ But by far the primary reason for the removal of copyright formalities was the desire on the part of the content industries and their supporters in Congress to accede—more than a century after its promulgation—to the Berne Convention.

1. *The Berne Convention*

The Berne Convention, which dates from 1886, was the fruit of negotiations that had been proceeding since the first International Congress of Authors and Artists met in Brussels in 1858.¹⁹⁴ In its current form,¹⁹⁵ the Berne Convention obliges signatories to honor two basic principles: (1) a “national treatment” principle requiring all signatory nations to grant the same rights to foreign authors that they grant to their own authors; and (2) a “baseline protection” principle requiring signatory countries to adhere in their domestic

193. See, e.g., *Copyright Law Revision*, *supra* note 108, at 68 (statement of Abraham L. Kaminstein, Register of Copyrights).

194. See Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC’Y U.S.A. 265, 267 (2000).

195. The Berne Convention has been revised repeatedly; particular revisions are referred to as “acts.” The group of countries that are signatories to the Convention, referred to collectively as the “Berne Union,” has an existence separate from any particular act. When the Convention is revised, Union members are not required to adhere to the new revision as a condition to remaining within the Union. A country may join the Union at any time by acceding to the most recent version of the Convention. The treaty obligations of any particular Union member are measured by the terms of the particular act or acts to which that member has acceded. See PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT* 20-21 (2001).

law to certain minimum levels of protection as specified in the Convention.¹⁹⁶ The Convention's baseline requirements include a copyright term for works by individual authors of life of the author plus fifty years,¹⁹⁷ and a prohibition on formalities that affect the "enjoyment and exercise" of copyright.¹⁹⁸

In 1886, when the Convention was first promulgated, the United States had not entered into a single copyright-related international agreement. The United States entered the international copyright system in 1891, when it concluded the first of a series of bilateral copyright agreements with France,¹⁹⁹ Great Britain,²⁰⁰ and Germany.²⁰¹ In 1955, the United States acceded to the Universal Copyright Convention (UCC), an instrument that established multilateral copyright relations between signatories to the Berne Convention and other nations, including the United States, that considered the Berne Convention's minimum standards incompatible with domestic law. As a measure to accommodate the United States, the UCC allowed member states to impose formalities as a condition of protection.²⁰²

The United States did not accede to the Berne Convention until 1989, and the Convention's prohibition of formalities is perhaps the primary reason that the United States, alone among industrialized nations, remained outside the Convention for its first century. Nonetheless, many U.S. authors secured the Berne Convention's benefits prior to U.S. accession by simultaneously publishing their works in Canada, a Berne signatory.²⁰³ As Professor Graeme Austin has noted, "Adoption of this practice by American authors wealthy or sophisticated enough to do so ensured that many of the benefits of the Convention accrued to American copyright industries. American society, however, shouldered few of its burdens."²⁰⁴

196. Berne Convention, *supra* note 14, art. 5(1). Under the Berne Convention's "points of attachment" rules, a work is entitled to Berne Convention protection in signatory nations if its author is a national or domiciliary of a signatory state or if the work is first or simultaneously published in a signatory state. *See id.* arts. 3(1)(a), 3(1)(b), 3(2).

197. *Id.* art. 7(1).

198. *Id.* art. 5(2).

199. Proclamation No. 3, 27 Stat. 981 (July 1, 1891).

200. *Id.*

201. Proclamation No. 24, 27 Stat. 1021 (Apr. 15, 1892).

202. Universal Copyright Convention, Geneva Text, Sept. 6, 1952, art. 3(2), 6 U.S.T. 2731, 2735, 216 U.N.T.S. 132, 136.

203. Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM.-VLA J.L. & ARTS 17, 42 (2002).

204. *Id.* This "back door" to Berne has, since 1914, been subject to the power of Union members to retaliate against authors who are nationals of non-Union countries but obtain Berne protection through first publication in a Union country, if the author's country of nationality "fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union." Berne Convention, *supra* note 14, art. 6(1).

2. Berne's rule against formalities

Curiously, the Berne Convention allowed formalities at its inception, providing that enjoyment of the rights prescribed by the Convention were subject "to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work."²⁰⁵ By 1908, however, Berne had been amended to provide that member countries must not condition the acquisition, exercise, or enjoyment of copyright protection for the works of foreign authors on the observance of any formality.²⁰⁶

The current version of the Convention's prohibition against formalities is set out in Article 5(2) of the 1971 Paris Act, which provides that

[t]he enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of the origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.²⁰⁷

The term "formality" is not defined, but is understood in the sense of an administrative obligation set out in a national law that imposes a condition necessary for a copyright to exist, or for the right to continue or to be practically available.²⁰⁸ Those provisions of U.S. law that provide for voluntary formalities—i.e., voluntary notice, registration, and recordation of transfers—and that provide incentives for compliance²⁰⁹ either apply only to U.S. works (for example, in the case of the bar on bringing infringement litigation absent registration, which was believed to negate the right to "exercise" the copyright and thus to qualify as a prohibited formality under Berne²¹⁰) or are not the type of formality that Berne prohibits.²¹¹

205. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2(2), *reprinted in* ARPAD BOGSCH, *BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, FROM 1886 TO 1986*, at 228, 228 (World Intellectual Prop. Org. Public'n No. 877(E), 1986) [hereinafter *BERNE CONVENTION FROM 1886 TO 1896*].

206. Berne Convention for the Protection of Literary and Artistic Works, Berlin Act, Nov. 13, 1908, art. 4(2), *reprinted in* *BERNE CONVENTION FROM 1886 TO 1986*, *supra* note 205, at 229, 229.

207. Berne Convention, *supra* note 14, art. 5(2).

208. WORLD INTELLECTUAL PROP. ORG., *GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971)* 33 (1978) [hereinafter *WIPO GUIDE*]; *see also* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 222-23 (1987).

209. *See supra* text accompanying notes 43-54.

210. *See* STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 106 (1983) ("[T]he necessity to register before bringing an action would probably be regarded as a 'formality' as it negates the 'exercise' of the right without such registration."); Mayer Gabay, *The United States Copyright System and the Berne Convention*, 26 *BULL.*

Importantly, although the terms of Article 5(2) bar the imposition of formalities on foreign authors, signatory nations remain free to impose formalities on the works of their own nationals.²¹² As the World Intellectual Property Organization's (WIPO) official exegesis of the Berne Convention explains, the freedom from formalities provided by the Convention

exists independently of any protection that the work enjoys in its country of origin. In fact, such country remains absolutely free to subordinate the existence or exercise of the rights on that work in that country to such conditions or formalities as it thinks fit: it is purely a matter of domestic law.²¹³

The United States's accession to Berne, therefore, did not require the wholesale removal of mandatory registration, notice, and recordation of transfers. Rather, the application of these mandatory formalities could simply have been limited to the works of U.S. authors, which have long comprised a large majority of works published in the United States.²¹⁴ Voluntary registration and notice formalities, along with the current system of inducements to compliance, could have been established for the works of foreign authors.

Though the matter is not free from doubt, there is also a strong argument that Berne accession did not require the removal of mandatory renewal for U.S. works. Article 7(1) of Berne prescribes a minimum term of protection for the works of individual authors of life of the author plus fifty years.²¹⁵ But it is

COPYRIGHT SOC'Y U.S.A. 202, 208 (1979) ("It is true that registration is 'permissive' and does not, under the 1976 Act, constitute a condition precedent for *acquisition* of copyright. But these factors merely give rise to a *bare right* that is incapable of being *exercised* in a U.S. court of law until registration is effected.")

211. The fact that registration affords successful infringement plaintiffs the opportunity to collect statutory damages and attorney's fees, for example, is not believed to violate the Berne Convention, because that instrument does not itself require that a country provide for such recoveries. See Gabay, *supra* note 210, at 209-10; Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 514 (1967).

212. Berne Convention, *supra* note 14, art. 5(2).

213. WIPO GUIDE, *supra* note 208, at 33. WIPO, one of the sixteen specialized agencies of the United Nations system of organizations, is the principal forum for negotiation of international intellectual property agreements. Headquartered in Geneva, Switzerland, WIPO administers twenty-three international treaties dealing with different aspects of intellectual property protection. WIPO counts 179 nations as member states. For more information on WIPO's mission, see World Intellectual Prop. Org., Medium-Term Plan for WIPO Program Activities, at <http://www.wipo.int/about-wipo/en/dgo/pub487.htm> (last visited Oct. 31, 2004).

214. See *supra* note 81.

215. Berne Convention, *supra* note 14, art. 7(1); see also *id.* art. 7(2) (establishing for cinematographic works a minimum term of fifty years after publication, or, for unreleased films, fifty years after production); *id.* art. 7(3) (establishing for anonymous and pseudonymous works a minimum term of fifty years after publication); *id.* art. 7(4) (establishing for photographs and works of applied art a minimum term of twenty-five years following a work's production in countries that protect these types of works).

clear that Berne members may impose a registration formality on domestic authors—i.e., they can condition the enjoyment of *any portion* of the minimum term for native works upon registration. Similarly, Berne member states should be able to condition enjoyment for native authors of *some portion* of the “minimum” term on compliance with the formality. In both instances, the law would continue to offer a Berne-compliant minimum term.

3. Berne’s “practical hostility” to formalities

Why does the Berne Convention prohibit the imposition of formalities on foreign authors? The response most often has been made at the level of copyright theory: that formalities are out of step with the natural rights theory of copyright, which has been characterized as the “Grundnorm” of the Berne Convention.²¹⁶

That explanation is deeply unsatisfying, for the degree to which formalities are inconsistent with natural rights-based copyright is easily overstated. Even the nations of continental Europe, whose copyright systems are most closely identified with a natural rights framework, do not provide for perpetual copyright, but balance authors’ rights with the public interest in the advancement of learning.²¹⁷ Consequently, even in so-called “natural rights” systems, copyrights expire, works enter the public domain, and the law therefore must seek some form of “utilitarian” balance between private incentives and public access. Indeed, even in a system that imposed a perpetual copyright, requiring registration and notice would nonetheless be a sensible step. As has been detailed above, a reliable and easily accessed ownership registry encourages transfers and licensing by lowering the cost to the would-be transferee or licensee of identifying rightsholders. A system focused on returns to authors should therefore seek to maximize authors’ rewards with modest investments in administrative mechanisms, such as a registry, that reduce transaction costs.

216. Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 771 (2003); see also Hesse, *supra* note 139, at 40 (“[Berne] tended to strengthen universalist claims for protection of inviolable natural rights against statutory limits imposed by particular nations on utilitarian grounds.”).

217. The European Union required member nations to adopt a uniform life-plus-seventy term in a 1996 directive. Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 [hereinafter EU Directive]. The EU Directive has now become the global benchmark. It was cited as a factor in the CTEA’s installment of an identical term in U.S. law, see *Eldred v. Ashcroft*, 537 U.S. 186, 195-96 (2003), and is reflected in domestic legislation in a number of countries both within and outside Europe, see Shauna C. Bryce, *Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States*, 37 HARV. INT’L L.J. 525, 529 (1996).

Again, there is no sharp disjunction between “natural rights” and “utilitarian” copyright systems in the manner one would expect if copyright were driven by theory rather than exigency. The primary difference between the utilitarian and natural rights approaches is which side of the balance is emphasized. Formalities could play an important role in any system of limited-term copyrights in maximizing copyright’s social utility by focusing protection.

So how are we to explain Berne’s aversion to formalities? The simplest and best explanation is much more prosaic than the one commonly offered. The overarching purpose of the Berne Convention is to provide protection to authors whose works will be published in many countries. Perhaps the most practically important element of that protection—more important for the protection of authors’ interests than establishing a minimum copyright term—is to avoid the necessity that authors comply with mandatory formalities in every country in which their works are published or may be found. Berne’s proscription of mandatory formalities is a rational response to the difficulty of complying (and maintaining compliance) with differently administered formalities that may have been, absent the Convention, imposed in dozens of national systems, some with registries, some without, and none of which shares information.

Evidence for this view can be found in the origins of the Berne Convention. The first stirrings of a movement toward an international copyright system were felt at the 1858 Brussels Conference on Literary and Artistic Property, which was organized by a group of Belgian authors and academics and attended by representatives from each major European country and the United States.²¹⁸ The Brussels Conference passed a series of resolutions establishing the rough outlines of an international copyright system. Among those resolutions was one directing that authors should be required to comply with formalities only in their home countries.²¹⁹ The domestic law of many countries at that time required compliance with formalities as a condition of protection.²²⁰

This initial approach of limiting formalities to an author’s home country was adopted in additional instruments preceding Berne, including the 1878 resolutions of the “Paris Congress,” which was presided over by Victor Hugo.²²¹ It was also the approach taken in the initial text of the Berne Convention itself,²²² which included a provision setting out evidentiary presumptions designed to assist authors in establishing before foreign tribunals

218. See RICKETSON, *supra* note 208, at 41-42.

219. *Id.* at 42-43.

220. *Id.* at 201.

221. *Id.* at 46-47.

222. See *supra* text accompanying notes 205-206.

their compliance with home-country formalities.²²³ So why, in the revisions to Berne adopted in Berlin in 1908, did the Convention move from a limited acceptance of formalities to a broader proscription?

Professor Sam Ricketson identifies a number of reasons, including the difficulty that authors faced, even with the assistance of the evidentiary presumptions, in proving home-country compliance.²²⁴ In addition, there was a broader interpretive problem: despite the signatories' clear intent that an author's compliance with formalities in his home country was sufficient to gain protection under the domestic law of all Berne signatories, some national tribunals, interpreting the Convention as prohibiting formalities imposed by domestic law *only* on foreign authors, took the view that the works of foreign authors were subject to the same formalities imposed on native works.²²⁵ In 1896, the French government proposed an amendment to the Convention that would clarify the matter, but the Berne nations ultimately agreed only to an Interpretive Declaration—i.e., an “authentic interpretation rather than a new disposition”—along the lines the French had proposed.²²⁶ It was these practical problems in administering Berne's original approach to formalities that drove the eventual decision to move to a complete ban.

This observation is helpful in better understanding the Berne Convention, but, more usefully for our purposes here, it also has important implications for the status of formalities in U.S. copyright law. In deciding whether a particular formality interferes with the “enjoyment and . . . exercise” of copyright, and thereby runs afoul of Article 5(2) of the Convention, it is important to understand that Berne's antiformality principle does not arise from any supposed foundational incompatibility between formalities and an authors' rights copyright framework. We will turn now to consider how formalities may be reintroduced into the U.S. system, in light of both the problems that Berne was trying to solve and technological developments that now allow much less burdensome approaches to solving the same problems.

III. REFORMALIZING COPYRIGHT

A. Defining “Interoperable” Formalities in the Berne Convention

Berne's prohibition of formalities dates from 1908, a time in which requiring authors to comply with formalities in the many countries in which a work may be published—i.e., requiring an author (or publisher) to inform himself about the requirements of the law in countries with which he has no

223. RICKETSON, *supra* note 208, at 202-03.

224. *Id.*

225. *Id.* at 201.

226. *Id.* at 85-86.

familiarity, and then to obtain and fill out forms in a variety of languages—would be difficult, expensive, and often result in unintentional noncompliance and the loss of valuable rights. Article 5(2) of the current Paris Text of the Berne Convention was promulgated in 1971, but the nature of the problem had not changed in the intervening sixty-three years: copyright systems remained substantively and procedurally diverse, the mechanisms of compliance in many countries remained balky, and the costs of informing oneself about requirements in different countries, and then complying with them, remained high.

Since 1971, however, there has been a series of technological changes that could make compliance with a redesigned set of formalities quick and easy. Those changes involve, of course, computers and the Internet. Now it is possible for an author publishing a work internationally to comply with formalities in his or her home country, or in the country of a work's first publication, and to have the data generated by that compliance formatted and transmitted reliably and nearly costlessly to other jurisdictions. But changes in technology alone are not enough—changes to the law are also required. To make compliance cheap, the law must ensure that data generated in one jurisdiction will be sufficient to permit compliance in any jurisdiction that chooses to reintroduce formalities into its domestic copyright laws.

The simplest way to take advantage of what technology now allows would be to propose a new Berne text that removes the prohibition in Article 5(2) of the current Paris Act and replaces it with a provision allowing member countries to impose formalities, provided that they adhere to a set of standards that make formalities “interoperable” across jurisdictions.²²⁷ What would the changes to the Berne Convention look like?

1. *The reciprocity principle*

The most direct approach would install a “reciprocity principle” alongside the existing national treatment and minimum standards principles that now drive Berne. The reciprocity principle would require that all Berne jurisdictions

227. The North American Free Trade Agreement (NAFTA) also contains provisions related to intellectual property. *See, e.g.*, North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., arts. 1708 (trademark), 1709 (patent), 1710 (semiconductor design), 1711 (trade secrets), 32 I.L.M. 605, 672-75 (implemented by 107 Stat. 2057). In particular, NAFTA Article 1703(2) mirrors the Berne Article 5(2) proscription of formalities, and must likewise be modified to permit reformation of domestic law in the United States. NAFTA Article 1703(2) provides that “[n]o Party may, as a condition of according national treatment under this Article, require rights holders to comply with any formalities or conditions in order to acquire rights in respect of copyright and related rights.” *Id.* art. 1703(2). Since NAFTA signatories Canada, Mexico, and the United States are all parties to a text of the Berne Convention that prohibits formalities, NAFTA Article 1703(2) is largely duplicative of Berne on the issue of formalities.

that impose formalities permit foreign authors to comply with formalities in their national laws by complying with formalities either in their home country or in the work's country of first publication or registration. The reciprocity principle would not require any particular Berne nation to impose formalities—i.e., it would not modify Berne's current minimum standards requirements. It would, rather, require only that Berne nations that choose to reformalize their domestic copyright laws do so according to standards set out in Berne.

Some nations may, of course, choose not to reintroduce formalities into their domestic law. But if some Berne Union countries have formalities, and others do not, the possibility arises that the home country of an author, or the nation of first publication of his work, will not have a registration requirement to which other Berne countries with formalities can grant reciprocity. To accommodate authors in this category who wish to comply with formalities across Berne jurisdictions, the Berne nations should also establish a centralized WIPO registry, subject to the same standards agreed upon by Berne members and subject also to the condition that all Berne nations will grant reciprocity.

To make the reciprocity principle practically workable, Berne signatories would enter into a side agreement that would standardize across jurisdictions the data required to register a copyright and standardize formatting of that data so that registration information—authors' names and addresses, creation and registration dates, etc.—may readily be shared among jurisdictions. Berne signatories could then establish an information-sharing agreement whereby registration data obtained in one country could be made available to other jurisdictions, at the rightsholder's discretion. As the secretariat for the Berne Union, WIPO would be well placed to coordinate the actual transfer of data among Berne members.

Taking this approach, it is not necessary to amend Berne to prescribe a minimum set of formalities. It would suffice, rather, simply to remove the Article 5(2) prohibition, to install the reciprocity principle, to work out a set of standards to ensure interoperability, and then to leave to the member states the decision whether to reinstall formalities or not.

2. The reciprocity principle and neighboring rights agreements

For countries that, unlike the United States, do not include protection for performances, sound recordings (also referred to as "phonograms"), and broadcasts in their copyright laws, but locate them instead in separate "neighboring rights" statutes, reformalization of domestic law must include changes to the law governing both types of rights. Similarly, the same reciprocity principle that would be installed into the Berne Convention must also be introduced into the applicable international agreements governing neighboring rights—an issue of some complexity.

The principal international agreement defining protection of neighboring rights is the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, also known as the Rome Convention.²²⁸ This instrument extends Berne-style national treatment and minimum rights principles to neighboring rights, although the minimum terms established are shorter.²²⁹ Unlike Berne Article 5(2), Article 11 of the Rome Convention does not prohibit signatories from conditioning protection of neighboring rights on formalities. Article 11 provides, however, that any signatory that conditions protection for performers on, or producers of, phonograms on compliance with formalities must permit its requirements to be met by affixing a prescribed notice to the recording or its container. Adoption of the reciprocity principle, therefore, would require replacement of the rule allowing blanket compliance through notice with formalities pertaining to protection of phonograms.

The 1973 Convention for the Protection of Producers of Phonograms Against Unauthorized Distribution of Their Phonograms, referred to as the Geneva Phonograms Convention, which is aimed at cross-border record piracy, requires signatories to protect qualifying phonogram producers “against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.”²³⁰ Like the Rome Convention, the Geneva Phonograms Convention allows signatories to impose formalities as a condition of protection for phonograms, but provides that affixation of notice must suffice to comply with all mandatory formalities.²³¹ Thus, the same changes that would be required to the Rome Convention must also be applied to the Geneva Phonograms Convention.

Now that we have seen what changes to international law are necessary to shift the treatment of formalities from hostility (Berne), or at best, grudging acceptance (Rome and Geneva), to acceptance with reciprocity, let us briefly

228. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 12 U.S.T. 2377, 496 U.N.T.S. 43.

229. Article 14 of the Rome Convention established minimum twenty-year terms for both phonograms and performances, measured either from the date of performance (for unfixed performances) or from the date of fixation (for performances recorded on phonograms). *Id.* art. 14. Article 17 of the WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1996), and Article 14(5) of TRIPs, *supra* note 16, extend these minimum terms to fifty years. TRIPs Article 14(5) also imposes a minimum twenty-year term for broadcasts. *Id.* art. 14(5).

230. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, art. 2, 25 U.S.T. 309, 325, 866 U.N.T.S. 67, 72.

231. *Id.* art. 5.

examine how such a system would work with respect to each of the familiar types of formalities.

3. *The reciprocity principle in practice*

Registration. The application of the reciprocity principle to the registration formality is comparatively straightforward. Once a work is registered in one jurisdiction (or with the centralized WIPO registry), it would be registered in all Berne Union jurisdictions that have reinstalled a registration formality in their domestic law.

Recordation of transfers. The same scheme established for registration should also apply to recordation of transfers—a transfer that is successfully recorded in one jurisdiction (or with the WIPO registry) should suffice to record that transfer in all jurisdictions in which the work previously has been registered.

Notice. Berne Union nations would be free, under the reciprocity principle, to require that notice be given for some or all works. Of course, if a Berne nation creates an effective, easily accessible copyright registry, there is little to be gained by also requiring notice: the registry should provide enough information to make the tracing of copyright ownership simple and cheap.²³² In the instance, however, that some Berne signatories choose to include a notice requirement in their reformed domestic law, the signatories should agree to standardize the form of notice for different types of works to ensure (1) that no more information is required to be elicited to comply with notice requirements than was supplied to complete registration, and (2) that the same form of notice that suffices in one jurisdiction for any particular type of work will also be accepted throughout the Berne Union. These rules would prevent differing standards for notice that might cause unintentional loss of rights. They would also encourage publication with the standardized form of notice even in those jurisdictions that do not require it as a condition of protection.

Renewal. Creating a renewal formality that is interoperable across jurisdictions raises a number of somewhat more complex problems, but should be achievable with an increased level of coordination among Berne members. The first problem is whether, in order to permit Berne nations to reinstall the renewal formality, a revised Berne Convention would have to remove the provision in the current version of Berne requiring all signatories to grant a

232. Indeed, because notice on existing works usually cannot be updated, notice can give misleading information regarding current ownership. For countries that choose to require notice, the marking requirement should be refocused to provide would-be users with information facilitating access to the registry, where the most up-to-date information on ownership would be available.

minimum copyright term of life of the author plus fifty years.²³³ The answer is likely no. Berne's prohibition of formalities is contained in an article separate from its minimum term requirements. Remove the current ban on formalities, and nothing in the Convention specifies that the term, if offered equally to every author, must be enjoyed in full by every author without condition.

The second problem is a more practical one: how to coordinate renewal across jurisdictions when different Berne member states may impose renewal requirements at different points in the copyright term. A simple application of the reciprocity principle threatens to create substantial confusion. If a rightsholder who complies with the renewal formality in the jurisdiction in which a work was first registered is deemed to have complied with renewal in any jurisdiction in which a renewal is required, then absent detailed knowledge of the point at which renewal may be required in a potentially large number of Berne jurisdictions, a would-be user will find it difficult to determine whether a work has been timely renewed.

For example, suppose that a work is first registered in country *A*, which imposes a renewal requirement at thirty years. Twenty-five years into the work's term, a would-be user in country *B* inquires whether the work is in the public domain. Country *B* imposes a renewal formality at fifteen years. The user sees that the work was registered twenty-five years ago; under country *B*'s law, the work would have passed into the public domain when the rightsholder failed to timely renew. But under country *A*'s laws, the work is still in its initial term; renewal will not be required for another five years. Accordingly, under a simple application of the reciprocity principle, unless the user understands (1) where the work was first registered, (2) when the renewal requirement occurs in that jurisdiction, and (3) that country *A*'s renewal requirement is the relevant one, the user will not easily be able to determine whether the work is in the public domain.

These information problems can be mitigated, of course, even if they cannot be eliminated. The standardized registration and notice format should include information on the nation of the work's first registration, and that information should be made available in all online registry sites maintained in the various Berne nations. In addition, Berne signatories should be encouraged to disseminate information about the rules governing renewal, and how to determine which renewal term applies to a particular work. Taken together, these measures might mean that the benefit, in terms of the simplicity of a straightforward application of the reciprocity principle to renewal, outweighs the cost in terms of the increased complexity of determining the status of rights.

An alternative, which would require a greater degree of coordination among Berne nations, would be to standardize renewal terms for all jurisdictions that reinstall a renewal formality in their domestic law. The

233. See *supra* note 215.

reciprocity principle would then apply to grant automatic compliance with all Berne nations' renewal requirements based on timely compliance with the requirement in the country of first registration, or by renewing with WIPO, if original registration was made with the WIPO registry. Based on the depreciation calculations made by Landes and Posner, the Berne nations could impose more than one renewal obligation during the copyright term. A first renewal obligation set at ten years would move approximately 50% of registered works into the public domain. A second renewal requirement set in the vicinity of forty-three years would result in only 10% of the number of originally registered works remaining under copyright. A third renewal requirement set at sixty-five years would move all but 1% of the number of originally registered works into the public domain. The works left under copyright after sixty-five years would be those of truly enduring commercial value for which the full term of copyright would be likely to provide significant continuing benefits.

B. Defining "New-Style" Berne-Compliant Formalities

If changing Berne to explicitly permit formalities is not possible, is there still a way to reformalize U.S. domestic law? There are several alternatives of varying merit. The next few pages will first briefly discuss two long-shot possibilities: the reintroduction of formalities for U.S. (but not foreign) authors and U.S. withdrawal from Berne (which, for reasons that will quickly become obvious, this Article does not recommend). I then focus on an alternative that seems much more sensible: the reintroduction into U.S. law of "new-style" formalities that provide the benefits of traditional formalities, but that do not run afoul of Berne's proscription of conditions that interfere with the "exercise and enjoyment" of copyright.

1. Reintroducing old-style formalities for U.S. authors

Because Berne does not prevent signatories from imposing formalities on the works of domestic authors or authors from non-Berne signatory nations, the United States could have retained a full set of traditional formalities for those works. In fact, an advisory group established by the Department of State to assess what changes to U.S. law would be necessary for Berne accession advocated this position, as part of a more broadly minimalist approach to the implementation of Berne that sought to alter only those portions of U.S. law that the group deemed clearly irreconcilable with the Convention.²³⁴

234. See *Final Report*, *supra* note 45, app. A at 622 (1986) ("[W]e have proposed what we think are *minimal* amendments to the law, only where change is *clearly* required, based upon widely shared understandings of Berne obligations A number of the alternatives

The minimalist approach of restricting unconditional copyright to foreign authors is, for reasons that are not difficult to imagine (e.g., the antipathy to granting foreign authors more rights than U.S. authors), not the approach that Congress took. Whether the politics of copyright are likely ever to shift in a way that would make the minimalist approach to unconditional copyright viable is a question beyond the scope of this Article. It is worth noting, however, that restricting unconditional copyright to foreign works would represent a significant improvement on the status quo without creating any risk of noncompliance with Berne.

2. *Withdrawal from Berne and reliance on the Universal Copyright Convention*

Because the United States is a signatory to the UCC, and because before it acceded to Berne the United States negotiated bilateral copyright agreements with several nations that were not UCC signatories, it would be possible for the United States to withdraw from Berne and rely instead on the UCC, which, unlike Berne, allows the imposition of formalities for the works of both domestic and foreign authors. This strategy would, however, impose unacceptable costs, the largest of which would arise from our resulting noncompliance with the TRIPs accord, which incorporates by reference Berne's standards, and with the North American Free Trade Agreement (NAFTA), which replicates Berne's ban on formalities. Although its applicability is subject to considerable debate, it is also possible that a provision of Berne's Appendix Declaration would prevent U.S. authors from claiming the benefits of the UCC in countries that are Berne signatories.²³⁵

A further cost of withdrawal would arise from Berne Article 6(1), which permits Berne nations to restrict the protection accorded to works of authors who are nationals of a non-Berne country that "fails to protect in an adequate manner the works of [Berne nationals]."²³⁶ There is little commentary on this provision, so it is difficult to forecast whether subjecting foreign works to formalities (at least formalities that do not discriminate between domestic and foreign works, and for which compliance is easy and cheap) would rise to the level of a "fail[ure] to protect in an adequate manner" the rights of foreign authors.

we propose for consideration seek to exploit the distinction in treatment between works of foreign and national origin permitted by the Berne Convention.").

235. RICKETSON, *supra* note 208, at 856.

236. Berne Convention, *supra* note 14, art. 6(1).

3. *Indefinitely renewable copyright*

Landes and Posner have proposed a system of indefinitely renewable copyrights—i.e., a perpetual copyright term, conditioned on periodic renewal.²³⁷ Landes and Posner suggest that such a system would result in more works entering the public domain more quickly; their conclusions in this regard are very likely correct. The Landes and Posner proposal is subject, however, to two critiques: the first is significant, and the second, for my purposes, is determinative.

First, a system of indefinitely renewable copyrights would prevent any work of enduring commercial value (many of which would also have important cultural value) from ever entering the public domain. For reasons explained above, extending copyright indefinitely for valuable works raises the cost of transformative use of these works and would give rightsholders a perpetual veto power over uses they don't like. These cultural and First Amendment costs are not balanced by countervailing benefits. Because the current regime of limited but very long copyright terms gives rightsholders virtually the same return (from a net present value perspective) as would be produced under a perpetual term, a shift to perpetual copyright for valuable works would yield no significant enhancement to the incentive to create.

Landes and Posner also discuss a series of limited-term options conditioned on repeated renewal requirements. These avoid the first objection, but they do not avoid the second: because they employ an old-style renewal formality (i.e., one that results in termination of rights for failure to comply), and because none of the proposals would guarantee a minimum term of life plus fifty years, all versions of the Landes and Posner approach would require the United States to withdraw from the Berne Convention.²³⁸ The authors make note of the incompatibility of their proposal with Berne,²³⁹ but their concerns, unlike mine, are focused solely on the economic effects of the proposal, not on its consequences for U.S. participation in the international copyright system.²⁴⁰

237. LANDES & POSNER, *supra* note 1, ch. 8; William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003).

238. Incompatibility with Berne's rule against formalities could be avoided, of course, by limiting the proposal to works of U.S. authors. But even such a limitation would not prevent incompatibility with the life-plus-fifty minimum term requirement, which applies to all works.

239. LANDES & POSNER, *supra* note 1, at 215 n.15.

240. In a forthcoming article, William Patry and Richard Posner argue that the problems created by ever-longer copyright terms in a deformalized system should be addressed by expanding the fair use doctrine to immunize use of works where a reasonable inquiry fails to identify a rightsholder from whom a license may be sought. William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. (forthcoming 2004) (working draft on file with author). The Patry and Posner article does not attempt to describe in any detail what a "reasonable inquiry" is, or how reasonableness

4. *The Public Domain Enhancement Act*

Another possible approach is set out in a bill currently before Congress, the Public Domain Enhancement Act (PDEA).²⁴¹ Sponsored by Representative Zoe Lofgren, a California Democrat, the PDEA would give copyright owners of works by U.S. authors unfettered rights for fifty years. At that point the copyright holder would be required to file a notice of continuation and pay a \$1 fee every ten years to continue the copyright. Because only a small number of works would retain any commercial value at the expiry of the minimum term, most copyright owners would not bother to file a notice of continuation and pay the fee. On September 4, 2003, the PDEA was referred to the House Subcommittee on Courts, the Internet, and Intellectual Property. There it has languished.

Unlike the Posner and Landes proposal, the PDEA is very likely compatible with Berne. The renewal requirement is limited to the works of U.S. authors, thereby avoiding conflict with Berne's rule against formalities. Although the renewal provision may cut off a work's copyright prior to the expiration of Berne's minimum term, that should not, for the reasons given above, cause Berne noncompliance.²⁴² Nonetheless, the PDEA is vulnerable to the critique that its effect is limited to tinkering around the margins: A large percentage of works are commercially valueless at inception or have an initial value that is quickly depleted. All of these works, however, would continue under the PDEA to be subject to a very long copyright term. While fifty years is certainly better than life plus seventy years, it may reasonably be asked whether the game is worth the candle.

5. *New-style formalities*

A fifth option, and by far the most attractive, is to formulate and install in U.S. law a set of new-style formalities that apply to both domestic and foreign works. New-style formalities would provide the filtering and information-creation benefits of traditional formalities. However, there is a good argument that, if structured properly, new-style formalities would not affect copyright's

might be assessed in particular cases. The uncertainty attending a "reasonableness" standard, combined with the investments that would be required to undertake searches in every instance, suggests that expanding fair use would be a more costly and less effective solution than direct reformatization. In addition, the expansion of fair use to immunize users unable to identify rightsholders following a "reasonable inquiry" would raise a separate issue of Berne compliance. Berne Articles 10 and 10bis narrowly circumscribe the type of fair use rules that signatories may establish in domestic legislation. Although a full analysis of these provisions is outside the scope of this Article, suffice it to say that the Berne status of the fair use expansion proposed by Patry and Posner will be subject to debate.

241. H.R. 2601, 108th Cong. (2003).

242. See *supra* text accompanying note 214.

“enjoyment and exercise,” and would, therefore, comply with our Berne obligations under the current Paris Act. This approach is attractive because it would require changes only to U.S. law; Berne, TRIPs, and the other international agreements that govern copyright and neighboring rights would remain undisturbed. Integrating new-style formalities with the current text of the Berne Convention does, however, raise several significant questions.

First, exactly what is a condition that interferes with the “enjoyment and exercise” of copyright? A solid starting point is that that language at least means that failure to comply with a formality cannot formally terminate the right, or prevent it from arising in the first place. It is unclear how much further “enjoyment and exercise” goes than that; I will return to this problem later.

Assuming for the moment that Article 5(2) allows a range of options short of formal nullification of copyright, we are still faced with a difficult problem: new-style formalities have to create a sufficient incentive for compliance to construct a reliable record of ownership and to reliably signal copyright status, but cannot use the forfeiture of rights to incent compliance.

The simplest solution would be to preserve formally voluntary registration, notice, and recordation of transfers (and reestablish a formally voluntary renewal formality) for all works, including works of foreign authors, but then incent compliance by exposing the works of noncompliant rightsholders to a “default” license that allows use for a predetermined fee. The royalty payable under the default license would be low. Ideally, the royalty to license a work that a rightsholder has failed to register, notice, reregister in the case of a transfer (i.e., record), or renew should be set to approximate the cost of complying with these formalities (i.e., the total cost of informing oneself about the details of compliance and then satisfying them). That way a rightsholder who expects his work to produce revenue exceeding the cost of complying with the relevant formality will prefer to comply with the formality, whereas a rightsholder who expects his work to produce revenue amounting to less than the cost of compliance will prefer to expose his work to the default license. (The rare rightsholder who estimates the likely revenues from his work to be equal to the cost of complying with the formality will be indifferent between compliance and exposure to the license.)

This system of formally voluntary formalities plus default licenses—which I have referred to previously as “new-style” formalities—establishes indirectly what the traditional system of compulsory formalities did directly: it eases access to commercially valueless works for which protection (or the continuation of protection) serves no purpose and focuses the system on those works for which protection is needed to ensure that the rightsholder is able to appropriate the commercial value of the expression. For the filtering function to work, of course, the government would have to maintain an easily accessible and up-to-date public registry. Given current computer database and search technology, this would not be difficult.

Importantly, the use of default licenses in a system of new-style formalities avoids the general objection to the compulsory licensing of intellectual property goods: the need for a legislature, agency, or court to set a price for the license in the absence of market negotiations. With respect to the particular use of default licenses proposed here, compliance with the formalities—or the failure to comply—serves as a price signal. Failure to comply means that the rightsholder places a minimal value on the right, a value no greater than the cost of compliance. That is all we need to know about works for which rightsholders fail to comply with formalities. And by exposing these works to a default license, we are giving these rightsholders nothing less than what they themselves expect in term of returns. The system of default licenses is therefore efficient: it removes transaction costs that would otherwise frequently prevent use, while charging an approximately optimal price (i.e., near zero) for a license. With respect to works for which rightsholders comply with formalities, the market continues to set the prices of licenses.

Default licenses can be analogized to the “penalty defaults” of the type proposed by Ian Ayres and Robert Gertner as gap-filling rules for incomplete contracts.²⁴³ Default rules in contract theory are intended to fill gaps in contracts by providing the parties with what they likely would have contracted for. “Penalty defaults” are gap-filling rules that are designed to give at least one party to the contract an incentive to contract around the default and therefore to choose affirmatively a preferred contract provision. Penalty defaults are purposefully designed to impose what the parties would not want, in order to encourage the parties to negotiate the solution that they do want. Importantly, penalty defaults incent contracting parties to reveal information to one another that might not be revealed otherwise.

Although Ayres and Gertner formulate and apply their theory of penalty defaults in the contract law context, the theory can be applied in the intellectual property context as well. The default licenses that back new-style formalities are a kind of penalty default rule, in that they are precisely the outcome that the owner of a valuable copyright would not desire. The existence of the license encourages owners of certain works to produce information that might not be produced otherwise—i.e., that their works are sufficiently valuable that continued copyright protection makes sense.

This system of voluntary formalities backed with default licenses raises an immediate question: do they comply with the Berne Convention (and, thereby, with TRIPs)? Although there are arguments both ways, I believe that the better reading of Berne would permit new-style formalities.

Article 5(2) and economic rights. The first issue is whether new-style formalities offend the Berne Article 5(2) proscription of formalities that

243. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 97-98 (1989).

interfere with the “enjoyment and exercise” of copyright. There are two senses in which that phrase may be interpreted. The first relates to enjoyment and exercise of the author’s economic rights. Under Article 9(1) of the Berne Convention, authors of literary and artistic works have the exclusive right of authorizing the reproduction of those works “in any manner or form.” This includes traditional photocopying, digital copying, or any other form of copying of the entire work or any part thereof. These exclusive rights include, as a necessary corollary, the right *to refuse* to authorize reproduction of a protected work. This right to exclude is the mainspring of the author’s economic right: by restricting reproduction, the author may reduce output of his work and thereby realize supracompetitive returns if his work lacks ready substitutes.

Nevertheless, authors who fail to comply with new-style formalities and thereby lose their previously existing right to exclude are likely not, as a category, deprived of any aspect of the “enjoyment and exercise” of the economic rights appertaining to their copyright. An author who fails to comply with new-style formalities is merely converting an entitlement that is initially protected by a property right (the right to exclude, realized through injunctions and infringement damages) into an entitlement protected by a liability right (the right to recover revenues from use via a default license).²⁴⁴ Even though new-style formalities set up the liability rule as the default, and require authors to opt out to preserve their ability to exploit the property rule, the system—unlike the usual system of compulsory licenses—is still voluntary. And if the royalty payable under the license is set correctly, owners of copyrights with projected values lower than the cost of complying with a formality should actually prefer the liability right as a means of exploiting their copyrights.

Creating an exploitation option based on a liability rule is a modest extension of what the current regime provides. In the copyright system we have now, rightsholders are allowed to choose the best approaches within the existing set of property rules for exploiting their copyrights, whether via exclusion and collection of infringement damages, a program of licensing and collection of license royalties, or a mixture of the two. New-style formalities would expand the existing process by establishing a liability rule option in the form of a default license for works not valuable enough to justify customized licensing. Again, whether the default license applies is within the control of the rightsholder, and therefore a rightsholder’s decision to rely on that liability rule, rather than on a property rule, to protect the enjoyment and exercise of his copyright is not a forfeiture of rights. It is, rather, a signal that a particular rightsholder believes that a one-size-fits-all liability rule based on a default license is preferable, because of low transaction costs, to a property right

244. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092-93 (1972).

exploited through (expensive) customized licensing or enforced through (expensive and protracted) infringement litigation.

The function of new-style formalities, in sum, would be to establish decision points at which rightsholders would be obliged to choose whether to stay within the typical system of property rules or to switch to a liability rule as the means to exercise and enjoy their copyright. Thus, new-style formalities do not touch on the existence or continuation of copyright, but merely on the manner in which rights are exploited. The difference is important, as the WIPO commentary to Article 5(2) makes clear: “what is at issue here is the recognition and scope of protection and not the various possible ways of exploiting the rights given by the law.”²⁴⁵

Of course, the “signal” that authors send via compliance or noncompliance with new-style formalities is unlikely to accurately reflect the underlying value of a work in every instance. Some authors will doubtless underestimate the future revenues that their works may bring in, and will mistakenly opt not to comply with formalities and expose their work to a default license. It is important to note that the possibility of error cuts both ways: some authors will mistakenly opt to invest in compliance with formalities for works that are unlikely to produce revenues greater than the cost of compliance. But despite the certainty that some authors will make the wrong decision, it is nonetheless true that authors (and assigns such as publishers) are the parties best placed to decide whether the likely returns from a particular work are great enough to merit investment in compliance with formalities, so the signal-to-noise ratio is likely to be usefully high. In any event, if an author is uncertain regarding his work’s future value, he retains the option of making the relatively small investment required to comply with formalities as a form of insurance against incorrectly valuing his asset.

There is a rejoinder to these arguments that proceeds from a different view of what exactly Berne protects the “enjoyment and exercise” of. What Berne protects, this objection would argue, is not the author’s overall ability to exploit his copyright, but something more specific: the enjoyment and exercise of an author’s *right to exclude*, a right that is granted in Article 9(1) of the Convention as well as in domestic law. The right to exclude, according to this objection, is not merely an initial entitlement, but is the subject of Berne’s protection for the entire term of copyright. Accordingly, even if rightsholders are free to alienate their right to exclude (via, for example, a voluntary license or a dedication to the public domain), Berne prohibits governments from conditioning the right to exclude on compliance with a formality. Berne prohibits, in other words, using noncompliance with a formality as a trigger to shift a work from property rule to liability rule status.

245. WIPO Guide, *supra* note 208, at 33.

This is a colorable argument, but is, I believe, an overreading of Berne. The right to control reproduction—to exclude others from making copies—is, as Article 9(1) of Berne makes clear, the core right granted under copyright. So copyright is structured to protect an author’s interests, using a property rule as the initial entitlement. But there is nothing inevitable about this choice; it is, rather, a practical one. Authors’ interest in their works could have been protected by using a liability rule as the initial entitlement, except that structuring the entitlement in that way would require government to set a price for the use of copyrighted works. In general, we do not believe that government is well placed to set prices. In the absence of any indication that government would be able to set a more accurate price for the right to reproduce a copyrighted asset than would be set by a market transaction (and to do it more cheaply as well), it makes sense to base copyright in a property rule, at least with respect to the initial entitlement.²⁴⁶ It also makes sense to limit government’s ability to mandate access to copyrighted works to the extent that we fear that the nonmarket pricing decisions that such mandated access would make necessary are unlikely to accurately track the market value of the asset. Article 9(2) of Berne limits such government-mandated “exceptions” from the author’s exclusive right; I will return to that provision shortly. But the important point is that the purpose of the copyright system is not to protect a rightsholder’s property right *qua* property right. The purpose of the copyright system is to protect a rightsholder’s ability to use his initial entitlement, which comes in the form of a property right, as a lever to pursue the exploitation strategy best suited to his particular interests.

Seen in that light, it makes little sense to lump default licenses, in which use is priced with the assistance of robust information produced by the author himself, together with typical compulsory licenses, in which price is determined by fiat (or, at best, fiat following administrative hearings at which rightsholders and would-be compulsory licensees offer contending and self-serving accounts of the worth of the assets at issue). Unlike in the case of ordinary compulsory licenses, the default licenses attending new-style formalities do not threaten to interfere with the exclusive rights of any rightsholder who does not consider the use of a default license to be in his interest. The objection to new-style formalities, then, is reduced to a narrow protest that government should not force authors to decide whether to exploit their right via a property rule or a liability rule, or, alternatively, that if government does force the choice, the default should be a property rule rather than a liability rule (i.e., rightsholders should have to affirmatively “opt in” to a liability rule). These arguments would make the right to exclude truly totemic. Berne (and domestic copyright law) would no longer be focused on protecting authors’ abilities to exploit their works, but would be bound up instead in

246. Cf. Calabresi & Melamed, *supra* note 244, at 1126.

enforcing a particular property rule, not just as an initial entitlement, but as a perpetual entitlement, even in instances where authors (and the public) would benefit from the use of an alternative means of exploitation.

Article 9(2), TRIPs Article 13, and copyright "exceptions." So the best reading of Article 5(2), in my view, would be one which allows new-style formalities. But assume for the moment, contrary to the arguments laid out above, that the right to exclude is in fact a totemic right under Berne. Assume then that the Article 5(2) prohibition of formalities that interfere with the "enjoyment and exercise" of copyright focuses narrowly on maintaining inviolate, throughout the term of copyright, the right to exclude, i.e., the property rule. Assume also that new-style formalities impermissibly interfere with the enjoyment and exercise of that right. The default licenses that enforce new-style formalities may nonetheless still be permissible under Article 9(2), which permits exceptions to the exclusive reproduction right in certain "special cases," provided that the excepted reproduction "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Article 13 of the TRIPs accord contains similar language and generalizes Berne's exceptions to all of the exclusive rights granted under Berne and TRIPs (e.g., the rights to create derivative works, to authorize public performances, and to authorize broadcasts).²⁴⁷

Ricketson states that exceptions permitted under Article 9(2) are subject in all cases to respect for the author's moral rights;²⁴⁸ that much is evident from the three-step test in Article 9(2), which mixes economic and moral rights concerns. It is also clear that the three criteria for restricting exclusive rights must all be met in order for restrictions to be permissible. Further guidance in how to apply the Article 9(2) test is available from the Report on the Berne Revision Conference held in Stockholm in 1967:

If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work.

247. TRIPs Article 13 provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." TRIPs, *supra* note 16, art. 13; *see also* Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 *REVUE INTERNATIONALE DU DROIT D'AUTEUR* 3 (2001) (analyzing the meaning of Article 13).

248. RICKETSON, *supra* note 208, at 489.

If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.²⁴⁹

There is another more recent, and perhaps more useful, interpretation of the exceptions language. In June 2000, a dispute resolution panel of the World Trade Organization (WTO) issued a report,²⁵⁰ in an action brought by the European Communities, holding that Section 110(5) of the Copyright Act,²⁵¹ a provision establishing royalty-free compulsory licenses for the public performance of radio or television transmissions of nondramatic musical works for businesses, including restaurants and bars, below a certain size or using certain “homestyle” stereo and television equipment, did not qualify as a permitted exception under Article 13 of the TRIPs accord.²⁵² The WTO panel stated that Berne Article 9(2) and TRIPs Article 13 were to be construed in a manner that avoided conflict,²⁵³ and it limned the scope of each of the three elements of the Berne Article 9(2)/TRIPs Article 13 test.

“*Normal exploitation.*” Whether a system of default licenses conflicts with the “normal exploitation” of a work can be thought of in two different ways. One would reflect a totemic view of the right to exclude: that right, this argument would hold, is the “normal” way in which works are exploited, and therefore default licenses, which substitute a liability rule for the exclusionary property rule, are incompatible with “normal exploitation.” But by that reasoning, all compulsory licenses would run afoul of the “normal exploitation” element of the Article 9(2) test, a result which makes no sense against the background of a Berne provision intended to regulate, but not to prohibit, the use of exceptions such as compulsory licenses.

The second, and better, construction of the “normal exploitation” element would ask whether a default license would result, in comparison with normal copyright remedies, in rightsholders in the aggregate realizing lower returns from their works—or, as the WTO panel framed the question, whether the excepted use would “enter into economic competition with the ways that right holders normally extract economic value from . . . the work . . . and thereby

249. WORLD INTELLECTUAL PROP. ORG., RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM 1145-46 (1967).

250. World Trade Org., *Report of the Panel, United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000) [hereinafter *Panel Report*].

251. 17 U.S.C. § 110(5) (2000).

252. *Panel Report*, *supra* note 250, ¶ 7.1. For a good summary of the details of § 110(5), see Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 96-98 (2000).

253. *Panel Report*, *supra* note 250, ¶ 6.66.

deprive them of significant or tangible commercial gains.”²⁵⁴ As outlined above, default licenses would apply only when a rightsholder failed to comply with a low-cost formality. Failure to comply is a signal that the net present value of expected future revenues from a work is lower than the cost of compliance. The fee payable under the default license (i.e., the fee payable by each user) is set to approximate the cost of compliance. Thus, for works that fall under the default license, on average the rightsholder’s ability to “exploit” the work will be, if anything, enhanced.

The argument that new-style formalities will not impair rightsholders’ abilities to exploit their works finds powerful support in the fair use doctrine, which often has been characterized as a limitation on exclusive rights that immunizes uses for which the transaction costs of negotiating a license exceed the potential return to rightsholders from the license.²⁵⁵ Articles 10 and 10bis of the Berne Convention list certain fair use-type exceptions to the exclusive reproduction right; these include limited rights to make quotations²⁵⁶ and to use works in aid of teaching²⁵⁷ and news reporting.²⁵⁸ Berne’s provision for fair use shows that the Convention permits incursions on the exclusive reproduction right when transaction costs make negotiated arrangements too costly. The default licenses that back new-style formalities can be supported on the same grounds—in fact, they are in some respects less invasive than fair use, because use under a default license results in compensation, whereas use under the fair use doctrine does not.

“Legitimate interests” and moral rights. The second requirement—that an exempted reproduction “not unreasonably prejudice the legitimate interests of the author”—is susceptible, at least in part, to the same analysis. To the extent that the author’s “legitimate interests” are taken to mean his ability to capture whatever rents his exclusive rights will return, the default license does not interfere.²⁵⁹ To the extent, however, that the phrase “legitimate interests” refers to the author’s moral rights, additional analysis is required.

254. *Id.* ¶ 6.183; accord RICKETSON, *supra* note 208, at 483 (stating that “normal exploitation” refers to “the ways in which an author might reasonably be expected to exploit his work in the normal course of events”).

255. See generally 2 GOLDSTEIN, *supra* note 140, ch. 10 (explaining the fair use doctrine).

256. Berne Convention, *supra* note 14, art. 10(1).

257. *Id.* art. 10(2).

258. *Id.* art. 10bis(2).

259. Even if default licenses did systematically interfere with rightsholders’ ability to profit from their works, that interference remains permissible so long as it does not create “unreasonable prejudice.” As the WTO panel made clear, whether an exception creates “unreasonable prejudice” will depend in part on whether compensation is provided to rightsholders: “in cases where there would be [a] serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).” *Panel Report*, *supra* note 250, ¶ 6.229 n.205

The “legitimate interests” of copyright holders (as well as the “enjoyment and exercise” of copyright) is tied, as well, to the moral rights that Berne requires signatories to grant to authors.²⁶⁰ Article 6bis of the Berne Convention requires member states to grant authors rights of paternity (i.e., the “right to claim authorship”) and integrity (i.e., the “right to object to any distortion, mutilation or other modification” that would prejudice the author’s reputation).²⁶¹ These rights are independent of the author’s economic rights, survive the transfer of those economic rights,²⁶² and must, in most instances, persist for at least the expiry of the economic rights, even following the death of the author.²⁶³

It must be noted that since acceding to the Berne Convention, the United States has refused to fully incorporate into its domestic law the moral rights set out in Article 6bis. Instead, the United States has relied on a number of different sources, including an author’s right under copyright law to control derivative works; state unfair competition, defamation, and privacy laws; and the Visual Artists Rights Act of 1990 (VARA),²⁶⁴ an amendment to the copyright law granting limited rights of paternity and integrity to a narrowly defined class of “works of visual art,”²⁶⁵ to approximate the Berne requirements. Whether the United States currently complies with Berne Article 6bis is a subject beyond the scope of this Article.²⁶⁶ But it seems likely that current U.S. law, if it complies at all, does so only minimally. The question is whether subjecting certain works to the default licenses that attend new-style formalities would subtract meaningfully from a level of protection for paternity and integrity rights that is already stinting. If so, then the United States may fall out of compliance with Article 6bis (or, perhaps, make its continued noncompliance no longer tolerable).

(quoting WIPO Guide, *supra* note 208, at 56).

260. Although the facts before the WTO panel did not involve exceptions alleged to affect moral rights, the panel suggested in its report that a rightsholder’s “legitimate interests” need not be “limited to actual or potential economic advantage or detriment.” *Id.* ¶ 6.223.

261. Berne Convention, *supra* note 14, art. 6bis(1).

262. *Id.*

263. *Id.* art. 6bis(2).

264. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (1990) (codified in scattered sections of 17 U.S.C.).

265. 17 U.S.C. § 106A (2000). As Goldstein notes, the moral rights granted under VARA extend to a small number of valuable works that exist only in a single copy or that are published in signed and numbered editions of no more than two hundred copies, and are subject to limitations that “exempt[] from liability virtually all significant commercial uses of artistic works.” GOLDSTEIN, *supra* note 195, at 284.

266. For a compelling argument that the United States has failed to comply with the Berne standards for moral rights, see John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

Regardless of whether current U.S. protection of paternity and integrity rights meets Berne minima, installing a system of new-style formalities need not touch these rights at all: although the works of noncompliant rightsholders would be subject to default licensing, the copyrights on works affected by the regime would nonetheless be left formally intact. Accordingly, there is no reason why the law could not specify that use of works under the default licenses is subject, in all cases, to whatever (narrow) protection current U.S. law affords to paternity and integrity rights.

But new-style formalities could go further, in a way that would strengthen the United States's commitment to facilitating the exercise of Berne-mandated moral rights. One method would be to infuse into new-style formalities the type of "some rights reserved" copyright customization that Creative Commons provides now.²⁶⁷ New-style registration, notice, recordation of transfers, and renewal could be designed to allow rightsholders to signal exactly which rights they wish to retain, and which freedoms are allowed. The difference is that instead of relying on a Creative Commons license, rightsholders' choices about which rights to reserve would be enforceable as a matter of positive law.

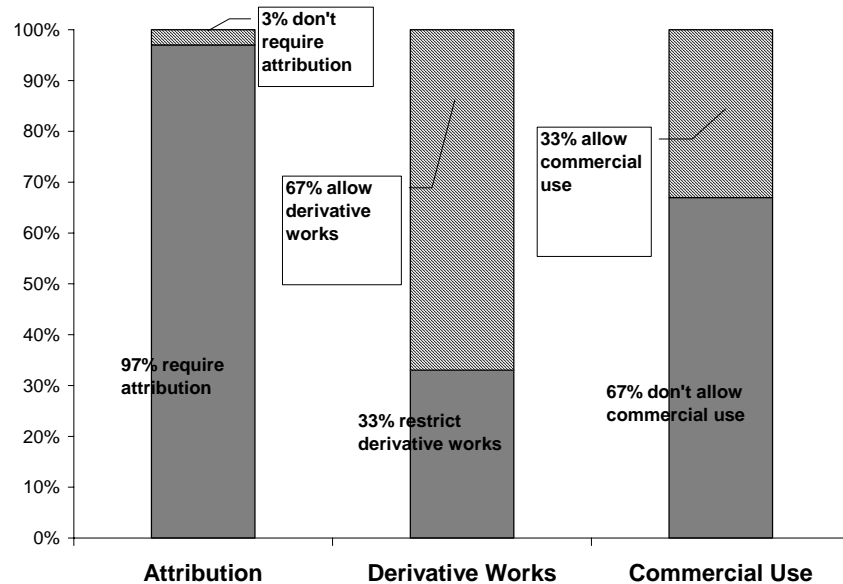
There are two potential advantages of the integration of new-style formalities with the Creative Commons approach. First, it could be used to strengthen U.S. compliance with Berne-mandated moral rights. Authors who comply with new-style formalities could be permitted, in exchange for a blanket grant of permission to use their works, to demand attribution in all cases, even in instances, such as fair use, where the rightsholder would not currently have the power to enforce such a demand. Similarly, authors who comply with new-style formalities would be able to protect their integrity rights, by permitting reproduction but restricting derivative uses.²⁶⁸

The second advantage is normative: by disaggregating economic from moral rights, and the moral rights of paternity and integrity from one another, new-style registration, notice, recordation, and renewal would allow us to understand over time what people want in terms of rights for different types of works, and how those desires change (if they do at all). That information would be useful in the debate over future changes to the copyright laws.

267. See *supra* text accompanying notes 115-123.

268. This bolstering of the integrity right is limited, of course, by the demands of the First Amendment. Any attempt to limit parody or criticism through a restriction on derivative works should be repelled by the fair use doctrine.

FIGURE 6: LICENSE DISTRIBUTION CHOICES OF CREATIVE COMMONS LICENSE USERS



The data set out in Figure 6—data which was provided by Creative Commons—shows the choices that Creative Commons licensors have made over the first two years of the organization's existence regarding which rights to reserve and which to give away. Although rightsholders who seek out, or become informed about, Creative Commons and decide to enter into a Creative Commons license are certainly not representative of rightsholders as a broader group, the Creative Commons license distribution data gives us some insight into what the world might look like when copyright is no longer an on/off switch, but is more finely variegated.

Perhaps most unexpectedly, the data shows that a significant majority (67%) of Creative Commons licensors allow the use of their content in the creation of derivative works. This data suggests that many rightsholders would voluntarily abandon control over derivative works, which is an element both of the author's economic right and his right of integrity—although most who do so (again 67%) would limit use to noncommercial derivative works.

In contrast, the Creative Commons data shows that almost all licensors (97%) require attribution in exchange for permission to use their works. That number suggests that the norm favoring attribution is strong, and, consequently, that we may succeed in moving copyright closer to rightsholders' expectations and simultaneously free a large amount of creative work if we install a

mechanism for exchanging the right to control reproduction for a stronger commitment to provide attribution.

“*Certain special cases.*” The final element of Article 9(2), the “certain special cases” requirement, is exceedingly difficult to pin down. The first area of difficulty is determining whether the element imposes a separate constraint at all. The official WIPO commentary on Article 9(2) does not lay out any guidelines for determining whether an exception fits under the “certain special cases” language. Indeed, the commentary fails to mention “certain special cases” as a separate requirement, and instead discusses only the “two conditions” of protecting normal exploitation and avoiding unreasonable prejudice to legitimate expectations—suggesting, perhaps, that the “certain special cases” language does no more than reflect a situation in which the two principal factors are met.²⁶⁹ The same sense is conveyed in the extract, quoted above, from the Report of the Stockholm Revision of the Berne Convention, which focuses on the “normal exploitation” and “legitimate interests” elements, and suggests again that the “certain special cases” language refers entirely to instances in which neither element is impinged upon.

The WTO panel took a different approach. Interpreting each of Article 13’s three requirements to avoid any “redundancy or inutility,”²⁷⁰ the panel held that the “certain special cases” language imposed a separate constraint on exceptions and, in fact, that exceptions must first be shown to meet its requirements before analysis of the other criteria is undertaken.²⁷¹ The panel read the “certain special cases” language to require that exceptions be “clearly defined”²⁷² and “narrow in [a] quantitative as well as a qualitative sense.”²⁷³ Applying these standards, the panel invalidated Section 110(5)(B)’s broad grant of compulsory licenses for nondramatic musical works for businesses, holding that the exception could not qualify as “narrow” when, according to evidence before the panel, 70% of all restaurants, 73% of all bars, and 45% of all retail stores qualified for compulsory licenses under the provision.²⁷⁴ In contrast, the panel upheld the provisions of Section 110(5)(A) granting compulsory licenses for dramatic musical works where the standards set out in the statute would allow only 16% of restaurants, 13.5% of bars, and 18% of retail stores to qualify for royalty-free compulsory licenses for a narrower class of copyrighted works.²⁷⁵

269. WIPO Guide, *supra* note 208, at 55-57.

270. *Panel Report*, *supra* note 250, ¶ 6.97.

271. *Id.* ¶ 6.160.

272. *Id.* ¶ 6.108.

273. *Id.* ¶ 6.109.

274. *Id.* ¶¶ 6.122, 6.133.

275. *Id.* ¶¶ 6.142, 6.159.

For reasons that have been discussed earlier in this Article, we would expect a large number of authors to fail to comply with registration and notice requirements, and, similarly, the majority of rightsholders to fail to comply with a renewal formality. Accordingly, a large number of works (in both absolute and percentage terms) will be exposed to default licenses in a system of new-style formalities. So one might read the WTO panel's holding that exceptions must be "narrow in a quantitative as well as a qualitative sense" as ruling default licenses out as an exception permissible under Berne 9(2) or TRIPs 13.

It should be noted, however, that the WTO panel's report was issued in a case involving royalty-free compulsory licensing, which means that, unlike in the case of default licenses, the WTO panel was dealing with an exception that eliminates rightsholders' ability to receive compensation for their work for the excepted uses. In that context, and in the absence of any particular provision in Berne or TRIPs approving the particular compulsory licenses at issue, an independent "special cases" element makes sense. If the touchstone of the exceptions provision is preserving rightsholders' abilities to profit from their works, application of the "normal exploitation" and "legitimate interests" elements might theoretically provide all the information needed to determine whether an exception should be permitted. But, in practice, whether a particular exception interferes with "normal exploitation" or a rightsholder's "legitimate interests" may be difficult to determine with certainty. The "certain special cases" element can therefore be seen as providing an easily administered threshold test: does this exception affect a large enough share of the potential licensing market that it is likely to interfere with a rightsholder's ability to exploit his work?

But what role should the "certain special cases" element play in a case like default licenses, where there is no systematic interference with rightsholders' economic interests? In such an instance, the "certain special cases" language may be both theoretically and practically coterminous with the "normal exploitation" element, i.e., the number of works to which an exception applies is required to be sufficiently limited that the market for a particular work is not substantially affected. For works that have a ready market, even a relatively small amount of excepted usage might affect the rightsholder's ability to exploit the work. But because the default licenses connected to new-style formalities apply only after a rightsholder signals that his work does not enjoy a substantial commercial market, even a relatively large number of excepted uses made under a default license would not interfere with the rightsholder's own understanding of his ability to exploit the work. Put differently, there is a strong argument that because default licenses arise only when the author or rightsholder sends a signal that his work lacks significant commercial value, the default license applies only in the "special case" where a liability rule is preferred by the rightsholder.

Perhaps the most that can be said at this point about the “special cases” element—and indeed about the Berne Article 9(2)/TRIPs Article 13 test altogether—is (1) that on a proper reading of Berne Article 5(2), the need to justify new-style formalities as an “exception” will never arise, and (2) if the exceptions provision is applicable, the elements of the test are sufficiently indeterminate (at least as they apply to default licenses, a mechanism that the Berne drafters could not have had in mind when they formulated the Article 9(2) test) that the application of the test will involve not so much testing new-style formalities under the formal elements as an evaluation of whether the system of new-style formalities serves (or undermines) the foundational principles of the Berne Convention. If Berne is focused on protecting authors’ ability to exploit their works, new-style formalities will be compatible with the Convention. If Berne is focused, instead, on enforcing a particular property rule, regardless of authors’ interests, then new-style formalities may fail under the current text of the Convention.

CONCLUSION

My hope in writing this Article is that reformalization might reduce the current friction over copyright to a level conducive to a broader discussion about intellectual property reform. As the discussion above makes clear, the stifling of creativity—as well as free speech—created by the current unconditional copyright regime will only become worse with the passage of time. Unlike more radical proposals for reforming copyright law, reformalization is a task that can be accomplished with a few manageable and realistic changes to international and domestic law and without endangering the interests of any particular segment of the copyright community. Just as importantly, unlike more limited proposals, reformalization would ensure that creative material lacking commercial value becomes available for reuse immediately.

With clear rules governing copyright protection and a formalities-compliance system making use of the best technology available, a reformalized copyright regime would reinstate the best aspects of the old U.S. copyright system while leaving behind the bureaucratic difficulties that turned “formalities” into a despised term decades ago. Though this Article does not offer a political road map for achieving the legislative changes needed for reformalization, the proposal outlined above shows that significant reform can take place without damaging the interests of copyright owners who would otherwise have strong incentives to oppose the creation of a less restrictive copyright regime. The challenge now is to turn these academic concepts into actual changes in domestic and international laws.