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BRENDAN BROWN LECTURE SERIES: ARTICLE: THE STEADILY SHRINKING PUBLIC DOMAIN: INEFFICIENCIES OF EXISTING COPYRIGHT LAW IN THE MODERN TECHNOLOGY AGE

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SUMMARY:
... The glaring inefficiency of present-day copyright law - and its sizable effect upon the magnitude and dynamics of the public domain - is perhaps best illustrated by a simple example. ... In 1976, Congress also altered the method of computing copyright terms: Protection for works created by identified natural persons began with the work's creation (not publication) and ended fifty years after the author's death; protection for anonymous works, pseudonymous works, and works made for hire lasted seventy-five years from publication or one hundred years from creation, whichever expired first. ... After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term) -- must be far smaller... . And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. ... Lengthy copyright protection would therefore be provided for economically profitable properties, but copyrights that are not renewed by the author would become part of the public domain. ... The gross inefficiencies of present-day copyright law have an immense impact on the public domain, and this is made especially apparent by today's prevalence of inexpensive computers and the Internet. ...

TEXT:
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I. INTRODUCTION

The glaring inefficiency of present-day copyright law n1 - and its sizable effect upon the magnitude and dynamics of the public domain n2 - is perhaps best illustrated by a simple example. A thirty-year-old writer who publishes a book and lives to be eighty possesses copyright protection extending 120 years (which is essentially the remaining life of the author plus seventy years). n3 Notwithstanding this lengthy copyright, it is unlikely that the book will have commercial viability beyond a decade or two. Thus, for approximately the next 100 years the book will in all probability lie dormant and remain unavailable to the public. If someone wishes to publish the book in any form, he must obtain written permission from the copyright owner (who may not be the author) and pay the required fee or be exposed to harsh penalties of strict liability. It is obvious to even the casual observer that this search for the copyright owner is often difficult and expensive, as there is no central repository for such information. n4 **[*550]** Many who face this daunting process will eventually give up, leaving the material unread by the public.

The rudimentary nature of locating copyright owners is made especially apparent by today's prevalence of computers and the Internet. Modern digital technology could enable the easy compilation and maintenance of a central registry for copyright owners, resulting in at least two obvious advantages. First, a central registry would allow for the effortless renewal of economically viable copyrights, and, second, it would permit those who wish to use such copyrights to readily locate copyright owners. Materials which are no longer profitable, and therefore not renewed by

their copyright owners, would then be released to the public domain, where they could be freely disseminated to others via the Internet and other means. n5

This proposal for renewal and registration would actually constitute something of a reversion to the first copyright statutes. The early copyright laws required registration and provided for a renewable fixed-term from the date of publication. n6 Since 1976, however, the copyright term is based on the life of the author, n7 and there is no longer a registration requirement. The registration and renewal aspects of prior copyright legislation provided important checks on the limited monopolies granted by copyright. First, registration ensured that prospective licensees could locate copyright owners. Second, requiring copyright owners to actively renew their copyrights forced them to consider their value; the renewal ensured that the added protection afforded to copyrighted material was only afforded when the **[*551]** copyright owners remained actively interested in developing their works. These formalities eliminated the problems which are found today when copyright owners were deceased, missing, or apathetic.

The current copyright system curtails the usefulness of the public domain. Works, abandoned perhaps due to the death or apathy of the copyright owner, lie dormant until the copyright term expires, often many decades after originally granted. Consequently, the Constitutional guarantee of a healthy, vibrant public domain is lost in the process. Present copyright laws unreasonably limit public access to many works and, thus, they limit the generation of new creations and stifle the process of innovation. To fulfill purpose of copyright law, economic incentives to authors cannot be the only consideration; n8 and even the effectiveness of economic incentives is doubtful when copyright protection is extended so far into the future. A copyright system requiring renewal would provide incentives for commercially successful works while also protecting the public domain and the continued supply and creation of innovative material. The rigid copyright law that presently exists potentially undermines a very important purpose of copyright law - the promotion of cultural and scientific progress.

II. THE IMPORTANCE OF THE PUBLIC DOMAIN

The Copyright Clause of the Constitution n9 possesses two equally important dimensions. On the one hand, the grant of exclusive rights encourages author and inventor creativity through financial incentives. n10 On the other hand, these limited grants guarantee that innovations enter the public domain as soon as the period of exclusivity expires. n11 Regarding this second, **[*552]** often-overlooked benefit of copyright law - the prompt entry of works into the public domain - the Constitution's framers clearly recognized the advantages of eventually providing unrestricted public access to creative works. n12 Noting that copyright is intended to "increase and not to impede the harvest of knowledge," n13 the Supreme Court has asserted that copyright should "motivate the creative activity of authors and inventors by the provision of a special reward," but also that it should "allow the public access to the products of their genius after the limited period of exclusive control has expired." n14 Thus, the public domain's eventual collective ownership of intellectual property is an important part of the copyright scheme as mandated by the Constitution.

At first glance, few areas of the law seem more straightforward and pedestrian than copyright law. In reality, however, the tangible tension between public and private interests often reaches emotional proportions. Some view copyright law as nothing less than strictly vested property interests. The deceased performer and legislator Sonny Bono, for example, once suggested that a copyright should last forever. n15 **[*553]** When his widow and congressional successor Mary Bono learned that such a change would violate the Constitution, she suggested Congress consider President and Chief Executive Officer of the Motion Picture Association of America Jack Valenti's proposal of a copyright term of "forever less one day." n16 Others see copyright as a rigid monopoly which should be as severely limited as possible. Stanford Law School professor Lawrence Lessig has stated that: "Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. That building is always and everywhere at least partially alone without permission and without compensating the original creator." n17

The Copyright Clause of the Constitution n18 attempts to strike a careful balance between financial incentives for the creation of original works and public access to those works. n19 While economic motivations for authors arguably justify copyright protection, the goal of a robust and constantly rejuvenated public domain is also critical to the intellectual and cultural well-being of the nation. n20 This is especially true when the public domain is more accessible than ever, enabled by inexpensive digital technology, which affords a vast majority of the population easy access to literary and artistic works. n21

[*554] Over the years, the Supreme Court has recognized this natural tension between maintaining financial incentives to individual creators and producing a vibrant public domain. As early as 1829, the Court noted:

> While one great object [of copyright law] was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main

> object was "to promote the progress of science and useful arts;" and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible; having a due regard to the rights of the inventor. n22

Later, the Court rejected the assertion that there are natural or "common law" rights of individuals to literary property, and stated instead that copyright statutes must represent a compromise between protecting authors and assuring access to "the result of their labours [which] may ... be beneficial to society." n23

Recognizing the importance of considering both private and public interests in copyright matters, the Court in Twentieth Century Music Corp. v. Aiken definitively nodded toward the public domain:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interests. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. n24

Additionally, in Stewart v. Abend the Court pointed out that "the copyright term is limited so that the public will not be **[*555]** permanently deprived of the fruits of an artist's labors." n25

Although copyright is intended to protect original expression, originality is relative. The general notion that most creations are wholly original is unfounded; many great works are in fact the artful retelling of others' stories. Mark Twain once noted that "substantially all ideas are second-hand, consciously or unconsciously drawn from millions of sources ... [and] there is not a rag of originality about them." n26 The adage that there is nothing truly new in the world seems applicable in this instance. The public domain enables creation, or "artful retelling," by serving as a device that "permits the rest of the system to work by leaving the raw material of authorship available for authors to use." n27 The judiciary recognized the danger of overly restricting this valuable resource:

> Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture. n28

A continually refreshed public domain is essential because it serves as a foundation for new works. Many - perhaps most - literary works draw from expression found within the public domain, and new digital technologies have substantially facilitated the location and expansion of these earlier creative works. The presence of the public domain also increases the likelihood that materials, which may otherwise be abandoned, are preserved. This is particularly true today. Technology allows a single individual to essentially become a custodian of information and thereby increases the likelihood that works will not only be preserved but communicated to others. Currently, older material is readily accessible, digital preservation is widely available, and dissemination of these works, via the Internet and e-mail, is **[*556]** practically effortless. n29

III. SHORTCOMINGS OF THE PRESENT COPYRIGHT SYSTEM

A. A Brief History

The first United States copyright statute, enacted in 1790, provided an exclusivity term of fourteen years from the date of publication, renewable for an additional term if the author survived the first term. n30 In 1831 Congress expanded the federal copyright term to a potential forty-two years (twenty-eight years from publication, renewable for an additional fourteen years). n31 In 1909, Congress extended the term to a potential fifty-six years (twenty-eight years from publication, renewable for an additional twenty-eight years). n32

A major overhaul of the copyright system occurred in 1976. n33 Having passed a series of temporary copyright term extensions, ranging from one to twenty years, n34 Congress removed the registration requirement altogether, extending copyright to all **[*557]** works, registered or not. n35 In 1976, Congress also altered the method of computing copyright terms: Protection for works created by identified natural persons began with the work's creation (not publication) and ended fifty years after the author's death; n36 protection for anonymous works, pseudonymous works, and works made for hire lasted seventy-five years from publication or one hundred years from creation, whichever expired first. n37 The provisions of the 1976 Act extended the terms of all works under the earlier 1909 Act retrospectively, from a maximum of fifty-six to seventy-five years. n38

The Copyright Term Extension Act ("CTEA") of 1998 n39 was the fourth major extension of copyrights. The CTEA retained the general structure of the 1976 Act, and it enlarged the terms of all existing and future copyrights by twenty years. n40 Protection for works created by identified natural persons now lasts from creation until seventy years after the author's death; n41 protection for anonymous works, pseudonymous works, and works made for hire, is ninety-five years from publication or 120 years from creation, whichever expires first. n42 The CTEA applied these new terms to all works not published by January 1, 1978. n43 For certain works published before 1978, with existing copyrights as of the CTEA's effective date, the CTEA extends the term to ninety-five years from publication. n44

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B. Compliance Costs

Permission to use copyrighted materials typically entails the payment of licensing fees after the proper owners of the copyright are located. Obviously, the older the work, the more difficult and expensive the process becomes. n45 Thus, copyright law often effectively prohibits publishers, librarians, scholars, and others from republishing and disseminating older works which have little significant commercial value, but possible strong historical or artistic value. n46

The process is further complicated by heirs or legatees of the copyrights. As one can imagine, it may be practically impossible to identify successors in interest to these copyrights, or to trace the transfer and assignment of copyrights over such a long period. n47 Heirs wielding rigid control and high costs over works long after the original author's death frequently frustrate the creativity of new authors who wish to draw upon these works for inspiration.

It should also be noted that copyright is a strict liability system, so the consequences for failure to obtain permission are severe. n48 Additionally, the cost of defending or insuring against legal actions, or paying substantial fees to research and clear a complicated tangle of rights, is often prohibitive. n49 As a result, **[*559]** the burdensome process of obtaining permission from copyright owners inevitably results in self-censorship; it is simply easier for the creator to abandon the project than wade through the morass to locate the proper copyright owner.

C. The Law of Diminishing Returns

As in all realms of life, there is a law of diminishing returns, n50 and the copyright realm is no exception. According to the law of diminishing returns, considerably extending a copyright's term eventually provides a prospective author little incentive to create new works in the present. This results because the discounted present value of any revenue stream to be captured many decades in the future is virtually nonexistent. n51 In his strident dissent in Eldred v. Ashcroft, Justice Breyer discussed this phenomenon:

What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works... . No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. n52

Justice Breyer's analysis was then forcefully substantiated with statistics:

> After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term) -- must be far smaller... . And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future **[*560]** when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. n53

In summary, current copyright protection is so lengthy that the present value of any additional revenue is not only small, but extremely uncertain.

D. The Preservation of Works

The older a work is, the more likely it will fall from the public's attention and the more difficult it will be for an individual to retrieve it. A few statistics illustrate this problem: In 1950, approximately 11,000 books were published in the United States; n54 in 2001, approximately fifty years later, only about 400 of these titles were still in print, and the remainder were presumably idling on bookshelves and attics around the country. n55

Technology has significantly changed the retrieval of literary works. Most of the nation's libraries have, for example, a copy of The Complete Works of Shakespeare, a few volumes of Plato, two or three of Mark Twain's novels, and perhaps several books by Dickens. Project Gutenberg, an Internet repository, however, provides instant access to several editions and works of Shakespeare, Plato, Twain, and Dickens. n56

Unfortunately, present copyright law detrimentally affects the preservation of those works with little commercial value. A vast number of copyrighted works are out of print and unavailable in any form. Additionally, current law does not require a copyright owner to ensure that the work remains publicly available. A more reasonable copyright expiration would permit a whole new generation access to the work through the Internet. n57 Were it not for the current law, a significant number of these works would have already entered the public domain, making them freely available for a broad range of scholarly, **[*561]** creative, and educational purposes. n58

E. First Amendment Considerations

Copyright law restricts some speech - that of non-copyright holders - to promote the speech of copyright owners, and as such, it is subject to certain First Amendment constraints. These First Amendment concerns were well-expressed by copyright-law expert Melville Nimmer:

> If I may own Blackacre in perpetuity, why not also Black Beauty? The answer lies in the First Amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright. n59

Most copyright legislation advances the governmental interest in providing incentives for creation of literary and artistic works, and thus it will be upheld when narrowly tailored to achieve those purposes. But very restrictive copyright laws disturb this delicate First Amendment balance. As copyright lengthens into perpetuity, the incremental incentive it provides to authors tends to vanish and the corresponding threat to the public domain tends to magnify.

IV. A MODEST PROPOSAL FOR REFORM

Although a definitive term for copyright protection is not established by the Constitution, the "limited times" language of the Copyright Clause restricts copyright terms. n60 The enrichment of the public domain, however, is not a by-product of this restriction, but its very purpose. Nevertheless, Congress' incremental and rigid extension of the copyright term indirectly extended the copyright term to the point of perpetuity. This de **[*562]** facto perpetual copyright term, however, is contrary to a rich and vibrant public domain, and the public's growing demand for such materials, made increasingly accessible by digital technologies, underscores the need for balance.

Present copyright law unnecessarily extends the copyright term to older works. The extension fails to benefit older works with little present economic value, and it therefore unnecessarily denies public access to such works. Copyright extensions should only apply to commercially viable works, and copyright owners should be required to renew their copyright by simply filing notice with the Registrar of Copyrights via an easily accessible database.

The proposal presented here is straightforward and simple: (1) file all copyright applications into a central registry, (2) revert to the former system of renewable fixed terms, and (3) provide for a total copyright protection of, say, 100 years, the first 30 years being automatic and the next 70 years provided in 10-year renewable terms. Lengthy copyright protection would therefore be provided for economically profitable properties, but copyrights that are not renewed by the author would become part of the public domain. This revision would correct the present arbitrary and lengthy system, and it would also ease the search for copyright owners.

A reversion to renewable terms is greatly preferable to wholesale, long-term extensions. A simple act of renewal could protect financially valuable works, and non-renewed works could immediately enter the public domain. This scenario is far preferable to waiting decades for an otherwise abandoned copyright to expire.

V. CONCLUSION

The Copyright Clause of the Constitution embraces the important, but often overlooked, principle that a vibrant, expanding public domain is a valuable bequest to future generations. The gross inefficiencies of present-day copyright law have an immense impact on the public domain, and this is made especially apparent by today's prevalence of inexpensive computers and the Internet. A requirement for copyright renewal would benefit both copyright owners and the public, and a central registry for copyright renewals would be easily maintainable and **[*563]** accessible. Those

non-renewed materials that lack commercial value would enter the public domain and be freely disseminated over the Internet. In the process, the constitutional guarantee of a healthy, vibrant public domain is achieved, and lengthy copyright protection would be achieved.

FOOTNOTES:

n1. *17 U.S.C. 101*-1332 (2004).

n2. The public domain consists of the repository of works which are ineligible for copyright, which were created before copyright law existed, which have had their copyrights expire, or which have been freely given to the public by their authors.

n3. *17 U.S.C. 302*(c); see also infra notes 39-44 and accompanying text.

n4. Imagine a real estate system which had no central repository of ownership, and the difficulties it would pose to a person interested in purchasing a vacant lot. The present copyright system often makes it exceedingly difficult to locate a copyright owner of an identifiable literary property.

n5. See infra Part IV (discussing suggested reforms in this area).

n6. See infra notes 30-32. Under prior copyright acts, most works actually entered the public domain as soon as the initial term expired because the copyright owners did not apply for renewal. See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, in 2 Studies on Copyright 1251 (The Copyright Society of the U.S.A. ed., 1963) (arguing for changes in the renewal system of the then current copyright law); Barbara A. Ringer, Study No. 31: Renewal of Copyright, in 1 Studies on Copyright 513-14 (The Copyright Society of the U.S.A. ed., 1963) (stating that the addition of the renewal device was necessary to permit the majority of copyrighted works to enter the public domain after a short set time, while allowing a longer term for works of continuing value). For example, a 1960 Copyright Office study concluded that only fifteen percent of registered works due to enter the public domain were in fact renewed after twenty-eight years of copyright protection. Id. at 583.

n7. See *17 U.S.C. 302*(a) (2004).

n8. See *New York Times Co., Inc. v. Tasini, 533 U.S. 483, 523 n.20 (2001)* (Stevens, J., dissenting) (stating that "copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas").

n9. U.S. Const. art. I, 8, cl. 8.

n10. See *Mazer v. Stein, 347 U.S. 201, 219 (1954)* (noting that "the 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 in "Science and useful Arts.'").

n11. An expired copyright does not prevent an author from continuing to develop and exploit his creations; it simply allows the public unrestricted access on equal footing. Even after works enter the public domain,

copyright owners of profitable works will continue to exercise control over and earn revenue from any derivative works. See *17 U.S.C. 103*(b) (2004).

n12. See, e.g., *Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994)* (stating that "the primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public"); *Fiest Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991)* (acknowledging that "the primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts'"); *Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429* (holding that "the limited grant is ... intended to motivate the creative activity of authors and inventors ... and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)* (stating that "creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"); *United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)* (recognizing that "the Copyright Law, like the patent statutes, makes reward to the owner a secondary consideration"); *Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)* (acknowledging that "the sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors").

n13. *Harper & Row v. Nation Enters., 471 U.S. 539, 545 (1985).*

n14. *Id. at 546.*

n15. 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono (R-CA.)).

n16. 144 Cong. Rec. H9952.

n17. See Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity 29 (Penguin Press 2004).

n18. The Patent and Copyright Clause of the Constitution provides: "The Congress shall have Power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

U.S. Const. art. I, 8, cl. 8.

n19. As the Supreme Court has explained:

The monopoly privileges that Congress may authorize 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, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

n20. The length of copyright "is limited so that the public will not be permanently deprived of the fruits of an artist's labors." *Stewart v. Abend, 495 U.S. 207, 228 (1990).*

n21. For example, the Library of Congress contains nearly 121 million items, more than two-thirds of which are in media other than books. Physically searching through the index to this collection (assuming one is able to make the trip to Washington, D.C.) would take days or weeks. Now one can log onto any computer and search the catalog within minutes.

n22. *Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 19 (1829).*

n23. *Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657-58 (1834);* see also *Graham v. John Deere Co., 383 U.S. 1, 9 (1966)* (stating that "the patent monopoly was not designed to secure the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.").

n24. *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).*

n25. *Stewart v. Abend, 495 U.S. 207, 228 (1990).*

n26. Mark Twain's Letters 731 (Albert Bigelow Paine ed., Harper & Bros. 1917).

n27. Jessica Littman, The Public Domain, *39 Emory L.J. 965, 968 (1990).*

n28. *White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993)* (Kozinski, J., dissenting).

n29. A single physical library contains only a small fraction of available materials, and it primarily serves its neighboring community. In contrast, the Internet - the dominant platform for digital archives - provides a relatively unlimited, low-cost capacity for the archiving of, and universal access to, traditional printed works, as well as audio, video, and still images. Internet-based archives are thus the true embodiment of the public domain.

n30. Act of May 31, 1790, ch. 15, 1, 1 Stat. 124, 124 (1790). The 1790 Copyright Act is directly modeled on the British Statute of Anne, both in title ("The Act for the Encouragement of Learning") and in many of its provisions, notably its specification of the basic term of copyright as fourteen years. 8 Anne, ch. 19 (1710).

n31. Act of Feb. 3, 1831, ch. 16, 16, 4 Stat. 436, 439.

n32. Act of Mar. 4, 1909, ch. 320, 23-24, 35 Stat. 1075, 1080-81.

n33. Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. 1, 101, 90 Stat. 2541 (amending title 17 of the United States Code in its entirety).

n34. See Act of Sept. 19, 1962, Pub. L. No. 87-668, 76 Stat. 555 (extending duration of copyright until Dec. 31, 1965); Act of Aug. 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (extending duration of copyright until Dec. 31, 1967); Act of Nov. 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (extending duration of copyright until Dec. 31, 1968); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (extending duration of copyright until Dec. 31, 1969); Act of Dec. 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (extending duration of copyright until Dec. 31, 1970); Act of Dec. 17, 1970, Pub. L. 91-555, 84 Stat. 1441 (extending duration of copyright until Dec. 31,

1971); Act of Nov. 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (extending duration of copyright until Dec. 31, 1972); Act of Oct. 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (extending duration of copyright until Dec. 31, 1974); Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. I, 104, 88 Stat. 1873 (extending duration of copyright until Dec. 31, 1976).

n35. Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. I, 101, 90 Stat. 2541, 2544-45 (codified as amended at *17 U.S.C. 102*(a) (2004)).

n36. Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. I, 101, 90 Stat. 2541, 2572 (codified as amended at *17 U.S.C. 302*(a) (2004)).

n37. Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. I, 101, 90 Stat. 2541, 2572-73 (codified as amended at *17 U.S.C. 302*(c) (2004)).

n38. Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. I, 101, 90 Stat. 2541, 2572-76 (codified as amended at *17 U.S.C. 301*-304 (2004)).

n39. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 102, 112 Stat. 2827, 2827-28 (1998) (codified as amended at *17 U.S.C. 301*-304 (2004)).

n40. The legislative record is void of suggestions that Congress found the pre-CTEA terms inadequate. Witnesses and members of Congress described the U.S. copyright system as extraordinarily successful. See Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. 26 (1995) [hereinafter Hearing] (prepared statement of Bruce A. Lehman, Assistant Secretary of Commerce & Commissoner of Patents and Trademarks Office, U.S. Department of Commerce).

n41. *17 U.S.C. 302*(a) (2004).

n42. *17 U.S.C. 302*(c) (2004).

n43. *17 U.S.C. 302*(a) & 303(a) (2004).

n44. *17 U.S.C. 304*(a)-(b) (2004).

n45. *Eldred v. Ashcroft, 537 U.S. 186, 250 (2003)* (Breyer, J., dissenting) (noting obstacles of obtaining permissions exist "(1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain").

n46. *Eldred, 537 U.S. at 251* (noting that the copyright owner may not be the author and, thus, has less of an interest in refusing reproduction of the material).

n47. See Hearing, supra note 40, at 18-19 (prepared statement of Marybeth Peters, Register of Copyright & Associate Librarian for Copyright Services, U.S. Copyright Office, Library of Congress). Marybeth Peters stated:

It is exceedingly difficult to determine the copyright status of certain types of works, e.g., photographs, prints and labels. Moreover, finding the current owner can be almost impossible. Where the copyright registration records show that the author is the owner finding a current address or the appropriate heir is extremely difficult. Where the original owner was a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works.

Id.

n48. See *17 U.S.C. 501* (2004).

n49. It is well settled that the fair use defense must be evaluated on a case-by-case basis, and the burden is on the publisher to prove fair use as an affirmative defense. See, e.g., *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).*

n50. The law of diminishing returns has been defined as: "If one factor of production is increased while the others remain constant, the overall returns will relatively decrease after a certain point." The Columbia Encyclopedia 796 (Paul Lagasse ed., 6th ed. 2000). It was originally developed in terms of agriculture and later applied to economics. Id.

n51. See Stephen Breyer, The Uneasy Case for Copyright, *84 Harv. L. Rev. 281, 324 (1970)* (increased present value of term extension is "hardly enough to affect [the author's] decision to write in the first place.").

n52. *Eldred v. Ashcroft, 537 U.S. 186, 254 (2003)* (Breyer, J., dissenting).

n53. *Eldred, 537 U.S. at 254.*

n54. E-mail from Andrew Grabois, Senior Director, Publisher Relations & Content Development, R.R. Bowker Co., to Cecil C. Kuhne, III, Attorney at Law, Fulbright & Jaworski L.L.P. (Oct. 12, 2004, 15:31 CST) (on file with author).

n55. Id.

n56. See http://www.gutenberg.org/catalog (last visited Oct. 11, 2004).

n57. The Internet is comparable to a "vast library including millions of readily available and indexed publications." *Reno v. ACLU, 521 U.S. 844, 853 (1997).*

n58. For a large segment of the population, especially those in rural locations and those searching for material on a tight schedule, the nation's cultural reserves are essentially inaccessible.

n59. Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, *17 UCLA L. Rev. 1180, 1193 (1970).* Nimmer noted that the First Amendment bars an inappropriately long copyright term. Id. As the copyright term lengthens into perpetuity, the incremental incentive it provides vanishes, so the extension serves no interest that can be balanced against the public domain it disserves. *Id. at 1193-94.*

n60. U.S. Const. art. I, 8, cl. 8.