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## Copyright's Vicious Triangle: Returning Author Protections To Their Rational Roots

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# **COPYRIGHT’S VICIOUS TRIANGLE: RETURNING AUTHOR PROTECTIONS TO THEIR RATIONAL ROOTS**

*Robert E. Shepard\**

*Copyright protections encourage the production of intellectual property by temporarily restricting free public access, a constitutional design that Justice Stephen Breyer has called a “two-edged sword.” Yet, the Copyright Clause really enshrines a triangular relationship among authors, consumers, and commodifiers, a third constituency that has always interposed itself between author-creators and consumer end-users.*

*Though the Copyright Triangle is nothing new, a fundamental reordering of these constituencies is in progress, with digital commodifiers such as Google assuming a dominant role. Though they sometimes proclaim themselves champions of free public access to culture, these commodifiers have instead aggrandized themselves at the expense of intellectual property creators and, ultimately, consumers, damaging the Copyright Clause’s delicate balance of private incentives.*

*This Note demonstrates how copyright law increasingly serves the interests of a limited subset of commodifiers at the expense of authors and the public. It shows how two recent Supreme Court decisions that ostensibly benefited authors, *Eldred v. Ashcroft* and *Golan v. Holder*, instead exacerbated this trend. The Note advocates two fundamental changes to copyright laws that may help protect authors’ rights in the expanding digital universe, and also protect the public’s right to gain timely, free access to intellectual property. First, Congress should allow authors to more rapidly reclaim the rights they grant to third parties, such as publishers. Second, Congress should dramatically reduce copyright durations for certain kinds of intellectual property, including books, injecting these works into the public domain more rapidly. These changes may not only bring equilibrium to the three sides of the Copyright Triangle but also restore the grand bargain enshrined in the Copyright Clause.*

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## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION .....  | 733 |
| II. THE TROUBLED RECENT HISTORY OF COPYRIGHT DURATION ....                           | 738 |
| A. <i>Eldred v. Ashcroft</i> .....   | 738 |
| B. <i>Golan v. Holder</i> .....  | 743 |
| III. THE UNSUNG BENEFICIARIES OF LONGER COPYRIGHT<br>DURATION .....                  | 747 |
| A. Enter the Commodifiers (Quietly): The Entertainment<br>Industry as “Author” ..... | 747 |
| B. The Triangle Evolves: The Information Industry<br>Aligns with Consumers.....      | 752 |
| IV. WHAT TO DO .....   | 760 |
| A. Reduce the Time Authors Must Wait to Recapture<br>Their Rights .....              | 761 |
| B. Apply Shorter, Not Longer, Copyright Terms to<br>Certain Kinds of Works .....     | 765 |
| V. CONCLUSION.....   | 769 |

## I. INTRODUCTION

The Copyright Clause of the United States Constitution confers upon Congress the power “[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.”<sup>1</sup> A close reading of the Clause suggests that it is a grand bargain seeking to balance the interests of two parties: authors and inventors, on the one hand, and the public on the other.<sup>2</sup> The Clause’s genius is that it establishes incentives for the creators of intellectual property, by allowing them exclusive control over their works for a period of time.<sup>3</sup> At the same time, however, it provides a windfall of art, science, and information to the public.<sup>4</sup>

Justice Stephen Breyer has observed that this dualistic structure confers a “monopoly” on authors and is therefore a “two-edged sword.”<sup>5</sup> That is, while “encourag[ing] production of new works” by deterring uncompensated copying, copyright also “tends to restrict the dissemination (and use) of works once produced.”<sup>6</sup> Copyright can accomplish this effect either by driving retail prices upward or by imposing additional “administrative costs” on users who want to “find [a work’s] owner and strike a bargain.”<sup>7</sup>

Justice Breyer’s observation ignores a third set of parties: the commodifiers of intellectual property who have always interposed themselves between creators and consumer end-users. Over the long history of the printed word, these have included printers, typesetters,

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1. U.S. CONST. art. I, § 8, cl. 8.

2. Although the Clause speaks equally to the interests of authors and inventors, this Note is concerned mainly with the rights of authors—especially authors of written works, and more especially authors of books.

3. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (characterizing the Clause’s “economic philosophy” as “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”).

4. *Id.* The *Mazer* Court went on to say: “Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” This oft-cited decision is remembered in part for its holding that statuettes of dancing figures, used as bases for table lamps, were protectable under copyright as “art.”

5. *Golan v. Holder*, 132 S. Ct. 873, 900 (2012) (Breyer, J., dissenting).

6. *Id.*

7. *Id.*

book publishers, wholesalers, and retail booksellers.<sup>8</sup> But more recently, this stratum of commodifiers—whose work is tied to the mechanical reproduction and retail sale of books and other printed and manufactured goods—has begun to give way to a new set of digital publishers and information aggregators.<sup>9</sup> These include search engine providers, such as Google, that permit users to search the complete texts of book-length works, viewing many pages at a time without charge.<sup>10</sup> Online retailers of books that are published in digital media rather than printed and bound, such as Amazon and its Kindle “ebooks,” have become significant players as well.<sup>11</sup>

With digitization has come a speeding of the time and a streamlining of the mechanisms employed to get works from their authors, photographers, composers, artists, and designers to the ultimate end-user.<sup>12</sup> Traditional commodifiers, such as book publishers, still interpose themselves between authors and consumers, but they must now share this increasingly crowded space with newer entities that arose online.<sup>13</sup> Moreover, book and “ebook” retailers such as Amazon have begun to found their own publishing divisions, thereby signaling a consolidation of both the editing and digital and print manufacturing of books with the retailing business.<sup>14</sup>

Thus, Justice Breyer’s two-edged sword is better characterized as a triangle: a three-way relationship among authors, consumers, and commodifiers. This “Copyright Triangle” is nothing new. It had its origins at least as early as Elizabethan England and gave rise to

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8. For a useful overview of the evolution of the “commodifier” side of the Triangle from early printers to booksellers to modern print and digital publishers, see Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in A Digital Age*, 52 DEPAUL L. REV. 1121 (2003).

9. See generally *Authors Guild, Inc. v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011) (discussing Google’s efforts to digitize 12 million books to make available for online searching without seeking copyright permission).

10. *Id.* Google has scanned more than 12 million books, of which millions were still under copyright, and made them searchable online. *Id.*

11. PUBLISHERS WEEKLY, REVEALING THE BUSINESS OF EBOOKS: THE FOURTH ANNUAL EBOOK SURVEY OF PUBLISHERS, APTARA CORP. (2012), <http://ww3.aptaracorp.com/lp/landingpages/4thebooksurveyregister.html> (follow “Download the Survey Results & Analysis” and complete registration form for free download).

12. See Julie Bosman, *Writer’s Cramp: In the e-Reader Era, a Book a Year is Slacking*, N.Y. TIMES, May 12, 2012, <http://www.nytimes.com/2012/05/13/business/in-e-reader-age-of-writers-cramp-a-book-a-year-is-slacking.html>.

13. See Steve Wasserman, *The Amazon Effect*, THE NATION, May 29, 2012, <http://www.thenation.com/article/168125/amazon-effect#>.

14. *Id.*

the very tensions among authors, printer–booksellers, and consumers that resulted in the foundational document in Anglo–American copyright law, the Statute of Anne (1710), which gave authors—and not exclusively printer–booksellers—the right to copy their own written works.<sup>15</sup> The Statute is the direct antecedent of our constitutional copyright protections and the federal copyright statutes that have interpreted and expanded those protections for more than two centuries.<sup>16</sup>

What *is* new, as this Note will argue, is a fundamental reordering of the traditional roles these three parties—authors, consumers, and commodifiers—have occupied along the sides of the Triangle. At different times in copyright history, authors (by asserting restrictions on the use and reuse of their work), consumers (by asserting their right of access to knowledge and art) and commodifiers (by asserting their critical role in moving intellectual property from authors to consumers) have each been in the ascendancy.<sup>17</sup> Thus the Triangle is not always equilateral; it has often been isosceles, with two sides of equal length and one side disproportionately shorter. And in recent years—first as traditional commodifiers asserted more and more authority at authors’ expense, and then as these traditional entities began ceding ground to the new class of digital commodifiers—authors have moved definitively to the short side of the Triangle.

By facilitating the movement of intellectual property to consumers at little to no cost without any apparent concern for authors’ copyright protections, the new commodifiers have challenged structures that helped compensate authors, however imperfectly, or their creative works.<sup>18</sup> Their arrival has also triggered

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15. See RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 41–42 (2004).

16. Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.). For a more complete summary of the Statute’s passage and its relation to the Copyright Clause of the U.S. Constitution, see Golan v. Holder, 132 S. Ct. 873, 900–01 (2012) (Breyer, J., dissenting).

17. See generally Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 501 (1991) (tracing, among other trends, continual shifts in the idea and meaning of “authorship” since the period of the Statute of Anne, the relation of authorship to the commodification of works, and the “remarkably congruent” interests of consumers and copyright owners).

18. See Fourth Amended Class Action Complaint at 11, Authors Guild, Inc. v. Google, Inc., 282 F.R.D. 384 (S.D.N.Y. 2012) (No. 05 CV 8136-DC), 2011 WL 5905500. The plaintiffs, a membership organization of authors and a representative class of individual authors, asserted that Google’s alleged unauthorized distribution of copyrighted works damaged authors through, *inter*

a new alliance between commodifiers and consumer end-users.<sup>19</sup> Authors are aware of the ongoing weakening of their control over the fruits of their labors yet continue to give ground.<sup>20</sup> Copyright law must be especially protective of authors' rights at such a time, yet, as this Note will show, it has instead been mainly protective of commodifiers, whose interests increasingly diverge from those of authors. Thus, it is important to explore what has upset the balance in the Copyright Triangle, and how it can be restored.

Part II examines the two most prominent recent Supreme Court decisions dealing with copyright, specifically copyright duration: *Eldred v. Ashcroft*<sup>21</sup> and *Golan v. Holder*.<sup>22</sup> The Court presented these decisions, which confirmed the durational extensions embodied in the most recent revision of the Copyright Act, as benefiting authors; however, their real effect, as Part III shows, was to strengthen the position of certain intellectual property commodifiers, notably movie studios, with little regard to the effects on authors. At the same time, the expansion of the new class of digital commodifiers further eroded the ability of authors to police the integrity of their own copyrights, while making copyrighted material

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*alia*, "depreciation in the value and ability to license and sell their Books," lost profits, and "damage to their goodwill and reputation." *Id.*

19. See Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2451 (2001) (differentiating the "institutional distribution regime" from digital distribution methods and asserting that "scholars and lawmakers alike have failed to address the root of the problem, which is not that technology empowers the public to flout copyright law with impunity, but instead that the public has no aversion to seizing this opportunity").

20. See, e.g., *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), the most recent case to erode author protections. In *HathiTrust*, the court upheld, largely on grounds that the "fair use" defense was available to the defendants, the mass-scanning into digital form of millions of books held by university libraries, without provision for royalty payments to the authors of those works that were under copyright. *Id.* at 464. *HathiTrust's* effects and meaning will be discussed in Part III *infra*. See also *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132, 135 (2d Cir. 2013) (vacating the district court's earlier class certification for a group of authors, publishers, and other copyright holders and remanding for a determination of whether the database company could assert a valid fair-use defense to mass copyright infringement). The court noted that Google's argument that the plaintiffs failed to represent the certified class "may carry some force." *Id.* at 134. James Grimmelman observed that "[i]f the case ever does manage to reach the fair use merits, Google is now that likelier to get the same kind of sweeping fair-use blessing that its library partners got in the *HathiTrust* decision." James Grimmelman, *Second Circuit Decertifies the Google Books Class*, THE LABORATORIUM (July 1, 2013, 11:30 AM), [http://laboratorium.net/archive/2013/07/01/second\\_circuit\\_decertifies\\_the\\_google\\_books\\_class](http://laboratorium.net/archive/2013/07/01/second_circuit_decertifies_the_google_books_class).

21. 537 U.S. 186 (2003).

22. 132 S. Ct. 873 (2012).

available to consumers at little or no cost.<sup>23</sup> Thus, as Part III concludes, one fundamental goal of the Copyright Clause—protecting authors so they could be encouraged to generate more works to benefit society—was left unserved. Part IV concludes by advocating two fundamental changes to copyright law that may help protect authors' rights in the newly expanding digital universe.

First, Congress should revise the most recent version of the Copyright Act to allow authors to more quickly reclaim rights they have temporarily granted to third parties, such as book publishers, during the term of copyright. Second, Congress should reduce copyright durations for certain kinds of works, including books—the opposite of the inflationary trend that has resulted in a continuous expansion of copyright durations since 1831. Reducing copyright duration may seem counterintuitive as a means of protecting author rights, yet may help restore a more traditional balance that has been altered by the aggrandizement of commodifiers. Each of these proposed policy changes points to one further philosophical imperative: dispensing with the idea that all forms of copyrighted works—from books to photographs to movies—must be treated exactly the same, especially with respect to duration. There is no such requirement under the Copyright Clause, and allowing authors to reclaim rights in certain kinds of works, such as books, may strengthen their position relative to commodifiers, like book publishers, while reassuring others, notably movie studios, that have tended to dictate the terms of copyright duration. By carrying out these changes in its approach to copyright, and duration in particular, Congress could restore balance to the three sides of the Copyright Triangle. Authors will lose few of the protections copyright was intended to bestow, commodifiers will maintain their rights to exploit different kinds of works for appropriate periods of time, and consumers will benefit from the passage of works into the public domain at rational, rather than arbitrary, junctures. Copyright can thus be modernized and rationalized with sensitivity to all players, providing for a more equilateral Copyright Triangle.

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23. See, e.g., Fourth Amended Class Action Complaint, *supra* note 18, at 11 (in which authors asserted that Google's alleged copyright infringement depreciated the value of licensing and selling their books and caused "damage to their goodwill and reputation.").

## II. THE TROUBLED RECENT HISTORY OF COPYRIGHT DURATION

*Eldred* and *Golan* both arose in the wake of the most recent revision of the Copyright Act, the Sonny Bono Copyright Extension Act of 1978 (CTEA), and both focused on copyright duration.<sup>24</sup> For a variety of reasons, they perfectly illustrate both the tensions that exist within the Copyright Triangle and the fallacy that lengthening copyright duration is always the proper way to balance the competing interests of authors, consumers, and commodifiers. This Part demonstrates how CTEA, an ostensibly author-friendly Copyright Act revision, actually disserves authors in a variety of ways while serving the interests of commodifiers. The arguments around *Eldred* and *Golan* also show how the centuries-old theoretical underpinnings of the Copyright Clause, itself, came back to the fore through these debates.

### A. *Eldred v. Ashcroft*

*Eldred v. Ashcroft* arose as a direct result of Congress's passage of CTEA, which extended copyright protection until seventy years after an author's death, rather than the previous fifty years.<sup>25</sup> By the time *Eldred* was decided, CTEA had become widely known as the "Mickey Mouse Protection Act," both because the copyright extension it embodied forestalled the Disney cartoon character from entering the public domain in 2003 and because the Walt Disney Co. had supposedly lobbied members of Congress to support its passage.<sup>26</sup>

As Justice Ginsburg observed in her majority opinion in *Eldred*, CTEA marked the fourth major extension of copyright duration since the Copyright Act of 1790 codified Congress's "limited Times" power as a fourteen-year term, renewable once for an additional fourteen years.<sup>27</sup> In extending copyright terms by twenty years,

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24. Sonny Bono Copyright Extension Act (CTEA) of 1998, 17 U.S.C. § 302 (1998). CTEA extended copyright durations, in most cases, to the life of the author plus 70 years, superseding a similar provision in the 1976 Copyright Act that had specified a duration of "life plus 50" years. Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572 (1976).

25. *Eldred*, 537 U.S. at 194-96. See also 17 U.S.C. § 302.

26. See Damien Cave, *Mickey Mouse vs. The People*, SALON (Feb. 21, 2002, 10:38 AM), [http://www.salon.com/2002/02/21/web\\_copyright/](http://www.salon.com/2002/02/21/web_copyright/) (discussing interview with co-petitioners Eric Eldred and Laura Bjorkland).

27. *Eldred*, 537 U.S. at 194. The other three extensions came in 1831 (twenty-eight-year initial copyright term, renewable for fourteen years); 1909 (twenty-eight-year initial term, now

CTEA not only embraced a “life of the author plus 70 years” duration for new works, but extended the copyright term in anonymous and pseudonymous works to ninety-five years from the work’s initial publication or 120 years from its creation, whichever came first.<sup>28</sup>

Eldred, the named co-plaintiff, had been offering public-domain works, such as novels by Nathaniel Hawthorne, free of charge on a website since 1995.<sup>29</sup> He claimed standing on the basis that CTEA’s implementation would delay his web publication of certain works—those that were about to enter the public domain when CTEA extended their copyrights—for twenty years, violating, he argued, not only the Copyright Clause but also the First Amendment.<sup>30</sup> More expansively, he asserted that “[w]hile formally, under each of these extensions [of copyright, over time], the term is limited, the practice of continually extending copyright retroactively means that Congress, in effect, is granting copyright holders more than a ‘limited term.’”<sup>31</sup>

Eldred claimed that CTEA violated the Copyright Clause in two ways: by conferring additional copyright “benefits” on authors retroactively, which could not “promote the Progress of Science” (especially if the author were already dead), and by extending many copyrights to ninety-five years from the time of creation.<sup>32</sup> This, he argued, was “beyond any reasonable expectation of the life expectancy of an author, since few authors begin creating works until they are at least adolescents and since there are few, if any, authors who have lived to an age exceeding 110 years.”<sup>33</sup> He did not argue, however, against the validity of granting the “life plus 70 years” term to brand new works.<sup>34</sup>

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renewable for a further twenty-eight years); and 1976 (abandoning the “publication-plus” formula in favor of protection lasting, in most cases, until fifty years after the author’s death). *Id.* at 194–95.

28. 17 U.S.C. § 302(c) (1998).

29. Cave, *supra* note 26.

30. Complaint at para. 5, *Eldred v. Reno*, 74 F.Supp. 2d 1 (D.D.C. 1999) (No. 1:99CV00065), 1999 WL 33743484.

31. *Id.* at para. 34.

32. *Id.* at para. 35. The ninety-five-year term was for works in which copyright already subsisted when the 1976 Act took effect. The corresponding term had been seventy-five years before CTEA extended it. *Id.* at para. 33.

33. *Id.* at para. 35

34. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

In effect, Eldred asserted that Congress had conferred a benefit upon authors, in the form of extended copyright duration, without asking for anything in return.<sup>35</sup> Implicit in Eldred's original complaint—and made more explicit by the time the case reached the Supreme Court—was the idea that the Framers had intended the Copyright Clause to demand a quid pro quo: Congress would grant authors copyright protection for a “limited Time” in exchange for their working to “promote the Progress of Science.”<sup>36</sup> As Eldred's brief noted, the first Congress had built this inherent “requirement of an exchange” into the Copyright Act of 1790.<sup>37</sup> In fact, as Eldred noted, the Act had really foreseen two different sets of exchanges. One was Congress's conferral of copyright protection on authors for limited times, in return for the author's generation of “new production”: works that could benefit the public.<sup>38</sup> Eldred's complaint also described the second exchange Congress had foreseen in 1790: “*In exchange* for a new federal right, the author or proprietor would abandon his common law or state statutory right.”<sup>39</sup>

The matter of this second exchange was an unusual one to raise in the late 1990s, but it had, indeed, been front and center when the Founders framed the Copyright Clause,<sup>40</sup> and it gained new relevance in the context of modern authors' rights. It had been enunciated both before and after the British Parliament's adoption of the Statute of Anne in 1710, and it was still being debated when the foundational case in American copyright law, *Wheaton v. Peters*,

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35. See Complaint, *supra* note 30, at para. 30–35.

36. Reply Brief for the Petitioners at 11–12, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 31039334.

37. *Id.* at 4–5.

38. *Golan v. Holder*, 132 S. Ct. 873, 903 (2012) (Breyer, J., dissenting).

39. Reply Brief for the Petitioners, *supra* note 36, at 5.

40. See THE FEDERALIST NO. 43, at 238 (James Madison) (Chicago, Scott, Foresman & Co. 1898) (“The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law.”). *But see* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 33 (2003) (“[A]n argument could be—and indeed was—made that . . . the constitutional language was intended to protect existing property rights in both writings and invention. Read superficially and without reference to other contemporaneous views expressed by him, Madison's comments in *The Federalist No. 43* could indeed be taken as supporting this view. But when the issue was presented to the Supreme Court in 1834 in *Wheaton v. Peters*, it chose to interpret the meaning given to ‘securing’ in quite a different light, namely, as merely a grant of authority to Congress to create a right.”).

reached the Supreme Court in 1834, seemingly settling the matter.<sup>41</sup> Now it was back before the Court.

The “common law” right that authors, according to Eldred, had abandoned in exchange for “a new federal right” was the right to a perpetual copyright.<sup>42</sup> But the *Wheaton* Court had dismissed the existence of such a perpetual right, emphasizing that when it passed the Copyright Act of 1790, Congress “instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.”<sup>43</sup> Moreover, Justice John McLean wrote,

The word *secure*, as used in the [C]onstitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors: and it had 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.<sup>44</sup>

Thus, according to the *Wheaton* Court, the Framers had no illusion that a common law copyright existed; it did not, and Congress in 1790 created a statutory copyright out of whole cloth.<sup>45</sup>

Commentators have differed on the Framers’ real intent in imposing a “limited” duration on copyright. Melville and David Nimmer enunciate the dominant view that “the authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors; and that the copyright monopoly is a necessary condition to the full realization of such creative activities.”<sup>46</sup> Other

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41. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). *Wheaton* had claimed infringement of his copyright in his multivolume set of Supreme Court opinions, the precursor to modern reporters. *Id.* at 595. *Peters*, his competitor, denied any infringing activity and asserted that *Wheaton* had no copyright to begin with, because he had failed to comply with certain statutory formalities. *Id.* After losing the case, *Wheaton* lived to see the opinion published by his rival and opponent, *Peters*. Craig Joyce, “A Curious Chapter in the History of Judicature”: *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 386 (2005).

42. *But see* MELVILLE B. NIMMER & DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT § 2.02 (2012) & 3-9 NIMMER ON COPYRIGHT § 9.09, n.11.2 (2012) (describing the exceptional—and exceedingly few—circumstances in which a vestige of common law copyright persists in the United States).

43. *Wheaton*, 33 U.S. at 592.

44. *Id.*

45. *Id.*

46. MELVILLE B. NIMMER & DAVID NIMMER, 1-1 NIMMER ON COPYRIGHT § 1.03 (2012).

scholars of copyright history, however, conclude that the Framers did not intend to use copyright as a spur to creativity, but rather to “vindicate any natural right the author may have to compensation for the product of his labor.”<sup>47</sup> If so, then there was no logic to Eldred’s complaint that Congress should have demanded a new creative quid pro quo of authors before conferring longer copyright durations on existing works.<sup>48</sup> Congress could determine the best way to “promote progress” however it saw fit.<sup>49</sup>

Before petitioning for certiorari, Eldred had lost his case both at trial and on appeal, but the dissenting judge in the United States Court of Appeals for the District of Columbia Circuit sounded a note of alarm that required an answer when *Eldred* arrived at the Supreme Court:

[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection. The Congress that can extend the protection of an existing work from 100 years to 120 years can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly.<sup>50</sup>

That is, if Congress could extend copyright in increments, and seemingly without limit, it could functionally restore the discredited idea of a perpetual copyright arising at common law.

The response to that argument, according to the *Eldred* Court, was that prospective claims about what Congress might be up to were beside the point, and CTEA’s twenty-year extension of copyright was fully compliant with the Copyright Clause’s “limited Times” requirement.<sup>51</sup> Moreover, the majority asserted, the durational expansion had been a “rational exercise” of congressional authority under the Copyright Clause, because Congress faced an urgent imperative: harmonizing U.S. copyright durations with those

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47. Thomas Nachbar, *Constructing Copyright’s Mythology*, 6 GREEN BAG 2D 37, 42 (2002). Nachbar argues that the “quid pro quo theory of copyright” is a modern construct contradicted by state copyright statutes, drafted at roughly the same time as the Constitution, that invoked authors “natural rights” as the true justification for copyright. *Id.* at 44.

48. *See id.* at 41–43.

49. *Id.* at 43.

50. *Eldred v. Reno*, 239 F.3d 372, 382 (D.C. Cir. 2001) (Sentelle, J., dissenting).

51. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

imposed under the Berne Convention and more recent European Union directives, which had set duration at life of the author plus seventy years.<sup>52</sup>

But what of the other exchange implicit in copyright law: granting authors copyright protection in exchange for their creation of new work? The *Eldred* majority rejected the plaintiffs' contention (as the Court characterized it) that such promotion had to be the sole objective of extending existing copyright terms.<sup>53</sup> Instead, the majority reasoned that extending copyright durations by decades served the Copyright Clause's goals by "spurring the creation and publication of new expression" as well as protecting the public's access to "facts and ideas."<sup>54</sup> The bottom line was that longer copyright durations, such as those embodied in CTEA, "protect authors' original expression from unrestricted exploitation."<sup>55</sup> However, the Court offered no evidence for its reasoning that longer terms were compatible with the Copyright Clause's goal of promoting "new expression."<sup>56</sup>

### B. *Golan v. Holder*

Like *Eldred*, *Golan v. Holder* arose partly in the context of harmonizing United States law with the nation's international treaty commitments. In *Golan*, a group of "orchestra conductors, educators, performers, film archivists, and motion picture distributors" sued the United States, claiming harm from United States adherence to the Uruguay Round of international trade agreements, which obligated the United States to place certain public domain works originally published outside the United States under copyright protection.<sup>57</sup> The obligation arose when the United States signed the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994.<sup>58</sup> TRIPS had, for the first time, imposed penalties on signatory nations that failed to comply with Berne.<sup>59</sup> Congress now saw no

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52. *Id.* at 204–05. The original 1976 Act had accomplished harmonization with Berne's "life plus 50" regime, but not with the subsequent EU extension of duration. *Id.* at 193.

53. *Id.* at 211–12.

54. *Id.* at 219–20.

55. *Id.* at 221.

56. *Id.* at 218–19.

57. Appellants' Opening Brief at 12–13, *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2005) (No. 05-1259), 2005 WL 2673976.

58. *Golan v. Holder*, 132 S. Ct. 873, 878–81 (2012).

59. *Id.* at 881.

choice but to “restore” copyright protection to these works, and did so through the Uruguay Round Agreements Act of 1994.<sup>60</sup>

The Berne Convention had been the principal international treaty governing copyright relations since 1886, but the U.S. did not become a signatory until 1989.<sup>61</sup> Previously, Congress had provided copyright protection to works first published abroad only when their countries of origin maintained reciprocal trade relations with the United States.<sup>62</sup> When Congress finally ratified Berne in 1989, it initially ignored the Convention’s requirement that it extend copyright protection to all works that were still under copyright protections in their countries of origin.<sup>63</sup> Consequently, works that were protected abroad—but which had never enjoyed copyright protection in the United States—remained in the public domain in the United States, leaving them available for free exploitation.<sup>64</sup> In effect, TRIPS created an enforcement mechanism for Berne that Congress could not avoid.

The *Golan* musicians and conductors claimed that their ability to publicly perform musical works would be impeded if sheet music previously in the public domain were suddenly placed under copyright protection and made subject to royalty payments.<sup>65</sup> Composers, similarly, asserted that works they had written to include selections of other composers’ works would be barred from public performance, since the underlying works—which had been in the public domain when the newer works were composed—would now be subject to copyright protection.<sup>66</sup> For example, a high school band instructor who had composed a piece of music quoting selections from a symphony by Russian composer Dmitri Shostakovich would

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60. 18 Uruguay Round Agreements Act § 514, 17 U.S.C. § 104A (2004). Although copyright “restoration” became shorthand for placing works under copyright protection that had formerly been in the public domain, most were not being “restored” to U.S. copyright protection, never having enjoyed it previously. *Golan*, 132 S. Ct. at 882 & n.13. There were three reasons for the initial lack of protection: the U.S. and the origin country did not maintain reciprocal copyright relations at the time the work was published; the foreign creator did not follow U.S. copyright formalities in place at the time, such as placing a printed copyright notice in the work; or the work in question was a sound recording, a format that was not covered by U.S. copyright protections until 1972. *Id.* at 881–82.

61. *Golan*, 132 S. Ct. at 877.

62. *Id.* at 879.

63. *Id.*

64. *Id.*

65. Appellants’ Opening Brief, *supra* note 57, at 14.

66. *Id.* at 16.

be barred from publicly performing his own “derivative” work, because the Shostakovich selections were given copyright protection after the band instructor wrote his “derivative” work.<sup>67</sup> Berne penalties or not, the *Golan* plaintiffs argued that Congress did not have the authority to remove works from the public domain, because the Copyright Clause applied protections only to newly created works.<sup>68</sup>

A second argument focused squarely on the duration of copyright protections, asserting that CTEA’s “life plus 70” standard granted such a long period of copyright protection that it could not be considered a “limited Time” at all, as the Copyright Clause demanded.<sup>69</sup> Under the *Golan* plaintiffs’ theory, Congress had not only removed works from the public domain but had placed them under “effectively perpetual” copyright protection, which it could extend again and again at will.<sup>70</sup>

It was not an easy argument to make, as the *Golan* plaintiffs acknowledged, both because the governing law did specify a statutorily finite copyright term (albeit a very long one) and because the Court had seemingly foreclosed the “effectively perpetual” argument in *Eldred*.<sup>71</sup> And, indeed, once again writing for the majority and referring to her earlier opinion, Justice Ginsburg rejected the “effectively perpetual” argument once more.<sup>72</sup> The Copyright Clause, the *Golan* Court reasoned, did not preclude Congress from imposing a copyright term on works that had not fallen under copyright before, any more than it prohibited Congress from adding years to an existing copyright term.<sup>73</sup>

Moreover, the majority observed, permitting Congress this kind of latitude did not suggest that it could one day create “perpetual”

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67. *Id.* at 16.

68. *Id.* at 21. The appellants cited as authority *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966), which held that public domain inventions could not be placed under patent protection retroactively. The same rule that governed patents should apply to copyright, they argued, since Congress’s authority over both arose in the Copyright Clause. Appellants’ Opening Brief, *supra* note 57, at 21.

69. Appellants’ Opening Brief, *supra* note 57, at 22.

70. *Id.*

71. *Id.*

72. *See Golan v. Holder*, 132 S. Ct. 873, 884–85 (2012).

73. *Id.* at 885. Viewed another way, the *Golan* petitioners had asserted, when a work lay in the public domain it essentially had a copyright term of “zero”; therefore, placing the work under CTEA’s copyright protection would effectively *lengthen* the term from zero years to seven decades or more. *Id.*

copyright protection, simply by extending copyright terms over and over.<sup>74</sup> Yet the Court did not say why this “hypothetical” case was so far-fetched; instead, Justice Ginsburg chose to highlight the benefits of harmonizing U.S. copyright protections with those afforded by treaty partners.<sup>75</sup> “In aligning the United States with other nations . . . and thereby according equitable treatment to once disfavored foreign authors,” she wrote, “Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights.”<sup>76</sup>

Yet, however admirable it was to align U.S. copyright protections with those of America’s Berne co-signatories, Congress had been moving steadily, if not “stealthily,” toward the vanishing point of “perpetual” protection for decades.<sup>77</sup> Neither the majority opinion in *Eldred* nor its counterpart in *Golan*, moreover, stated just who would benefit from longer copyright terms, or how. While *Eldred* had nominally disfavored an early Internet information aggregator in the guise of allowing authors longer copyright terms it offered no clear evidence of how authors might benefit from CTEA’s durational extension.<sup>78</sup> The *Golan* majority seemed to step back from the need for any incentive toward authors at all, endorsing the “dissemination” of works as a valid means of fulfilling the Copyright Clause mandate to “promote science.”<sup>79</sup> No new “creation” was necessary.<sup>80</sup> In effect, as Part III<sup>81</sup> explores, those with the power to “disseminate” information were, for the first time, being placed on par with authors and the public as copyright’s intended beneficiaries.

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74. *Id.*

75. *Id.* at 875–76.

76. *Id.*

77. *See generally* *Eldred v. Ashcroft*, 537 U.S. 186, 194–95 (2003) (tracing the series of increases in copyright duration beginning with the Copyright Act of 1790 and concluding with the CTEA). Justice Ginsburg, writing for the majority, nonetheless reasoned that CTEA’s copyright terms, “though longer than the 1976 Act’s terms, are still limited, not perpetual.” *Id.* at 186.

78. *Id.* at 187.

79. *See Golan*, 132 S. Ct. at 888.

80. *Id.*

81. *See infra* Part III.

## III. THE UNSUNG BENEFICIARIES OF LONGER COPYRIGHT DURATION

A. *Enter the Commodifiers (Quietly): The Entertainment Industry as “Author”*

In some ways, *Golan* and *Eldred* were remarkable not for what they had to say about copyright duration, but for what they left out, such as who stood to benefit the most from extending copyright terms. But Justice Breyer, who dissented in both decisions, lost no time in identifying the real beneficiaries:

The economic effect of this 20 year extension . . . is to make the copyright term not limited but virtually perpetual. Its primary legal effect is to grant the extended term *not to authors*, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of “Science” by which words the Framers meant learning or knowledge.<sup>82</sup>

Justice Breyer suggested that focusing on America’s treaty obligations—or possible trade imbalances if Congress failed to match the European Union copyright terms—was a red herring.<sup>83</sup> “European and American copyright law have long coexisted despite important differences,” he observed.<sup>84</sup> More than two decades had passed since the U.S. adjusted its copyright law to conform to Berne’s “life of the author plus” structure for computing copyright term.<sup>85</sup> Europe’s adoption of the even longer “life plus seventy” standard did not require a like response; it was merely a matter of “European institutional considerations” following that continent’s consolidation.<sup>86</sup>

Leaving treaty harmonization aside, Justice Breyer also rejected the majority’s alternate rationale for extending copyright durations: providing incentives “*to those who act as publishers* to republish and to redistribute older copyrighted works.”<sup>87</sup> This justification could not be valid, Justice Breyer opined, because it ran counter to the Framers’ view that “it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination

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82. *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) (emphasis added).

83. *See id.* at 259.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 260.

of works already in existence.”<sup>88</sup> Far from serving the needs of authors or the public, CTEA’s extended durations seemed to serve only a “uniquely publisher-related rationale.”<sup>89</sup> Congress’s attempt to provide incentives for the “dissemination” of existing work, rather than the creation of new work, was “constitutionally perverse.”<sup>90</sup>

Justice Breyer found a more likely explanation for CTEA’s durational change in the Act’s legislative history, which “refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports.”<sup>91</sup> At congressional committee hearings leading up to CTEA’s passage, corporate spokespeople and trade association executives—especially from the music and film industries—had testified to the need for copyright term extensions to maintain industry competitiveness abroad.<sup>92</sup> Many invoked the need to protect authors’ livelihoods before turning to the industries’ own concerns; however, they refrained from going into great specifics about what authors could be expected to suffer without the durational changes: an old trope.<sup>93</sup>

The Senate Judiciary Committee’s chairman, Sen. Orrin Hatch of Utah, opened the hearing of September 20, 1995 in typical fashion, declaring that Congress sought to bestow benefits on authors when, in reality, commodifiers were the proposed legislation’s main beneficiaries.<sup>94</sup> “Our trading partners in Europe have recently established the goal to move the minimum copyright term . . . to life plus 70,” Hatch testified.<sup>95</sup> “If we do not adopt the same rule, our creators will not reap the benefit of this new international standard.”<sup>96</sup> Written works were property, Hatch told the committee, and he “[came] to the conclusion that, like most property owners, the vast majority of authors expect their copyrights to be a potentially valuable resource to be passed on to their children and through them

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88. *Id.*

89. *Id.* at 261.

90. *Id.* at 262.

91. *Id.*

92. See, e.g., *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) [hereinafter *Senate Hearing*].

93. See Christopher Ledford, *The Dream that Never Dies: Eldred v. Ashcroft, the Author, and the Search for Perpetual Copyright*, 84 OR. L. REV. 655, 656 (2005).

94. *Senate Hearing*, *supra* note 92 (opening statement of Sen. Orrin G. Hatch).

95. *Id.*

96. *Id.*

to the succeeding generation.”<sup>97</sup> But copyrights often expired “before even the first generation of an author’s heirs have fully benefited from them.”<sup>98</sup> Particularly since Americans were enjoying longer life spans and marrying and having children later, Hatch continued, “life plus 50” copyright terms threatened to prematurely cut off the birthright of generations of authors’ offspring.<sup>99</sup> Failing to lengthen copyright terms might also doom “perishable” works, such as old movies, to crumble rather than being preserved through digitization.<sup>100</sup> Or, Hatch asserted, such films might have to be preserved at taxpayer expense, when lengthening copyright terms might allow “private parties” to fund preservation efforts, instead.<sup>101</sup>

The next speaker, Register of Copyright Marybeth Peters, partly tempered Hatch’s prediction, admitting that it was “difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage authors to write.”<sup>102</sup> Nonetheless, she agreed with Sen. Hatch’s assertion that “bringing our law into conformity with the longer copyright terms enjoyed by authors of other nations” would justify passage.<sup>103</sup>

Authors, however, would not be the only or, necessarily, the primary beneficiaries of the proposed longer copyright duration. Christopher Ledford has observed that commodifiers have regularly claimed to be serving the rights and needs of authors when arguing for longer copyright durations that actually serve their own interests:

When authors’ and media corporations’ interests diverge and one group’s position must yield, even on the rare occasion when the latter does not triumph, the media corporations’ interests are hardly dampened. Ultimately, the moments of authorial supremacy serve mainly to illustrate the manner in which perceived advances by authors are deflected or minimized while media interests acquire and retain tremendous benefits through their association with authors.<sup>104</sup>

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97. *Id.* at 2.

98. *Id.*

99. *Id.* at 3.

100. *Id.*

101. *Id.*

102. *Id.* at 6 (statement of Marybeth Peters, Register of Copyright).

103. *Id.*

104. Ledford, *supra* note 93, at 660.

One of the hearing's most prominent speakers spoke frankly about the real beneficiaries of copyright extension. After dismissing "the thickets of . . . arcane academic issues that float around this," Motion Picture Association of America President Jack Valenti identified the reasons underlying his organization's support for CTEA: "The copyright industries in this country—that includes computer software and music and books, television, movies, and home video—do about \$45 billion a year abroad."<sup>105</sup> These industries, Valenti said, would be "at a distinct disadvantage" in competing with their European counterparts if the U.S. maintained shorter copyright terms than Europe.<sup>106</sup> "The revenues that would come back to the American copyright owner now are truncated and are diverted into European and other hands," Valenti told the senators.<sup>107</sup>

Valenti's written statement went even further in analyzing the supposed deleterious effects of shorter copyright terms. Valenti wrote that, contrary to the claims of academics—who argued that works enjoyed wider dissemination once they entered the public domain—"[w]hatever work is not owned is a work [in which no one would] invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale."<sup>108</sup> It was a curious argument, coming at a time when digitization was beginning to make the preservation of intellectual property all the more feasible.<sup>109</sup> Taken as a whole, however, Valenti's in-person testimony and written statement were notable for their focus on industries rather than on authors as the true beneficiaries of longer copyright terms. They also announced the conjoined interests of the other two parties to the Copyright Triangle: consumers and commodifiers.<sup>110</sup>

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105. *Senate Hearing, supra* note 92, at 40 (statement of Jack Valenti, President of the Motion Picture Association of America).

106. *Id.* at 41.

107. *Id.* at 40.

108. *Id.* at 42.

109. *Cf. The Digital Age Promised Vast Libraries, but They Remain Incomplete*, ECONOMIST, (Apr. 28, 2012), <http://www.economist.com/node/21553410> (tracing the recent history of digital preservation efforts and the relative ease of preservation efforts in mechanical terms, but also highlighting significant remaining legal roadblocks to preservation).

110. *Senate Hearing, supra* note 92, at 42 (statement of Jack Valenti, President of the Motion Picture Association of America).

The Congress can, without any harm to the consumers, magnify the revenue reach of copyright owners, and thereby help, perhaps modestly, but help nonetheless, in the reduction of our trade deficit . . . The Congress must equip American owners of intellectual property with a full measure of protection, else competition, in Europe particularly, becomes skewed and U.S. copyright owners are reduced in their reach and their effectiveness.<sup>111</sup>

In movie industry terms, the import of “copyright owners” was clear: at least at the level of major motion pictures and network television broadcasts, the copyright “owner” was the studio, not the screenwriter, the director, or the author of the underlying book.<sup>112</sup>

Justice Breyer, suspicious that the needs of authors were lost in such discussions, characterized this assertion of commodifiers’ competitive interests as a proper exercise of Congress’s commerce power rather than of its copyright power.<sup>113</sup> And he again turned to the constitutional imperative to foster new creativity in authors—not the dissemination of older work by corporate grantees—when he addressed copyright duration in his dissent in *Golan*.<sup>114</sup> Copyright was supposed to benefit “the writer who has not yet written a book, the musician who has not yet composed a song” by providing incentives for creative output, Justice Breyer wrote.<sup>115</sup> “When a copyright law is primarily backward looking the risk is greater that Congress is trying to help known beneficiaries at the expense of badly organized unknown users who find it difficult to argue and present their case to Congress.”<sup>116</sup> The same issues, Justice Breyer noted, had been at work when Parliament, attempting to rein in the “monopoly” control of the British book business by printer-booksellers in the early 18th century, vested copyright in authors rather than publishers through the Statute of Anne.<sup>117</sup> The “utilitarian” objective embodied in that statute and “embraced by

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111. *Id.*

112. *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984) (holding that the sale of home video recorders did not infringe copyrights in movies and television programs, which were held by two movie studios).

113. *Eldred v. Ashcroft*, 537 U.S. 186, 262 (2003) (Breyer, J., dissenting).

114. *Golan v. Holder*, 132 S. Ct. 873, 909 (2012) (Breyer, J., dissenting).

115. *Id.* at 907.

116. *Id.*

117. *Id.* at 901.

Jefferson and Madison” was clear: authors’ rights in their work were not meant to be gratuitous but to “advance public welfare” and “elicit new creation.”<sup>118</sup> Conferring new rights on movie studios, record labels, and other corporate interests by extending copyright protections on works that already existed did not benefit “authors” and might restrict the dissemination of intellectual property.<sup>119</sup> These two results were the exact reverse of the Copyright Clause’s stated intentions.

*B. The Triangle Evolves: The Information Industry  
Aligns with Consumers*

Though the movie industry and record labels claimed to speak for authors when they supported longer copyright terms in the 1976 Act and CTEA, Justice Breyer observed that these terms did not benefit authors in most cases.<sup>120</sup> In fact, Congressional Research Service statistics showed that “only about 2% of copyrights can be expected to retain commercial value at the end of 55 to 75 years.”<sup>121</sup> Justice Breyer already had ample experience with such figures. In a 1970 article, in which he assessed early proposals to adopt the Berne Convention’s “life of the author plus 50” durational standard, he had concluded that only 1 percent of published works remained in print at the end of the then-prevailing fifty-six-year copyright term.<sup>122</sup>

These figures suggested that authors stood little to gain financially from longer copyright terms. The same fact had been recognized decades earlier when Congress debated the 1909 Copyright Act’s proposed extension of copyright renewal terms beyond fourteen years, or even adopting a “life plus thirty years” formula.<sup>123</sup> In debates leading to the 1909 Act’s passage, Congress heard testimony that most authors never bothered to renew

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118. *Id.* at 899–900 (internal citations omitted).

119. *See, e.g.,* *Eldred v. Ashcroft*, 537 U.S. 186, 254–63 (2003) (Breyer, J., dissenting) (providing reasons for the lack of support the Copyright Term Extension Act offers to authors and the general circulation of intellectual property).

120. *Id.* at 267–68.

121. *Id.* (citing EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144 E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998)). Justice Breyer clarified that “retain commercial value” meant that the works would “still generate royalties after that time.” *Id.* at 248.

122. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 324 (1970).

123. *See* H.R. REP. NO. 59-7083, at 13 (1907) (testimony of Rep. Frank D. Currier).

copyrights after the initial twenty-eight-year copyright period, which allowed 95 percent of works to pass into the public domain.<sup>124</sup> As Breyer now pointed out, commodifiers—specifically the “entertainment industry”—might benefit from longer copyright terms even though authors would not, earning “higher corporate profits” by continuing to exploit rights that authors had granted to commodifiers years before.<sup>125</sup>

Congress’s willingness to use copyright to serve the interests of commodifiers such as movie studios did not automatically disenfranchise authors. But the Court’s announcement that the Copyright Clause could be used purely to benefit the dissemination of existing works, rather than the creation of new ones, heralded a new aggrandizement of commodifiers at the potential expense of authors and the public.<sup>126</sup> It also came just as a new cohort of commodifiers doing business on the Internet, and outside the traditional structures of the publishing and entertainment industries, began to assert their rights in ways that potentially damaged authors’ rights.

These were entities such as Google that did not depend on creative works such as books and movies to generate their corporate profits, but were instead engaged in the movement of information and intellectual property from point to point.<sup>127</sup> They thus did not depend on grants of rights by authors, such as those that authors had made to book publishers or that screenwriters had made to movie producers.<sup>128</sup> Instead, they could serve as toll collectors in the information “superhighway,” earning revenues both from advertising and from the sale of information they accumulated about Internet users.<sup>129</sup> Their primary stake was in having “information” available

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124. *Id.* at 14.

125. *Eldred*, 537 U.S. at 262–63 (Breyer, J., dissenting).

126. See Stacy F. McDonald, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 HOW. L.J. 541, 544 (2007) (arguing that “commodification of intellectual property distorts the copyright balance by valuing a copyrighted work for its market potential over, above, and to the exclusion of its non-economic values”).

127. See Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 480–83 (2011).

128. *Id.* at 481.

129. *Id.* at 508–10 (Google “makes the overwhelming majority of its revenues from search-related advertising” but seeks additional revenue stream through the sale of scanned, searchable “snippets” of book texts and “non-display uses” of book contents). See also Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L.

to furnish to users; far from claiming to act on behalf of the information's "creators" or publishers, in fact, Google claimed to provide access to information on an impartial basis.<sup>130</sup>

These new commodifiers had arisen in an online environment that emphasized the democratizing power of the public domain and the idea, first articulated by the Internet pioneer Stewart Brand, that "information wants to be free."<sup>131</sup> By his own description, Brand's original quote, offered at the first Hackers' Conference, in 1984, was as follows:

On the one hand information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other.<sup>132</sup>

Brand offered a prescient revision of this statement three years later, foreshadowing the realignment of authors, consumers, and commodifiers that was to take place once the Internet became a fixture of household life:

Information wants to be free. Information also wants to be expensive. Information wants to be free because it has become so cheap to distribute, copy, and recombine—too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It leads to endless wrenching debate about price, copyright, "intellectual property," [and] the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better.<sup>133</sup>

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REV. 87, 92–93 (noting authors' and publishers' concern that Google intended "to sell advertising in connection with previews of copyrighted books").

130. See *Frequently Asked Questions*, GOOGLE INVESTOR RELATIONS, <http://investor.google.com/corporate/faq.html> (last visited July 7, 2013) (noting that the search engine's primary focus is "on improving the ways people connect with information," that "Google primarily generates revenue by delivering relevant, cost-effective online advertising," and that "[w]e will do our best to provide the most relevant and useful search results possible, independent of financial incentives).

131. See Stewart Brand, *Information Wants to be Free*, STEWART BRAND, [http://sb.longnow.org/SB\\_homepage/Info\\_free\\_story.html](http://sb.longnow.org/SB_homepage/Info_free_story.html) (last visited Sept. 18, 2013).

132. *Id.*

133. *Id.* At his website, Brand cites this version of his own statement to his book, *THE MEDIA LAB* (1987).

Once the Internet came into wide use by consumers, legal disputes involving this new means of disseminating copyrighted material were inevitable. The rise of file-sharing over the Internet also threatened traditional commodifiers such as movie studios, record labels, and book publishers.<sup>134</sup> One of the first high-profile cases arose in the setting of the music industry.<sup>135</sup>

*A&M Records, Inc. v. Napster, Inc.*<sup>136</sup> weighed whether a “peer-to-peer” file-sharing service that allowed users to search, store, and share digital music files infringed copyright.<sup>137</sup> After several record companies sued, Napster asserted in its defense that users’ copying and sharing of files constituted “fair use” under the Copyright Act for any of three reasons: because the sharing was temporary; because users were merely sharing files that they had already legally purchased; or because, in some cases, musical groups had consented to allow their songs to appear on Napster free of charge.<sup>138</sup> The court, however, concluded that the fair use defense was inoperative where the plaintiff could prove “present or future market harm” and that both forms of harm were present.<sup>139</sup>

Critics of *Napster* and a subsequent case finding infringement involving peer-to-peer networks, *Metro-Goldwyn-Mayer v. Grokster*,<sup>140</sup> have argued that such decisions gave too much control to content providers (record labels in *Napster* and movie studios in *Grokster*) and too little to the consumer-propelled market forces the Internet had unleashed.<sup>141</sup> These cases did not represent the last word on the role of Internet-based commodifiers in facilitating the movement of copyrighted material to consumers without the payment of royalties to authors. Arguably, however, they did play a role in building consumer perceptions that web-based file-sharing sites, search engines, and similar services were allies in the “free”

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134. See Ledford, *supra* note 93, at 674.

135. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

136. *Id.*

137. *Id.* at 1010–11.

138. See *id.* at 1014.

139. *Id.* at 1016–17.

140. 545 U.S. 913 (2005).

141. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 82 (2008) (“The Internet is safe now . . . because it developed so fast that it was a reality before people had time to be afraid of it. But it should give us pause that if we had our current guiding set of policy goals in place, our assumption that cheaper copying means we need greater regulation, we would never have allowed it to flourish.”).

movement of “information” and that traditional commodifiers and authors were the enemy.<sup>142</sup> In this conception of the new digital landscape, book publishers, record labels, movie studios, and other traditional commodifiers, allied with authors, sought to “enclose” the information commons in ways reminiscent of late-feudal attitudes toward physical property and were arrayed against forces that sought the healthy expansion of the public domain.<sup>143</sup>

It was in this continuing charged atmosphere that a federal court recently handed down a decision with potentially damaging effects for both book authors and traditional book publishers—and a concomitant liberating effect for online commodifiers of material in copyrighted books.<sup>144</sup> The unexpected district court ruling in *Authors Guild, Inc. v. HathiTrust*<sup>145</sup> concerned the right of a non-profit organization serving the blind to freely disseminate digital copies of ten million published works, even though seventy-three percent of them were under copyright protection.<sup>146</sup> The principal defendant, HathiTrust Digital Library, planned to make the books available to the blind in such a way that they could easily be read, annotated, and navigated online.<sup>147</sup> However, HathiTrust and five university-library co-defendants had also reached an agreement with Google that gave Google exclusive rights to make the books available for viewing by the general public (albeit in “snippets”) on its Google Books service.<sup>148</sup> In return, the libraries received digital copies of each scanned work.<sup>149</sup> A subset of “orphan” works—whose copyright

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142. Ledford, *supra* note 93, at 674 (“The generational notion of entertainment or information as properly acquired for free is a major blow to the copyrighted industries. Thus, as distribution becomes less controllable, the focus on the author may in the long run prove to bite back at the corporations. If all legitimacy resides in the author, there is little reason to feel a moral obligation to pay the distributor.”).

143. See BOYLE, *supra* note 141, at 43–46 (arguing that a “second enclosure movement” seeks to wall off the “intellectual commons” in a fashion similar to the “enclosure” of private real estate in 15th to 19th century England). But see David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 144 (2009) for the contrasting view that “contrary to many commentators’ claims, the biggest problem the public domain faces is not property-like rule structures in copyright law, but the lack of them.”

144. 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

145. *Id.*

146. *Id.* at 448.

147. *Id.* at 449.

148. *Id.* at 448.

149. *Id.* The five libraries were those of the Universities of Michigan, California, Wisconsin, Indiana University, and Cornell University. *Id.* at 447. Indiana did not participate in the Orphan Works Project. *Id.* at 449.

owners are unknown—would be listed on a website for ninety days.<sup>150</sup> If the owners failed to emerge after that time, those works would become available free of charge to HathiTrust's users as well as to library users.<sup>151</sup>

The Authors Guild, a membership organization representing U.S. authors, joined by its counterparts from Canada, Australia, Norway, and a separate group of individual plaintiffs, sued both HathiTrust and Google in separate actions.<sup>152</sup> In their action against HathiTrust, plaintiffs alleged that the arrangements made between the two companies violated provisions of the Copyright Act governing exclusive reproduction rights of authors and copying by libraries.<sup>153</sup> Plaintiffs sought, *inter alia*, an injunction barring HathiTrust and its co-defendants from providing the covered works to Google for digitization unless the copyright holders authorized such uses.<sup>154</sup> The district court, however, granted HathiTrust's motion for summary judgment.<sup>155</sup> It held that the "Fair Use" doctrine provided a complete defense for the libraries.<sup>156</sup> Significantly, the court found that the doctrine applied, in part, because the purpose and character of the use of the works—a key factor courts weigh in applying the fair-use defense to copyright infringement—was "transformative" in nature.<sup>157</sup> "The use to which the works . . . are put is transformative," the court reasoned, "because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material."<sup>158</sup> Moreover, the judge concluded, the authors had failed to show that the libraries' and Google's scanning activities, and HathiTrust's dissemination<sup>159</sup>—a factor that had been key in *Napster*—would damage authors' ability to fully exploit their works,

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150. *Id.* at 449.

151. *Id.*

152. *Id.* at 447; Author's Guild Inc., v. Google, Inc. 721 F.3d 132 (2d Cir. 2013).

153. *HathiTrust*, 902 F. Supp. 2d at 447.

154. *Id.* at 449 (citing 17 U.S.C. §§ 106 (2002), 108 (2005)). The claim for injunctive relief did, however, carve out a limited exception for use by the libraries for non-commercial purposes. *Id.* (citing 17 U.S.C. § 108).

155. *Id.* at 447.

156. *Id.* at 464.

157. *Id.* at 460.

158. *Id.* The court also found the use transformative on the separate ground that provision of the works to the blind was not among the works' originally envisioned uses. *Id.* at 461.

159. *Id.* at 462–63.

including by licensing them.<sup>160</sup> The *HathiTrust* court largely brushed aside the Ninth Circuit's observation in *Napster* that "lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works."<sup>161</sup> Instead, it dismissed this possibility as "conjecture" and reasoned that use of the works in an existing, transformative fashion effectively immunized the defendants against claims of harm to future markets.<sup>162</sup>

*HathiTrust* suddenly cast into doubt the outcome of the related class action lawsuit by authors against Google, again with the Authors Guild as lead plaintiff, which had dragged on without resolution since 2005.<sup>163</sup> And it followed by only a month another ruling that seemed to spell defeat for authors and book publishers and victory for a major online commodifier: in this case, Amazon.<sup>164</sup>

In *United States v. Apple, Inc.*,<sup>165</sup> the United States Justice Department sued the technology company and the nation's five largest book publishers, claiming that they had engaged in a price-fixing scheme to sell books via Apple's iBookstore service.<sup>166</sup> In entering its final judgment against the publishers, the court required the five companies to terminate their pricing arrangements with Apple and to avoid, for two years, entering into any contract with an electronic book retailer in which the publisher asserted control over book pricing.<sup>167</sup> Though ostensibly intended to break up an anti-competitive pricing arrangement, the Justice Department's

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160. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001).

161. *Id.*; *HathiTrust*, 902 F.Supp.2d at 463.

162. *HathiTrust*, 902 F.Supp.2d at 463.

163. *Authors Guild, Inc. v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). After granting initial approval to the settlement, the court reversed course—following three years of negotiations—on grounds it would "give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission." *Id.* at 669.

164. *United States v. Apple, Inc.*, 889 F. Supp. 2d 623 (S.D.N.Y. 2012). The Authors Guild charged that the Department of Justice's initial settlement with three of the publishers would restore a "status quo" that previously allowed Amazon to claim 90 percent of the online bookselling market through "predatory pricing." *Court Approves Justice Department's E-Book Proposal, Restoring pre-2010 Status Quo Without an Economic Study*, AUTHORS GUILD (Sept. 7, 2012), <http://www.authorsguild.org/2012/09/>.

165. *Apple*, 889 F. Supp. 2d at 623.

166. *Id.* at 627. All five publishers eventually settled with the government. Bob Van Voris, *Apple Denies Conspiring with Publishers in E-Books Trial*, BLOOMBERG (June 20, 2013, 9:01 PM), <http://www.bloomberg.com/news/2013-06-20/apple-denies-conspiring-with-publishers-in-e-books-trial.html>. Apple announced that it would appeal the consent decree, and continued as the sole defendant. *Apple*, 889 F. Supp. 2d at 643.

167. *Apple*, 889 F. Supp. 2d at 629.

action was widely seen as benefiting the largest electronic bookseller, Amazon, and damaging publishers' ability to assert control over development of the e-book market.<sup>168</sup> The Authors Guild's public statement on the settlement called attention to the weakened state of two traditional sets of commodifiers—the publishers themselves and “brick-and-mortar” bookstores—and the strength of Amazon, which represented the new type of commodifier that had originated in the digital environment.<sup>169</sup> As a membership organization representing authors, the Guild's concern was understandable: publishers might not always act in authors' best interests, but at least the two parties' interests were inextricably bound. Amazon, in contrast, had no direct relationship with authors and was looking out for Amazon alone. Once publishers and other traditional commodifiers ceded control of their side of the Copyright Triangle to entities such as Google and Amazon, authors would exert even less control over their intellectual output—or even its value.

The twin copyright-duration rulings in *Eldred* and *Golan* had confirmed the novel principle that one of the Copyright Clause's primary goals was the “dissemination” of authored works—not necessarily with the additional goals of compensating authors for their creativity or expanding consumers' access to cultural wealth. These rulings did not, however, anticipate the combined effect that lengthened copyright durations might have once Google and Amazon—and other commodifiers whose main business was dissemination—began to subsume the place of traditional content providers in the Copyright Triangle. Although Napster had failed to find a way to commodify copyrighted works without infringement, Google and Amazon appeared poised to succeed. A new set of commodifiers, born in an era of megabytes rather than printing presses, had allied themselves with consumers reared under the mantra of “Information Wants to be Free.”<sup>170</sup> It remained to authors

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168. See Dawn C. Chmielewski & Carolyn Kellog, *E-book settlement has publishing world in turmoil*, L.A. TIMES, Sept. 8, 2012, <http://articles.latimes.com/2012/sep/08/business/la-fi-ct-ebooks-20120908>. Jonathan Kirsch, a Los Angeles intellectual property attorney and author, told the newspaper that “[i]n terms of the real-life experiences of publishers, authors, and readers, this will represent a fundamental change in how books are published and sold.” *Id.*

169. See AUTHORS GUILD, *supra* note 164.

170. See Michael J. Madison, Comment, *Where Does Creativity Come From? and Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 756–58 (2003) (explaining consumers' discontent with the copyright system due to its complexity or because they object to the way “copyright industries have successfully commoditized culture”).

to see if there was still some way to adjust copyright protections to serve them in this new era.

#### IV. WHAT TO DO

As discussed in Part III, the rise of Google and other digital information commodifiers did not occur because of changes in copyright law, such as CTEA's extension of copyright terms. But their arrival did come about just as CTEA, confirmed by *Eldred* and *Golan*, made profound changes in copyright duration that benefited the older class of information commodifiers. Now that the newer class of commodifiers had arrived and found a willing audience of consumers who were happy to share books, songs, and movies in new ways (even if it meant infringing copyrights), traditional content providers, such as book publishers, found their interests potentially compromised, yet seemed unable to react except defensively.<sup>171</sup> *HathiTrust* and the Justice Department's settlement with the book publishers in the Apple price-fixing litigation seemed to suggest the beginning of the end of the traditional structures these older companies had used to bring creative works to market.

Although authors had always been uneasy allies with the companies that controlled their access to consumers,<sup>172</sup> they had to wonder whether these imperfect but functional alliances could serve them much longer. And consumers, frustrated with traditional pricing structures for published works, found ways to get access to them for free.<sup>173</sup>

No further adjustment to copyright duration could, alone, be expected to return market conditions to those that existed before the Internet redefined consumers' access to information and intellectual property. But the Framers chose duration as the Copyright Clause's principal mechanism.<sup>174</sup> Therefore, it remains to be considered whether some new adjustments to duration, born in an era in which the printing press has given way to digital transmission, may better allow the Copyright Act to meet the Clause's constitutional

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171. See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 24–25 (2009) (“The Internet has ended the ability of copyright owners to deny consumers their preferences, but rather than make money by satisfying them, copyright owners have resorted to litigation and technological locks to thwart them. Myopia appears to be, in their case, a congenital disease.”).

172. *Id.*

173. See Madison, *supra* note 170, at 756–58.

174. U.S. CONST. art. I, § 8, cl. 8.

imperative—whether that imperative is seen as fostering creativity, compensating authors, or building a flourishing public domain.

This Part proposes two changes to copyright duration that may help authors to navigate this new landscape on their own, without concern for their traditional allies in the older content industries. One proposed change would strengthen authors' ability to divorce their work from grantees, such as book publishers, to which they temporarily assign their rights. It would do this by revising the 1976 Copyright Act to allow authors to reclaim their rights more quickly than is currently permitted by statute: thirty-five to forty years, depending on whether the grant includes publication rights.<sup>175</sup> Thus the author would be able to enjoy the balance of the copyright term unencumbered by a grant he or she had earlier made to a book publisher or other corporate entity. The second proposal would be to return durations for certain kinds of works (notably books) to much shorter terms: perhaps periods very like the fourteen-year term, renewable once, that was enshrined in the original Copyright Act of 1790.<sup>176</sup> Though admittedly difficult to implement, both because copyright durations have consistently increased over time and because of harmonization of copyright laws under international regimes such as TRIPS, a reduction in copyright durations for certain kinds of works would meet the needs of the digital era, in which information may be disseminated rapidly, without printing presses and archaic distribution channels. The combined effect of these adjustments would be to keep creative works actively on sale rather than consigned to obscurity, benefiting the author for as long as he or she controlled the rights but benefiting the public by moving works into the public domain more quickly.

*A. Reduce the Time Authors Must Wait to  
Recapture Their Rights*

For the first century and a half of American copyright law, authors who granted some or all of their rights to third parties—for

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175. 17 U.S.C. § 203(a)(3)(2006). For grants of rights made after January 1, 1978, Congress specified that copyright owners could effect termination during a five-year window that began thirty-five years after the execution of the grant. In the case of publishing contracts, the termination clock began running thirty-five years after publication or forty years from execution of the grant, whichever was sooner. For works published prior to January 1, 1978, the termination provision, similar to that in § 203(a), appears in § 304(c).

176. 1 Stat. 124 (1790).

example, book or sheet music publishers—were reasonably assured of being able to reclaim those rights in a timely fashion.<sup>177</sup> The relative ease of reclamation came about through a structure that had always been part of the Copyright Act: the renewal term.<sup>178</sup> Thus, for example, if an author in 1920 granted a book publisher the exclusive right to publish his or her novel, under provisions of the 1909 Copyright Act, his or her successors retained the ability to reclaim the granted rights when it came time to renew the copyright after the initial twenty-eight-year term.<sup>179</sup> This was because the author was the only party empowered to renew the copyright.<sup>180</sup>

Even while renewal terms still existed, prior to passage of the 1976 Copyright Act, book and music publishers found ways to circumvent the rights-reclamation process by having authors contractually grant their renewal rights to the publisher.<sup>181</sup> Congress had considered but abandoned proposals to match copyright duration to Berne's "life plus 50" regime as it framed the 1909 Copyright Act.<sup>182</sup> It instead retained the renewal structure specifically in order to allow authors to reclaim their rights.<sup>183</sup> "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum," the Committee on Patents told the House of Representatives.<sup>184</sup> "If the work proves to be a great success and lives beyond the term of twenty-eight years, . . . it should be the exclusive right of the author to take the renewal term."<sup>185</sup>

Despite this unambiguous expression of congressional intent, in 1943 the Supreme Court unexpectedly interpreted the 1909 Act to allow authors to assign their renewal rights contractually.<sup>186</sup> To

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177. Peter S. Menell & David Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, 33 COLUM. J.L. & ARTS 227, 227 (2010).

178. *Id.* at 228.

179. *Id.*

180. *Id.*

181. *Id.* at 227.

182. H.R. REP. NO. 60-2222, at 14 (1909).

183. *Id.* at 15–16.

184. *Id.* at 14.

185. *Id.*

186. *Fred Fischer Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (holding that the author of the song "When Irish Eyes Are Smiling" had irrevocably transferred his renewal interest, not just his publishing rights, when he signed a publishing contract with a sheet music company).

prevent any future question that the renewal interest was inalienable, Congress made this an explicit provision of the 1976 Act.<sup>187</sup>

However, the 1976 Act also fundamentally altered the mechanism for reclaiming rights by doing away with copyright renewal; after January 1, 1978, copyright in most works would be defined by a single term, equal to the life of the author plus fifty years.<sup>188</sup> To allow authors to reclaim rights granted to third parties before the end of such a long period, Congress had to add a provision providing for reclamation.<sup>189</sup> As early as 1961, the United States Copyright Office, already investigating revisions to the 1909 Act, had recommended that Congress adopt a blanket twenty-year limitation on copyright assignments as well as a provision allowing authors to terminate unremunerative grants.<sup>190</sup> By the time the 1976 Act was adopted, however, the automatic termination provision was gone (as was the ability to terminate on the basis of insufficient royalty income) and Congress had set the threshold for reclamation at thirty-five years.<sup>191</sup> This provision was carried over when CTEA extended copyright durations by a further twenty years, despite recommendations by some copyright experts to allow authors and their heirs to reclaim their rights for the extension period.<sup>192</sup>

As noted above, the grant termination provision (embodied in the 1976 Act and retained under CTEA) allows authors to terminate grants of rights thirty-five to forty years after the date of the grant.<sup>193</sup> That is too long. It was in the debates leading to passage of the 1976 Act that Justice Breyer, then teaching at Harvard Law School, analyzed Congressional Research Service figures and found that only 1 percent of published works remained in print after fifty-six years.<sup>194</sup> There is little reason to suppose that many more works remain in print after thirty-five or forty years. The award-winning British novelist Julian Barnes recently asserted, “Nowadays, the

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187. Menell & Nimmer, *supra* note 177, at 228.

188. Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572–73 (1976).

189. Menell & Nimmer, *supra* note 177, at 229.

190. *Id.* at 228–29.

191. *Id.* Menell and Nimmer term the debates on this provision “quite spirited.” *Id.*

192. See, e.g., William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 688 (1996).

193. *Id.* at 685.

194. Breyer, *supra* note 122, at 324.

average shelf-life of a new hardback novel—assuming it can reach a shelf in the first place—is four months.”<sup>195</sup> Judging by recent industry statistics, the time in which printed works become obsolescent is only accelerating. For example, recent U.S. book publishing industry statistics show that unit sales of printed and bound books declined 9 percent in 2012, on par with declines for each of the previous two years.<sup>196</sup> It is clear that traditional publishing industry sales and marketing methods—tied to physical bookstores that are themselves in retreat—are no longer adequate to help authors reach consumers any more than traditional music stores are adequate to help composers and musicians market their own work. Yet in most book publishing contracts, authors grant publishers exclusive rights to publish in book and derivative forms “for the full term of copyright,” locking up a complete package of subsidiary rights (including paperback editions, electronic books, translations, excerpts, audio recordings, and in many cases, even television and film rights) for at least the full thirty-five years until termination becomes possible.<sup>197</sup> The situation is similar in the music business where, traditionally, “very few corporations” acquire copyrights in songs from individual songwriters and musical groups, benefiting from authors’ inability to terminate grants they made in essentially unequal negotiations.<sup>198</sup>

Some intellectual property scholars have suggested that, rather than allowing authors to terminate grants of rights more rapidly, Congress should consider new forms of regulation in author-publisher contracts, since authors are in an inherently “weaker bargaining position.”<sup>199</sup> That seems to miss the point. Empowering authors to reclaim rights in a more timely fashion will enable them to find new ways to exploit works that might otherwise lie fallow in publishers’ catalogs, years after most physical sales have taken place.

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195. Julian Barnes, *My Life as a Bibliophile*, THE GUARDIAN (June 29, 2012, 5:55 PM), <http://www.guardian.co.uk/books/2012/jun/29/my-life-as-bibliophile-julian-barnes>.

196. Jim Milliot, *Rate of Print Decline Flattened in 2012*, PUBLISHERS WEEKLY (Jan. 4, 2013), <http://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/55382-rate-of-print-decline-flattened-in-2012.html>.

197. See, e.g., Melville B. Nimmer & David Nimmer, 5-26 NIMMER ON COPYRIGHT § 26.03 (2012) (template for a “typical book publishing agreement”).

198. See Patry, *supra* note 192, at 662–63.

199. Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1586–87 (2010).

Ultimately, authors, as creators of written, visual, and musical works and as individuals attempting to look after their own careers and reputations, have the greatest stake in making sure that their works reach the public and provide a healthy livelihood. In order to protect the value of agreements that book publishers, music labels, and other corporate entities entered with authors in good faith, a revised termination provision could and should resurrect the Copyright Office's 1961 proposal: provide for the early termination of "unremunerative" grants.<sup>200</sup> Copyright would remain in force but control would revert to the author. Congress could set financial or unit-sales criteria to help determine when a grantee had exhausted all likelihood of substantial further sales, triggering reclamation of rights by the author. Thus, even if copyright duration continued for the extremely long terms imposed by CTEA, authors would stand a chance of recovering and reinvigorating works grantees had long since stopped exploiting. They would also be in a position to police the exploitation of their rights in the online environment.

*B. Apply Shorter, Not Longer, Copyright Terms  
to Certain Kinds of Works*

The Copyright Act of 1790 protected "the authors and proprietors" of maps, charts and books printed in the United States.<sup>201</sup> With time, works in more media received protection, including engravings, etchings, and prints (1802) and musical compositions (1831).<sup>202</sup> Congress protected photographs and their negatives in 1865.<sup>203</sup> One impetus for passage of the 1909 Copyright Act was the then recent invention of the phonograph and the need "to protect the composer against the unlicensed use of his music in these mechanical instruments."<sup>204</sup> Just three years later, the invention of the motion picture required Congress to act again, adding movies to copyright protection.<sup>205</sup>

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200. Menell & Nimmer, *supra* note 177, at 229.

201. Copyright Act, 1 Stat. 124 (1790).

202. McDonald, *supra* note 126, at 547.

203. Golan v. Holder, 132 S. Ct. 873, 892 (2012).

204. S. REP. NO. 59-6187, at 3 (1907).

205. Golan, 132 S. Ct. at 892.

Copyright duration, however, is uniform without reference to the medium of the work in question.<sup>206</sup> That is true in the Copyright Act of 1976, as amended by CTEA in 1998,<sup>207</sup> just as it was true in the Copyright Act of 1909.<sup>208</sup> One reason for this uniformity may have been “the relative homogeneity of market conditions applicable to protected subject matter,” particularly when the Copyright Clause protected relatively few kinds of works.<sup>209</sup> However, one has only to look to the legislative history of CTEA, and other recent adjustments to copyright statutes, to see that some media industries and intellectual property rights interest groups have greater lobbying capabilities than others.<sup>210</sup> Indeed, it may have been inevitable that an industry responsible for “more than \$4 billion in surplus balance of trade,” as the movie and television industry’s representative told the Senate committee considering CTEA in 1995, placed such a premium on extending copyright durations to match those in force in the European Union.<sup>211</sup>

However, it is also the case that “innovators’ needs for intellectual property protection vary substantially across industries and among types of innovation.”<sup>212</sup> Some experts in the economics of intellectual property reason that when rights are “more or less robust than necessary” to induce innovation, the resulting distortions, measured by interference with distribution, exact a “social cost.”<sup>213</sup> Such distortions may arise for reasons of both the scope and duration of rights, particularly when these factors are made uniform rather than tailored to “differences in functionality and expressiveness in patentable and copyrightable subject matter.”<sup>214</sup> Copyright duration in the United States has always been uniform across all forms of intellectual property, even though the Copyright Act was initially

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206. Copyright Term Extension Act, 17 U.S.C. § 302(a) (1998) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of life of the author and 70 years after the author’s death.”).

207. *Id.*

208. Copyright Act, 17 U.S.C. § 23 (1909).

209. Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 846 (2006).

210. *Senate Hearing, supra* note 92 (in which, as noted earlier, testimony by the president of the Motion Picture Association of America, Jack Valenti, was arguably the most prominent).

211. *Id.* at 42 (Prepared Statement of Jack Valenti).

212. Carroll, *supra* note 209, at 847.

213. *Id.* at 849.

214. *Id.* at 862.

interpreted to apply to works in only a handful of media.<sup>215</sup> Thus, there is a historical tradition for uniform duration; and, in recent years, U.S. adherence to international intellectual property regimes like Berne and TRIPS has confirmed the status quo attitude toward uniformity.<sup>216</sup> In effect, the U.S. is now seemingly locked into a degree of durational uniformity imposed from beyond its borders, with relatively little discretion left to manage the attendant costs.<sup>217</sup>

However, the United States could, and should, elect to lobby for change at an international level. The Berne Convention's "life plus 50" durational structure is virtually uniform across all works.<sup>218</sup> However, Berne was born in a European civil law context that had always emphasized the idea of "authors' rights," emphasizing the idea of creative works as an extension of the author's intellect.<sup>219</sup> That is a fundamentally different conception of authorship than the utilitarian model, with its emphasis of tradeoffs between the author's practical need to earn a living and the public's need for a thriving public domain, which has predominated in the United States.<sup>220</sup> Arguably, the Internet's arrival and its ability to disseminate works more quickly is reason enough to question the continued validity of the authors' rights model as the basis for rigid conceptions of copyright duration.

The public's embrace of the "information wants to be free" model imperils the view that authors will always be perceived as the "good guys," small-time artists who deserve to earn a living providing books, songs, photographs, and other works of creative expression for an adoring public. So long as authors are perceived as using copyright to "enclose" the information commons, Internet-based information disseminators such as Google can be cast as intellectual Robin Hoods, liberating information that had selfishly

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215. *Id.* at 846–47; *see also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) (noting that the Copyright Act of 1790 was initially interpreted to apply only to maps, charts, and books); *and* *Golan v. Holder*, 132 S. Ct. 873, 892 (2012) (providing dates when Congress extended copyright protection to additional categories of works).

216. Carroll, *supra* note 209, at 875.

217. *Id.* at 878.

218. Berne Convention for the Protection of Literary and Artistic Works arts. 3 & 7, July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221. As Berne was originally framed, interestingly, photographs and "works of applied art" were exempted from the "life plus 50" rule, though a minimum term of twenty-five years applied. *Id.* art. 7.

219. *See* CRAIG JOYCE ET AL., *COPYRIGHT LAW* 57–58 (8th ed. 2010).

220. *See* Nachbar, *supra* note 47, at 39–40.

been guarded by greedy authors and their purported allies, the old-style content providers (publishers, movie studios, record labels, and so forth) that stand to gain from reduced dissemination and increased prices.

One way to combat this perception is to roll back copyright durational periods that impose social costs but can find no basis in financial reality for authors or even for content providers. At a time when information becomes obsolescent with astonishing speed and the public seems to adopt and overthrow “favorite” forms of entertainment with abandon, the case can be made that very few creative works have any business remaining under copyright for the life of the author plus seventy years or, for that matter, for terms even nearly approaching such lengthy durations.

As Congress heard at hearings that preceded the 1909 Copyright Act—and as it heard again in the years leading up to the 1976 Act, including from the young Stephen Breyer—the vast majority of published works cease earning revenues for their authors within their first three decades of existence. If Julian Barnes is correct, most contemporary novels may achieve their entire shelf life within months of publication. Thus, copyright durations that served the nation in 1790 may once again be timely for certain kinds of works—especially books. Reducing durations to fourteen years, renewable once for fourteen years more, may be a perfectly sensible response to the new marketplace of ideas, where books and other creative works can be transmitted from creator to consumer in mere seconds, without need of printing presses, warehousing, physical shipment, and “brick-and-mortar” retail stores. However, Hollywood movies, which may take years and millions of dollars to develop and the resources of major motion picture studios and production companies to realize and exploit, may continue to require the “life plus 50” duration that Berne enshrined and CTEA extended.

Now that the United States adheres to international treaties that impose long copyright durations and has ample reason to protect its intellectual property industries from retaliatory trade practices of other countries, it is constrained from imposing unilateral solutions to its own copyright dilemmas. But even if international regimes are cumbersome to negotiate, the transformation of technology demands replacement of Gutenberg-era copyright practices with customs and formalities that will serve a new age. The United States should begin

to set the stage for modernized and rationalized international regimes that will decouple creative works in each medium, and consider the scope and duration of protections that will best serve each one as well as the creators who depend on producing such works for their livelihoods and the consuming public.

## V. CONCLUSION

Against the backdrop of the Internet, information and even art age more rapidly. No longer dependent on creaky distribution channels such as paper newspapers and magazines, printed and bound books sold in stores, and vinyl records sold in stores, works of authorship may travel to market far more quickly—but may also live out their lives much more rapidly. Now that consumers may read books, watch movies, and listen to music on their mobile phones as well as in their living rooms, it is easy to see how information moves at a faster pace than ever before. It is no longer sensible to imagine that information commodifiers can or should require decades to recoup their expenses in marketing and selling creative works that were, after all, the fruits of someone else's labors.

A more impressionistic rationale for copyright reform may be added to the substantive reasons for restoring authors' control over their own work in the digital era: doing so might remind consumers that they have more in common with authors than with large commodifiers. If authors were decoupled from the media conglomerates that have controlled their creative output for so long, a generation of consumers raised under the "information wants to be free" ethic might think twice before downloading copyright-protected works from the Internet without compensating the works' creators. Reducing copyright durations—and allowing authors to reclaim their rights more quickly—might also allow authors to exploit their works more creatively, again fashioning a more productive and meaningful partnership between them and consumers. The result will be a more robust information commons, and a more rational, equilateral, Copyright Triangle.

