Repairing Copyright: Getting Back to Basics and Ending an Era of Experimentation

John Howard

INTRODUCTION

Societies communicate their values in many different ways. Often this communication comes through the creation and use of cultural works: [1] poems, paintings, books, articles, scientific manuscripts, movies, photos, and the list goes on. A society's culture is of vital importance. Culture is "acquainting ourselves with the best that has been known and said in the world, and thus with the history of the human spirit."[2] Culture is the means in which we, as humans, pass important information about ourselves from person to person, from generation to generation. With the importance of this process the question then becomes: How do we not only protect these works, but also make sure that the process stays intact?

As modern society progressed these questions became even more important, and at the same time, more difficult. Artists and authors sought to keep creating but needed a way to be able to protect their works in order to make sure that they would be able to monetize them and eke out a living. These concerns came to a head in 16th century England where the printing press started to make the dissemination of "works of authorship"[3] a profitable business.[4] This is where modern copyright law took root as a means to protect the interests of the creators of these works.

[1] In using the term "cultural works" I do not intend to invoke the same meaning that the term has gained in the area of indigenous people's rights and the many "cultural works" that are created by indigenous people. I seek only to retain the important connection between the many different types of works that are created and protected under the broad scope of copyright law and human culture.
[2] Gustav Jahoda, *Critical Reflections on Some Recent Definitions of "Culture"*, Vol. 18 Culture & Psychology 289, 290 (2012) (Quoting 19th century author Mathew Arnold).
[3] "Works of Authorship" becomes a term of art that is used to define the types of cultural works that are afforded protection under modern copyright regimes. *See* 17 U.S.C. §102 (listing the types of works considered "works of authorship" under U.S. law)
[4] Alfred C. Yen & Joseph P. Liu, *Copyright Law: Essential Cases and Materials* 1-2 (2nd ed. 2011)

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Over time the types of works protected and the extent of the protection has increased.[5] This expansion of both positive and negative rights has been likened to the English enclosure movement of the 16th through the 18th centuries, and dubbed the second enclosure.[6] As the individual rights to cultural works are strengthened and expanded, what is available to the public is constricted. The public domain, or what is termed the commons, is essential to the dissemination of cultural knowledge. The enclosure of this knowledge gives preference to private rights over the public need.[7]

So back to the question – How do we protect works that are imbued with our culture, and incentivize the production of such works? Obviously, these two ideas can easily create tension between each other. Historically, governments have attempted to achieve both goals by providing a limited monopoly to the authors so they could have exclusive rights to monetize their creation through controlled dissemination.[8] The limitation of these rights is what was viewed as providing the needed balance between the private and public needs.[9] The current state of the United States copyright regime, and the continual expansion of the private rights it affords, has created an imbalance in the system.

This article will discuss the source of this imbalance and the competing ideas that have been proposed to try and restore the cultural commons through a strengthening of the public domain. It will then propose changes to the law that will help repair the current copyright regime. Section

[5] *Compare* Statute of Anne, 8 Ann c. 21 (1710) *with* Sonny Bono Copyright Term Extension Act, 112 Stat. 2827 (1998) (term of protection in the Statute of Anne was set at 21 years, the term, in the U.S., was extended to life of the author plus 70 years, or 90 years from first publication or 120 years from creation for anonymous works). In addition over the past 300 years the scope of the types of works that are protected has also expanded to include not only original works but also derivative works. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 106, 95 Stat. 2541, 2546. (Reserving the exclusive right to make derivative works from the original).

[6] James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 Law & Contemp. Prob. 33, 34 (2003).

[7] Lewis Hyde, *Common as Air* 45 (2010).

[8] *See* Statute of Anne, 8 Ann. C.21 (1710), *See also* Copyright Act of 1790, 1 Stat. 124 (1790).

[9] Hyde, *supra* note 7 at 89.

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A will provide a brief history of copyright and highlight its underlying purpose of making sure knowledge remains available to the public at large. Section B will then trace the gradual expansion of the private rights afforded by copyright and demonstrate the slow movement away from its original purpose. Section C will discuss the enclosure of the public domain and cultural commons by the increasing propertization of copyrights and the focus on individual rights. Section D will discuss current efforts to strengthen the public domain and proposed solutions. Section E will propose changes to the current law that will have the effect of bringing the copyright regime back in line with its original purpose, and reducing its negative impact.

A. History of Copyright

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean neither more nor less."
>
> Lewis Carroll; *Through the Looking Glass*

An author's expression of their ideas is a rather subjective thing. In the author's point of view their words mean exactly what they want them to mean. But, once those words are released into the wild they can be adopted, changed, and grown into many more new ideas. That is, as long as the laws of the land allow for the words to reach the public sphere where they can be harvested for such a purpose. Copyright has sought to control this movement through reasonable terms that allow an author to retain control of their words for a limited time. This control helps ensure that an author's words mean just what they choose them to mean, or at least, their words are used only in ways they choose them to be used.

1. The Statute of Anne

The Statute of Anne has been credited as the birth of modern copyright through its provisions that shifted exclusive rights in books away from the publishers and to the authors.[10] While there is debate behind the exact driving force behind the enactment of the statute,[11] one likely factor is the rise of the professional author.[12] This new class of writer sought to make a living on their work through better remuneration and better control.[13] This is one possible reason for the author protective provisions found in the Statute of Anne.[14]

The statute also had another purpose as evidenced by its own working title: *An Act for the Encouragement of Learning*.[15] This and some of the provisions of the statute provide evidence that the House of Commons was trying to balance the demands of the booksellers and the authors, while at the same time trying to protect the interests of the public.[16] By granting exclusive rights to the authors for a limited time they hoped to maximize both the production of future works and the eventual dissemination of the books to the public.[17]

Prior to the Statute of Anne monopolies were granted to printers and publishers of books as a means to censor the new industry.[18] This grant of exclusive rights to the printers and publishers

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[10] 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, 1479 (2010).
[11] Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 Berkeley Tech. L.J. 1427, 1431 (2010).
[12] Ginsburg, *supra* note 10 at 1477.
[13] *Id.* at 1477-78.
[14] *Id.*
[15] Statute of Anne, 8 ann., c. 19 (1710).
[16] Bracha, *supra* note 11 at 1431.
[17] *Id.*
[18] Yen, *supra* note 4 at 2. (In 1557 Queen Mary granted exclusive rights of printing to the London Stationers' Company. This relationship allowed the crown to effectively censor what was being printed by allowing the Company to seize and destroy unauthorized presses and books.)

had the effect of fencing off some of the intellectual works that would have previously been available to all. Here, it is important to understand where the idea that works were universally available comes from, the idea of the commons and the public domain.

It was common belief that the knowledge that written and oral works contained were not the product of one man, but the product of all men and their shared experiences through time.[19] As Confucius stated, "I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients."[20]

In addition to this idea of shared experience there was a thought that knowledge was nothing more than a gift from God.[21] Human creativity was the product of divine intervention.[22] Christian tradition believed that the nonhuman origin of knowledge meant that it could not be bought, sold, forged, or stolen.[23] Knowledge belonged to all, in common, or as John Locke wrote, "God…has given the earth…to mankind in common."[24]

Previous to the Statute of Anne authors would sell their manuscripts to the printers for a single payment.[25] The idea here was that they were not truly selling the work, but instead were supplying a common commodity that the printers needed for their business.[26] No exclusive rights to the work were transferred – anyone would be able to print and distribute the same work since it was common property. The monopoly provided by the crown was in the printing itself, not in the printed work.[27]

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[19] Hyde, *supra* note 7 at 19
[20] *Id.* at 20 (quote used by Hyde as part of his discussion demonstrating the stark contrast between traditional views of the origins of knowledge and modern views that knowledge is the product of the individual).
[21] *Id.*
[22] *Id.*
[23] *Id*.
[24] *Id.* (talking about how commons is a product of nature, something that exists before labor, cultivation, and the cash economy)
[25] Ginsburg, *supra* note 10 at 1478
[26] *Id.* at 1478-79
[27] Yen, *supra* note 4 at 2.

Works that resided in the commons were not viewed as property, but had qualities that were the opposite of property, no one had the right to exclude another from its use.[28] As William Blackstone, am eighteenth-century British jurist, stated, property is something that allows for an individual to have a "right of ownership" over it, and defined such right as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[29] But, in the commons, the public at large holds a property right in the form of a right of action, a right to use, share, and build upon all that the commons contains.[30] It was this shift from a common right to an exclusive right that effectuated what can be viewed as an enclosure of the intellectual commons and public domain.[31]

2. The First Enclosure

The Law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose

The law demands that we atone
When we take things that we do not own
But leaves the Lordes and Ladies fine
Who takes things that are yours and mine.

The poor and wretched don't escape
If they conspire the law to break;
This must be so but they endure
Those who conspire to make the law.

The law locks up the man or woman
Who steals the goose from off the common
And geese will still a common lack
Till they go and steal it back

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[28] Hyde, *supra* note 7 at 24.
[29] *Id.* at 25.
[30] *Id.* at 24.
[31] While this is an example of the beginning of the gradual shrinking of the public domain, it is not the beginning of the real issue. The type of exclusive rights granted by the Statute of Anne served a real purpose, to incentivize the continued production of cultural works through the grant of a limited monopoly effectuated by such rights. It can be argued that this action actually helped preserve, if not enlarge, the public domain by incentivizing production.

- *Anonymous*

This poem[32] demonstrates some of the tension that was present during the English enclosure movement between the fifteenth and nineteenth centuries.[33] Through its lines it demonstrates the artificial nature of property rights that are created to provide private ownership of something that had previously been outside of the property system.[34] While the poem was directed more towards the enclosure of common land, there can be seen a direct correlation to the privatization of rights in books and written works.

Through study of the enclosure movement you can see the social costs that are the result of the state enforcement of property rights to try and achieve controversial social goals.[35] The purpose may have been to create a new "respect for property" but had the effect of removing rights that were relied upon by a whole class of people; often the poorer class that had less resources to try and influence the creation of the law.[36] "The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation."[37]

The enactment of the Statute of Anne was a continuation of the very same ideals and purpose that were being applied to other types of property at the time. It took what was traditionally a common right and transformed it into a private right in the name of social justice. A form of a social experiment whose goal was to enrich private rights and provide protections for those who

[32] Boyle, *supra* note 6 at 33.
[33] *Id.* at 34 n. 2 (The enclosure movement was actually a series of events with a varying amount of state involvement that sought to privatize property that had previously been held in common).
[34] *Id.* at 34
[35] *Id.* at 34-35.
[36] *Id.* at 35.
[37] *Id.*

had worked to create something. It also had the unfortunate effect of removing a sense of community created from cultural works as it pushed market logic into new areas.[38] Potentially "disrupting traditional social relationships" and "views of the self."[39]

Don't get me wrong, the creation of private property was a wonderful thing. There are many benefits from vesting private rights and ownership in individuals.[40] Some of the same benefits have been realized in the realm of cultural works. Production was incentivized, distribution and dissemination were protected, and culture and knowledge were allowed to flourish. But, over the course of time these benefits have been eroded by the gradual expansion of the scope of protections afforded by the copyright regime.

Copyright is a monopoly of a sort in of itself. This has been understood since before the enactment of the Statute of Anne, and has been one of the main concerns of copyright opposition.[41] John Locke argued in 1694 that copyrights are a form of monopoly that are "injurious to learning," and the same argument was posed in 1841 by Thomas Babington Macaulay during a parliamentary speech against a proposed extension of the copyright term.[42] Macaulay said, "Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly."[43] Parliament had seen it fit to forbid the creation of monopolies through its enactment of the 1624 Statute of Monopolies[44] which only provided an exception for patents.[45] When copyright came into existence in 1710 the push was to see them in

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[38] Boyle, *supra* note 6 at 35.
[39] *Id.*
[40] *Id.* at 35-36 (One such benefit is the creation of a system that helped eliminate starvation that was a result of overuse and underinvestment in the land).
[41] Hyde, *supra* note 7 at 85.
[42] *Id.*
[43] Hyde, *supra* note 7 at 85
[44] An Act concerning Monopolies and Dispensations with penall Lawes and the Forfeyture thereof, 21 Jac 1 c. 3 (1624).
[45] Hyde, *supra* note 7 at 85-86 (The 1624 Statute of Monopolies only provided an exception to the prohibition of monopolies for the granting of patents for a fourteen year term or less to the first and true inventor. There were

the same light as patents, a privilege that had been granted by the Parliament, a not the recognition of a right.[46] The fear was that if copyright was seen as a perpetual natural right that there would be serious injury to society as a whole. Without limitations on the term of a copyright, the intellectual commons that drives culture and learning would be severely restricted and harmed. Hence the need to understand and view copyright as a form of monopoly that needed to be limited in form and scope.

3. Birth of American Copyright

There was quite a bit of discussion around the topic of monopolies and the ownership of ideas during the time of the constitutional debates in the late 1780's.[47] Some of the founding fathers had different ideas about how best to approach the problem of encouraging literary works and inventions while avoiding the harms associated with monopolies.[48] In a 1788 letter Thomas Jefferson wrote to James Madison he stated that he understood that a rule against monopolies would lessen "the incitements to ingenuity, which is spurred on by the hope of a monopoly of a limited time," but even so, "the benefit of even of limited monopolies is too doubtful to be opposed to their general suppression."[49] Madison, while still seeing monopolies as one of the "greatest nuisances in Government," disagreed, he felt that the grant of a limited monopoly is a sacrifice of the many to the few.[50] In order for there to be a benefit for "the many" there needs to be some concessions made for "the few." The goal always being that "ideas should freely spread

no other exceptions made available since monopolies were viewed as dangerous to the social good and public welfare.)

[46] Hyde, *supra* note 7 at 85-86 (The distinction here is between a natural right that should exist in perpetuity, or a statutorily created privilege that could and should be limited in term. Two cases eventually settled this argument; a British case, *Donaldson v Becket*, 1 Eng. Rep. 837 (1774), and an American case, *Wheaton v. Peters*, 33 U.S. 591 (1834). Both cases found that copyright is a statutorily created limited privilege, not a perpetual natural right.).

[47] *Id.* at 89.

[48] *Id.*

[49] *Id*.

[50] *Id.*

from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition…"[51] Both men finally came to an agreement that limited monopoly privileges were a useful incentive, but that "perpetual monopolies of every sort are forbidden… by the genius of free Governments."[52]

This understanding can be seen in the patent and copyright clause that was included in the U.S. Constitution.[53] The Constitution grants Congress the power to create legislation that secures exclusive rights for authors and inventors in their writings and discoveries for *limited* times.[54] As the previous discussion shows, the idea of limiting the exclusive rights granted to authors was / is of utmost importance. It was the understanding of the drafters that only through limitation could the harms of monopolies be avoided.[55]

In May of 1790 the U.S. Congress enacted the first U.S. copyright statute.[56] The 1790 Act was the first federal U.S. copyright legislation.[57] This statute borrowed heavily from the Statute of Anne, and from similar U.S. state copyright statutes.[58] The similarities abound, starting from the title of the statute, *An Act for the Encouragement of Learning, by Securing the Copies or Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned*,[59] to many of the requirements and limitations they contain.[60] The 1790 Act

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[51] Hyde, *supra* note 7 at 90-91 (Quote taken from an excerpt from an 1813 letter from Jefferson discussing the ownership of ideas.)
[52] *Id.* at 90 (Quote from a Madison memorandum on monopolies.)
[53] *See* U.S. Const. art 1, § 8, cl. 8.
[54] *Id.*
[55] *See* Hyde, *supra* note 7 at 86-92.
[56] Copyright Act of 1790, ch. 15, 1 Stat. 124.
[57] Bracha, *supra* note 11 at 1453.
[58] Bracha, *supra* note 11 at 1453. (Many of the state statutes borrowed directly from the Statute of Anne. This may indicate that the Statute of Anne was only an indirect influence on the 1790 Act, but there is some evidence that the Statute of Anne had a more direct role in the development of federal U.S. Copyright).
[59] Copyright Act of 1790, Ch. 15, 1 Stat. 124 (As compared to the title of the Statute of Anne; *An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned*, 8 Anne c. 19 (1710)).
[60] Bracha, *supra* note 11 at 1453-56.

essentially took the Statute of Anne and updated the language to make it more modern, and made a few additions and subtractions along the way.[61] One of the main differences was that the scope of works covered was enlarged in the U.S. statute.[62] Maps, charts, and previously unpublished works such as manuscripts could be registered and protected.[63] This change in scope showed a desire to protect more works than had previously been included in the 1710 statute. Both restricted the unauthorized printing, reprinting, and importation of protected works, but the U.S. statute also restricted unauthorized publication as well.[64] This change is most likely do to the change in the methods of distribution and the development of other forms of communication as a result of the refinement of printing technologies over time, such as newspapers and other periodicals.

The most significant omission was the elimination of the twenty-one year term of protection afforded previously printed works.[65] The 1790 Act left this provision out, only allowing pre-existing works the same term of protection as the future works under the act.[66] The U.S. statute granted fourteen year terms of protection to works that were registered with the clerk of the U.S. District Court.[67] After the initial fourteen year term a work could be re-registered for an additional fourteen years, for a total of twenty-eight years of protection, as long as the author was still living.[68] This statutory construction was nearly identical to that of the Statute of Anne.[69]

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[61] Bracha, *supra* note 11 at 1453.
[62] *Id.* at 1454.
[63] *Id.*
[64] *Id.* at 1453-54.
[65] *Id.* at 1453.
[66] *Id.*, *See also* 1 Stat. 124, § 1 (1790).
[67] 1 Stat. 124, § 1 (1790), *See also* 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, 669 (1996).
[68] Copyright Act of 1790, 1 Stat. 124, § 1.
[69] Bracha, *supra* note 11 at 1453-55.

Notably, both acts allowed for reversion of the copyright back to the author after the initial term.[70] The function of the reversion is slightly different between the two acts.[71] In the Statute of Anne reversion was bundled with the renewal of the copyright.[72] After the initial fourteen year term the copyright would just return to the surviving author for another fourteen years.[73] In the 1790 Act the reversion only happened after a proactive re-registration of the protected work during the last six months of the first fourteen year term.[74] Only if this formality was followed would the right be renewed and returned to the author.[75]

These slight changes may be indicative of a tightening of the privileges granted through copyright. As already discussed, the founding fathers were reluctant to grant monopolies that had any potential of existing in perpetuity. By limiting the term of the grant of rights, creating strict formalities, and the tightening of reversion rights the drafters of the 1790 Act created a regime that would find balance between the competing interests of encouragement of creation and the dissemination of knowledge and learning. The limited terms created in the 1790 Act would remain untouched until the early 1800's, over one-hundred years after the enactment of the Statute of Anne.

B. Tipping the Balance: Moving Away from Public Benefit

1. The Copyright Act of 1831

[70] Bracha, *supra* note 11 at 1456, *See generally* Ginsburg, *supra* note 10.
[71] Bracha, *supra* note 11 at 1456.
[72] *Id.*
[73] *Id.*
[74] Copyright Act of 1790, 1 Stat. 124, § 1, *See also* Bracha, *supra* note 11 at 1456.
[75] Bracha, *supra* note 11 at 1456, *See also* Ginsburg, *supra* note 10 at 1450-51 (Over the course of the next forty years the extent of the granted reversion right in the 1790 Act and its alienability would be an issue of contention. Authors would try and assign the reversion interest to others, but this type of assignment would be contested and argued against. The argument positing that assignment should not be allowed since it did not match the intended purpose of the statute to make sure that authors continued to benefit from the continued success of their work).

In 1831 the U.S. Congress amended the Copyright Act of 1790 in a couple of very significant ways. One of the main changes was the doubling of the length of the initial term of protection.[76] This gave a registered work twenty-eight years of protection, as well as an additional fourteen years upon renewal for a total of forty-two years of protection.[77] In addition to the increased term length, the scope of the right was also expanded to include musical compositions for the first time.[78]

What is most significant here is why Congress decided to amend the 1790 Act. From before the enactment of the 1790 Act Noah Webster had been busy lobbying in the states for increased copyright protection.[79] He sought to gain better protection for his spelling books.[80] His lobbying efforts started around 1782 and continued into the 1830's.[81] His latest efforts were directed at gaining better protection for his newest and largest dictionary.[82] Webster feared that without stronger copyright protection he would not be able to make money selling his books.[83] It is interesting to note that Webster himself was a dedicated plagiarist, and himself had borrowed extensively from similar works of other authors,[84] and that it was at the request of this businessman that Congress responded by increasing the scope of protection of U.S. copyright.[85]

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[76] Copyright Act of 1831, §§ 1,2 4 Stat. 436, 21 Cong. Ch. 16, *See also* 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, 669 (1996).
[77] Copyright Act of 1831, §§ 1,2 4 Stat. 436, 21 Cong. Ch. 16.
[78] Andy Lykens, *A Brief History of Copyright Law*, www.americansongwriter.com, https://americansongwriter.com/2013/09/songwriter-u-a-brief-history-of-copyright-law/ (last visited March 24, 2017).
[79] David Micklethwait, *Noah Webster and the American Dictionary* 10 (McFarland 2005).
[80] *Id.*
[81] *Id.* (Webster's lobbying efforts began in 1782 and would be renewed forty-five years later to gain stronger protection for his largest volume yet. Webster would release new editions near the end of each previous editions copyright term to try and maintain copyright protection).
[82] *Id.*
[83] Micklethwait, *supra* note 79 at 10.
[84] *Id.* at 10-11.
[85] 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, 670 (1996).

Under the new law Webster's dictionary would be protected from the same kind of borrowing that it was built with.

While it is unlikely that Webster's request was the only reason Congress was moved to act, it does show the level of influence big business and lobbying can have on the creation and amendment of laws. Through this influence proprietors of copyright have been able to gain more protection for their economic interests. [86] The expansions of copyright made in this act tipped the balance in their favor.

2. The Copyright Act of 1909

The Copyright Act of 1909 was a major revision of the U.S. copyright laws.[87] Under the new act the term of protection was extended to be twenty-eight years initial protection and twenty-eight more upon renewal.[88] This made for a potential fifty-six years of copyright protection before the work would become part of the public domain, if renewal was applied for and the work reregistered within the last year of the initial twenty-eight year period.[89]

Formalities still played a significant role in securing copyright protection in the 1909 Act.[90] One significant change found in the 1909 Act was the point in which copyright protection was affixed to a work. Under the new law protection started at the date of first publication instead of the date of filing a prepublication copy.[91] This change is significant because works could gain copyright protection before depositing the works with the copyright office, as long as, they were

[86] Webster's son-in-law was a member of the House of Representatives at the time this act was passed, and a member of the Judiciary Committee on whose behalf he reported the bill. The average person would not have this level of influence on the law making process; leaving the public and their interests at a severe disadvantage. *Id.* at 670 n. 35.
[87] Copyright Act of 1909, 60 P.L. 349, 35 Stat. 1075, 60 Cong. Ch. 320 (1909).
[88] Patry, *supra* note 85 at 670.
[89] *Id.*, *see also* Copyright Act of 1909, § 3 60 P.L. 349, 35 Stat. 1075, 60 Cong. Ch. 320 (1909).
[90] Yen, *supra* note 4 at 179.
[91] Patry, *supra* note 85 at 670.

published containing the required notice of copyright.[92] This change, albeit small, shows a move towards what eventually becomes the default, automatic protection upon creation. Under the 1909 Act failure to comply with these simple formalities would cause forfeiture of copyright protection and release the work to the public domain.[93]

The reversionary right of the authors was also retained in the 1909 Act.[94] Congress came close to eliminating the two term structure of copyright protection in favor of a single term of life plus a fixed number of years, but was dissuaded from doing so.[95] The House Committee on Patents found that it was "distinctly to the advantage of the author" to retain the exclusive right in the renewal term in order to be able to profit from a work that has retained, or gained in, value beyond the initial twenty-eight years.[96] This provision of the act allowed for a termination of transfer, or assignment, of the copyright that happened during the initial term.[97] This provision was seen as essential to help provide the intended incentive for authors to create by allowing them to benefit from the success of their work.[98] These albeit small changes slowly pushed the delicate balance further in the direction of private right and away from public benefit. The remaining protections left in the form of formalities and limitations would come under fire in the changes that were to be made in 1976.

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[92] Copyright Act of 1909, § 12 60 P.L. 349, 35 Stat. 1075, 60 Cong. Ch. 320 (1909).
[93] Yen, *supra* note 4 at 179-81.
[94] Patry, *supra* note 85 at 670-71.
[95] *Id.* (Mark Twain testified before the House Patent Committee, who had jurisdiction over intellectual property at the time, that he had not made money on *Innocents Abroad* until the copyright reverted back to him for the renewal term. This may have had some influence on Congress' decision to retain the two term structure).
[96] *Id.*
[97] Yen, *supra* note 4 at 206.
[98] Patry, *supra* note 85 at 671 (The copyright office has held the view that an author should not be able to assign their renewal right during the initial copyright term. The U.S. Supreme Court took it upon themselves to change this structure by holding in *Fred Fisher Music Publishing Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), that an assignment of a renewal right is valid and enforceable. In a later case, *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 363 (1960), (the Court narrowed the *Fred Fisher* ruling by holding that where an author died before the renewal term the assignment failed as a contingent interest).

3. The Copyright Act of 1976

The significance of formalities was greatly diminished under the 1976 Act.[99] Under the Copyright Act of 1909 authors had to satisfy the notice, registration, and deposit formalities.[100] Failure to comply with these formalities could result in the forfeiture of copyright protection and the release of the effected works to the public domain.[101] Such forfeiture became highly unlikely under the 1976 Act.[102]

Publication was required under the 1909 Act, and was what triggered copyright protection as long as it was done with proper notice.[103] Under the 1976 Act copyright protection no longer was predicated on publication, but rather, was granted upon creation.[104] Even though publication was no longer required it did trigger the 1976 Act's notice requirement.[105]

The notice and registration requirements are two of the most important formalities to be found in the different versions of the U.S. copyright acts. Proper notice requires the use of the copyright symbol (©), or the word "copyright," the year of first publication, and the name of the holder of the copyright.[106] Without this information it becomes nearly impossible for anyone who wishes to use a protected work to gain permission to do so.[107] Under the 1976 Act the notice formality was maintained, and could result in forfeiture, but only in limited situations.[108] Works would only become part of the public domain "if there were more than a relatively small number

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[99] Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. Pa. L. Rev. 856, 869 (1978).
[100] *Id.*
[101] Yen, *supra* note 4 at 179-80, *see also* Gorman, *supra* note 109 at 869 (outlining the effects of failures to comply with the 1909 Act's formality requirements).
[102] *Id.* at 181.
[103] *Id.* at 181-82.
[104] Gorman, *supra* note 99 at 868.
[105] Yen, *supra* note 10 at 181.
[106] Copyright Act of 1976, § 401(a) 54 P.L. 553, 90 Stat. 2541 (1976).
[107] Lynn M. Forsythe & Deborah J. Kemp, *Creative Commons: For the Common Good?*, 30 U. La Verne L. Rev. 346, 349 (2009).
[108] Yen, *supra* note 4 at 187.

of copies distributed."[109] But, even if more than a "relatively small number" of copies were distributed, the failure could be cured by registering the work and taking reasonable steps to attach notice to such copies within five years of publication without notice.[110] Thus failure to attach notice was not fatal.[111]

Unfortunately registration has never been a required condition of copyright.[112] This remained true under the 1976 Act.[113] Although, registration was incentivized by providing substantial benefits to those that did so, including: constituting *prima facie* evidence of copyright validity if done within the first five years of *publication*, ability to receive statutory damages from infringement actions, and allowing suit to be brought in federal court, it remained optional and could be done at any time.[114] Similar to the difficulties created by a lack of copyright notice, a lack of registration, and an effective registry, locating a copyright holder becomes very difficult.[115]

Deposit is only required for works published in the U.S. containing a copyright notice.[116] Unpublished works and works published without notice are exempt from the deposit requirement.[117] This is also a very soft requirement. Failure to comply with the deposit requirements will only result in a $250 fine per work, or the costs of the Library of Congress to

[109] Yen, *supra* note 4 at 187 (internal quotations omitted).
[110] *Id.*
[111] *Id.*
[112] *Id.* at 189.
[113] Gorman, *supra* note 99 at 870.
[114] 17 U.S.C. §§ 410-12, *see also* Yen, *supra* note 4 at 189-90. This type of scheme allows a copyright holder to forgo registration until they need to do so, such as, in order to bring an infringement action.
[115] Forsythe, *supra* note 107 at 349.
[116] Yen, *supra* note 4 at 189.
[117] *Id.*

acquire copies of such works.[118] There are potentially greater fines for willful or repeated failures to comply.[119]

The formalities required under the 1976 Act were eliminated when Congress enacted the Berne Convention Implementation Act of 1988 (BCIA).[120] In order to become member to the Berne Convention[121] works of authorship have to be protected regardless of compliance with formalities.[122] Therefore, after the enactment of the BCIA copyright protection is the default upon creation without any further actions needing to be taken by the copyright owner.[123]

Congress also expanded the term of protection afforded by the grant of copyright in 1976. With the enactment of the Copyright Act of 1976 Congress removed the two term structure previously found in U.S. copyright law.[124] Under the new act copyright protection would begin at the date of creation and last the lifetime of the author plus fifty years.[125] Similar to the previous acts, the term extensions created by the 1976 Act would apply to existing and future works.[126] Works created before or after January 1, 1978, the effective date of the 1976 Act, would get the life plus fifty year term, except, anonymous works, pseudonymous works, and works made for hire which would receive protection for seventy-five years from the date of publication, or one-hundred years from the date of creation.[127]

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[118] Copyright Act of 1976, § 407(d) 54 P.L. 553, 90 Stat. 2541 (1976).
[119] Copyright Act of 1976, § 407(d)(3) 54 P.L. 553, 90 Stat. 2541 (1976) (imposing a $2500 fine).
[120] Berne Convention Implementation Act of 1988, P.L. 100-568, 102 Stat. 2853, *see also* Yen, *supra* note 10 at 180.
[121] The Berne Convention for the Protection of Literary and Artistic Works is the primary international treaty concerning copyright.
[122] Yen, *supra* note 4 at 180.
[123] *Id.*
[124] Yen, *supra* note 4 at 191, *see also* Ginsberg, *supra* note 10 at 1564.
[125] Copyright Act of 1976, § 302(a) 54 P.L. 553, 90 Stat. 2541 (1976).
[126] *Id.* at §§ 302-04, *see also Eldred v. Ashcroft*, 537 U.S. 186, 194-95 (2003) (summarizing the extent of the term changes made in the 1976 Act).
[127] Copyright Act of 1976, § 302 54 P.L. 553, 90 Stat. 2541 (1976)., Protecting a work in which the author is unknown, or operating under a false name, from the date of creation is problematic in a system that makes registration optional such as the 1976 Act. *See generally* Yen, *supra* note 4 at 189-90. Without the ability to know

Works that were created prior to January 1, 1978, and were not published or registered, would be removed from state common law protection and given protection that would expire on Dec. 31, 2002.[128] If the works were published before December 2002 they would then receive a term of protection not to expire prior to December 31, 2027.[129] Any works that were protected under the 1909 Act would receive extensions that would allow them to be protected for a total of seventy-five years.[130] The one caveat was that if the work was still in its first of the two allowable twenty-eight year terms the copyright holder would still have to re-register the work and apply for the renewal, at which point they would receive another forty-seven years of protection.[131]

When said and done, any work whose copyright did not expire prior to December 31, 1976 received an additional nineteen years of protection, if already in the second of its two allowable terms, otherwise it received an additional forty-seven years.[132] Alfred Yen and Joseph Liu provide a useful example to fully understand the reach of the 1976 Act's term extensions. "A work originally copyrighted in 1922 would ordinarily have fallen into the public domain in 1978… since the work survived until the 1976 Act took effect, the new expiration date became

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when a work is created, or who to contact for permission to use a work, the information costs incurred by an subsequent creator are prohibitively high, especially when the term of protection lasts a full century.

[128] Copyright Act of 1976, § 303 54 P.L. 553, 90 Stat. 2541 (1976), *see also* Patry, *supra* note 85 at 680 (Stating that the Copyright Act of 1976 would effectively supersede any state common law protection afforded unpublished works), The new law would supersede state law as a direct result of the 1976 Act changing the copyright trigger from publication to creation. This would cause an overlap in state and federal law were the supremacy clause of the U.S. Constitution would kick in.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Yen, *supra* note 4 at 203 n. 38. (One would think that any work which was granted a fifty-six year term of protection under the 1909 Act, and which gained protection more than fifty-six years prior to Dec. 31, 1976, would have fallen into the public domain and would not have benefitted from the 1976 Act's term extensions. However, Congress passed multiple term extensions to copyrights that would have expired during the drafting of the 1976 Act in Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573. These extensions allowed works that were published as early as 1906 to survive ad take advantage of the term extensions provided by the 1976 Act).

December 31, 1997."[133] That would mean that anything that was supposed to enter the public domain would not have done so until January 1, 1998. After the enactment of the 1976 Copyright Act and the BCIA the balance had officially shifted completely away from any concern of the public benefit or need that copyright was originally created to protect. This trend would continue with a new extension that would be granted in 1998.

4. Sonny Bono Copyright Term Extension Act of 1998 (CTEA)

In October of 1998 Congress would enact another term extension for existent and future works.[134] This act would give all existing copyrights a twenty year extension to their current copyright protection.[135] Any new works would automatically get copyright protection for the life of the author plus seventy years without any action by the author at all.[136] Anonymous, pseudonymous, and works made for hire would be protected ninety-five years from first publication, or one hundred and twenty years from creation.[137]

The CTEA was just the most recent of a series of copyright term extensions enacted by Congress. Each time an extension is granted copyright comes closer and closer to a perpetual right. This is exactly the type of action the drafters were trying to avoid. By looking at the below chart you can see how this trend has expanded over time. Each time a new extension is authorized there is an overlap with the previous grant of copyright. The one time there was a "delay" in granting a new term extension Congress passed interim extensions to make sure any works about to become public property would survive to take advantage of the newly granted term extensions.[138]

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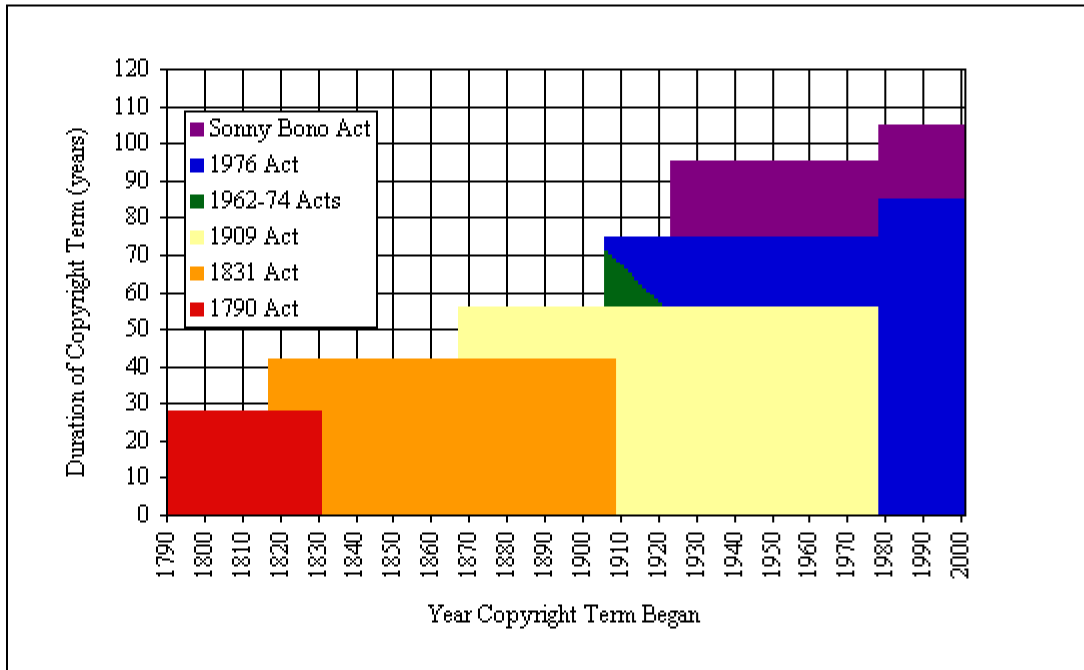
[133] Yen, *supra* note 4 at 203.
[134] Sonny Bono Copyright Term Extension Act of 1998, P.L. 105-298, 112 Stat. 2827.
[135] Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. Mem. L. Rev. 363, 381 (1999).
[136] *Id.* at 379.
[137] *Id.*
[138] Yen, *supra* note 4 at 203 n. 3.



Trend of Maximum U.S. General Copyright Term[139]

[139] Tom W. Bell, *Trend of Maximum U.S. General Copyright Term*, http://www.tomwbell.com/writings/(C)_Term.html (2008) (last visited March 30, 2017) (*additional information as supplied by Tom W. Bell:* The above chart illustrates the most easily quantified evidence of the expansion of U.S. copyright law: the trend of the general copyright term (that is, for works not created anonymously, pseudonymously, or for hire). The first federal copyright legislation, the 1790 Copyright Act, set the maximum term at fourteen years plus a renewal term of fourteen years. The 1831 Copyright Act doubled the initial term and retained the conditional renewal term, allowing a total of up to forty-two years of protection. Lawmakers doubled the renewal term in 1909, letting copyrights run for up to fifty-six years. The interim renewal acts of 1962 through 1974 ensured that the copyright in any work in its second term as of September 19, 1962, would not expire before Dec. 31, 1976. The 1976 Copyright Act changed the measure of the default copyright term to life of the author plus fifty years. Recent amendments to the Copyright Act expanded the term yet again, letting it run for the life of the author plus seventy years. As the chart reveals, all but the first of these statutes extended copyright terms retroactively. In calculating copyright terms based on the life of the author, the above chart conservatively assumes that authors create their works at age thirty-five and live for seventy years.
Please note that this version of the chart amends the originally published one in response to the helpful comments of Prof. John Rothchild. Specifically, the present version of the chart includes data relating to the 1962-74 interim renewal acts and shows the retroactive effect of the Sonny Bono Copyright Extension Act to reach back to 1923. I am deeply grateful for Prof. Rothchild's careful attention and diligent scholarship.).

The CTEA was attacked as being unconstitutional in *Eldred v.* Ashcroft.[140] In that case constitutional law scholar Lawrence Lessig argued that the CTEA 1) was a "content neutral regulation of speech that fails heightened scrutiny under the First Amendment,"[141] and 2) it violated the Copyright Clause[142] which gives Congress the authority to grant exclusive rights to inventors and authors for only a limited time.[143] It is this second argument that is highly relevant to our current topic.

Lessig argued that even if the twenty year extension in the CTEA was technically a "limited time," by allowing Congress to apply the extension to existing copyrights they are able to work around the "limited time" requirement and create effectively perpetual copyrights through repeated term extensions.[144]

The Court did not find this argument persuasive.[145] The Court found the fact that Congress had previously exercised its constitutional authority to grant extensions in the 1831, 1909, and 1978 acts, without crossing a "constitutionally significant threshold," as evidence that Congress was operating within it constitutional powers.[146] The Court further found that they are not at "liberty to second-guess congressional determinations and policy judgments… however debatable or arguably unwise they may be."[147] In the end the Court held that the CTEA was not an abuse of Congress' power under the Copyright Clause.[148]

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[140] 537 U.S. 186 (2003).
[141] Ashcroft, 537 U.S. at 218.
[142] U.S. Const. art. 1, § 8, cl. 8.
[143] Ashcroft, 537 U.S. at 208.
[144] *Id.* at 208-09.
[145] *Id.* at 208.
[146] *Id.* at 209.
[147] *Id.* at 208.
[148] *Id.*at 208. The Court also held that the First Amendment was not implicated since the Copyright Clause and the First Amendment were drafted so close together. Their temporal proximity indicate that in the Drafter's view copyrights limited monopolies are consistent with free speech principles. *Id.* at 219.

Justice Breyer's dissent in the case provides some interesting insight into potential underlying forces behind the enactment of the CTEA. Lobbying has always played a large role in the changing of copyright laws to increase the terms of protection and create more expansive protections for protected works.[149] The term extensions found in the CTEA would be a product of this type of influence. Justice Breyer points out the continual mention of the benefits the CTEA would bring to the economic standing of the entertainment industry in the statute's legislative history.[150] Again Congress' main concern would be the benefit garnered for big businesses, such as Sony and Disney, and private individuals at the expense of the public.[151] The overarching purpose of the Copyright Clause to provide a reward for an author's creative activity and "to allow the public access to the products of their genius after the limited period of exclusive control has expired"[152] would be interpreted in the author's favor one more time. The general purpose of the clause to advance progress by adding to the public domain would seemingly be forgotten.[153]

C. The Enclosure of the Intellectual Commons

"If I have seen further than others, it is by standing on the shoulders of giants."

Isaac Newton[154]

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[149] See previous discussion regarding Noah Webster and Mark Twain's lobbying activities.
[150] Ashcroft, 537 U.S. at 262 (J. Breyer Dissent).
[151] Ashcroft, 537 U.S. at 262 (J. Breyer Dissent) *citing* S. Rep. No. 104-315, p.3 (1996) ("The purpose of this bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade.") *and* 144 Cong. Rec., at H9951 (statement of Rep. Foley) (noting "the importance of this issue to America's creative community," "whether it is Sony, BMI, Disney" or other companies).
[152] Ashcroft, 537 U.S. at 227 *quoting Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (J. Stevens Dissent).
[153] Ashcroft, 537 U.S. at 226 (J. Stevens Dissent).
[154] Quote found in a letter Isaac Newton wrote to Robert Hook in 1676. Newton was not the creator of this phrase but may have borrowed it from John of Salisbury who wrote in his treatise on logic, *Metalogicon*, "We are like dwarfs sitting on the shoulders of giants. We see more, and things that are more distant, then they did, not because our sight is superior or because we are taller, but because they raise us up, and by their great stature add

The socially detrimental effects of the continual expansion of our copyright laws often goes unnoticed.[155] This is largely because most of our legal system regarding ownership is built upon traditional property ownership concepts that focus on the individual right of ownership.[156] With intellectual property this becomes problematic because a large part of the value contained in the expression of ideas, inventions, and other creative works comes from the ability of these works to transmit the human story and culture. Culture is not something that is owned, but is something that is inalienable, and belongs to everyone at the same time.

Many great artists, thinkers, and overall creators have understood the value of being able to borrow and build upon the works of those that came before them. Pablo Picaso said, "All artists borrow; great artists steal," an idea that Picaso may have acquired from poet T.S. Elliot who wrote, "Immature poets imitate; mature poets steal."[157] American artist, and recent Nobel Prize winner, Bob Dylan gives credit for his many works to previous artists such as Woody Guthrie and Robert Johnson.[158] Dylan described his songwriting process like this:

> *"What happens is, I'll take a song I know and simply start playing it in my head. That's the way I meditate… I'll be playing Bob Nolan's "Tumbling Tumbleweeds," for instance, in my head constantly – while I'm driving a car or talking to a person or sitting around or whatever… At a certain point, some of the words will change and I'll start writing a new song… That's the folk music tradition. You use what's been handed down. "The*

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to ours." Salisbury, being know to refine works of others, may have not been the origin of this expression either. The Phrase Finder, *The meaning and the origin of the expression: Standing on the Shoulders of Giants*, https://www.phrases.org.uk/meanings/268025.html (last visited Apr. 11, 2017).

[155] Forsythe, *supra* note 107 at 349.

[156] *Id.*

[157] Hyde, *supra* note 7 at 202.

[158] *Id.* at 197.

> *Times They Are A-Changin'" is probably from an old Scottish folk song."*[159]

The socially valuable activity of borrowing from those before you is the exact activity that the current expansion of copyright laws is negatively effecting.[160] Take Dylan's process for instance. What he describes would be considered a derivative work, and under the Copyright Act of 1976, derivative works are now included in copyright's prohibitions.[161] The U.S. Copyright Office defines a derivative work as a "work based upon or derived from one or more already existing works."[162] This would include a "musical arrangement of a pre-existing musical work."[163] Therefore, without permission and a proper license from the previous author, Dylan would not have been able to make his music if he was subject to the new copyright laws.[164] Even worse, with the continually expanding copyright term for new and already existing works, this restriction will stretch further back in time and into the future. Making it even more difficult to build upon what came before.

This expansion of property rights over intangible property, rather than real, has been called the "Second Enclosure Movement."[165] The enclosure referred to here is the enclosure of the "intangible commons of the mind," or what we know as the public domain.[166] The public domain consists of works that are completely free from the restrictions of intellectual property rights,

[159] Hyde, *supra* note 7 at 199.
[160] Forsythe, *supra* note 107 at 349.
[161] Copyright Act of 1976, § 103 54 P.L. 553, 90 Stat. 2541 (1976), *see also* Forsythe, *supra* note 107 at 352.
[162] United States Copyright Office, *Copyright in Derivative Works and Compilations*, https://www.copyright.gov/circs/circ14.pdf (last visited Apr. 11, 2017).
[163] *Id.*
[164] Since Dylan's songs were created before the 1976 Act's expanded restrictions he was not violating any laws. But, any new artists will have to navigate the difficulties of the new copyright regime in order to be able to create anything in the same manner that Dylan did. The high transaction costs alone can create a negative impact on creation and innovation.
[165] Boyle, *supra* note 6 at 37.
[166] *Id.*

such as works whose intellectual property rights have expired, and works that did not qualify for protection under the intellectual property laws.[167] This includes areas that have been traditionally outside the realm of intellectual property such as ideas, concepts, principles, and natural occurrences.[168] But even these areas are being threatened through the expansion of intellectual property laws.[169] Again what was previously thought to be common property, or uncommodifiable, is now being covered by new, or expanding, property rights.[170]

This is a dramatic shift from our understanding a hundred years ago that "the general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become after voluntary communication to others, free as air to common use."[171] One of the fundamental goals of our intellectual property laws was the protection of the commons.[172] But, under the current expansion of copyright protections, the balance has tipped to more protection is better.[173] The question that needs to be answered is – Better for whom?

There are two common arguments supporting this expansion of control and private right.[174] The first argument focuses on the non-rival and non-excludable nature of informational goods.[175] With modern technology it is possible for a single product to be copied and shared without any noticeable difference in the product itself.[176] This is the essence of the argument – Without the

[167] Mariam Bitton, *Modernizing Copyright Law*, 20 Tex. Intell. Prop. L.J. 65, 69 (2011).
[168] *Id.*
[169] Boyle, *supra* note 6 at 39 (discussing the expansion of what is deemed patentable to cover what was previously thought to be un-patentable "ideas," such as business method patents).
[170] *Id.* at 37.
[171] Int'l News Serv. V. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).
[172] Boyle, *supra* note 6 at 40.
[173] *Id.*
[174] *Id.* at 41-44
[175] *Id.* at 42. When a good is non-rival each use of the good does not interfere with any subsequent use. Likewise, when a good is non-excludable it is very difficult, if not impossible, to keep one unit from satisfying an infinite number of users. For example – intellectual properties can be copied at infimum without degrading, nor excluding further use, of the original.
[176] *Id.*

ability to exclude, creators will not be able to control distribution and charge for their creations, and therefore, adequate incentives to create will not exist.[177]

The idea here is that since intellectual property rights were created to try and solve the non-rival and non-excludable nature of intellectual property, any increase in the ease of copying and the transmission of copies should require an increase in the strength of the corresponding rights in the property.[178] The problem with this argument is the fact that the same technology that has made copying and transmission easier has also made it easier and cheaper to produce, market, advertise, distribute, and sell the same products.[179] This would suggest an increase in incentives rather than a loss of rights.[180] A large market, that includes some illicit copying, may be more profitable than a narrow market where there is much more control.[181]

The second argument is much more nuanced. Over time the value of informational products has increased, and the importance of these information-intensive products to the world economy has increased.[182] Therefor it is only rational to conclude that the protection for these important products must also increase (or so the argument goes).[183] The problem here is the fact that each informational product is built upon many smaller pieces of other informational products.[184] So in turn, if we increase the protections of each of these informational products, we also increase the cost of producing any future products that rely on the output of previous products for their own inputs.[185] This is why there is such a strong need to understand the importance of finding a balance in the system. If you create too strong of protections, you then increase the cost of

[177] Boyle, *supra* note 6 at 42.
[178] *Id.*
[179] *Id.* at 43.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 43-44.
[184] *Id.*
[185] *Id.*

innovation (by reducing access to other works), and reduce the amount of informational products that need protection.[186] This is the essence of the second enclosure. The balance has tipped too far in the direction of increased protections and is now enclosing the informational commons. An increase in intellectual property rights may actually slow down innovation by creating multiple roadblocks, such as multiple necessary licenses, in the way of subsequent innovation.[187]

D. Efforts to Restore the Public Domain

In response to the increasing expansion of copyright laws, and the increasing harm those laws have on innovation and the cultural welfare of society, many ideas have been developed to try and protect the public domain. This section will discuss some of those ideas and their implications. While these ideas, and movements, are individually beneficial in the way they attempt to give back to the public what has slowly been taken away, they are evidence that continued experimentation will only result in a more confusing intellectual property landscape. In order for true protection of the progress of science and the useful arts, and a continued incentive to create, a straight forward single solution needs to be put in place that will help address the many complications that arise from overlapping systems of control.

1. The Creative Commons Movement

Partly in response to the outcome of the *Eldred v. Ashcroft*, Lawrence Lessig helped develop the Creative Commons.[188] The Creative Commons is both a political movement and a system that can be used as a tool by creators to license their works for public use in a uniform manner.[189] A Creative Commons (CC) license is used in addition to the underlying copyright in a work.[190]

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[186] Boyle, *supra* note 6 at 44.
[187] *Id.*
[188] Forsythe, *supra* note 107 at 346.
[189] *Id.*
[190] *Id.* at 347.

The current copyright statutes are unfortunately silent on how a copyright owner might go about divesting any of the statutorily granted exclusive rights.[191] Creative Commons attempts to provide a solution to this issue through its user-friendly licensing system that allows a copyright owner to designate which rights they are willing to give up and under what conditions they are willing to do so.[192]

There are a limited number of licensing options available created through the combination of four possible conditions: no derivatives, non-commercial, share alike, and attribution.[193] These conditions are then combined to make one of six possible licenses: Attribution, Attribution-NoDerivs, Attribution-NonCommercial-NoDerivs, Attribution-NonCommercial, Attribution-NonComercial-ShareAlike, and Attribution-ShareAlike.[194] The attribution and share alike provisions are the least restrictive as they only require that credit be given to the original creator (attribution) and that any subsequent works be shared under the same terms as the original (share alike).[195] The no derivatives condition restricts any subsequent use to only allow copying, display, distribution, or performance of the original.[196] The non-commercial condition restricts any subsequent users from incorporating the work for any commercial purposes.[197] What constitutes a commercial use is not defined by Creative Commons, an ambiguity that exists in the copyright statute as well, but is generally seen to mean any use that is for profit.[198]

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[191] Forsythe, *supra* note 107 at 347.
[192] *Id.* at 347-48.
[193] *See* Creative Commons License Types, https://creativecommons.org/share-your-work/licensing-types-examples (last visited Apr. 18, 2017).
[194] Forsythe, *supra* note 107 at 356 n. 70.
[195] Creative Commons, *supra* note 193.
[196] *Id.*
[197] *Id.*
[198] Forsythe, *supra* note 107 at 357.

Creative Commons also attempts to lower the inherent transaction costs that come along with trying to use another's work.[199] The transaction costs of the current copyright licensing system can be a huge roadblock for creators that wish to use another's copyrighted work.[200] Obtaining a license becomes a daunting task do to the amount of work involved – determining who owns the copyright, locating the owner, and then negotiating terms of use – steps that may act as an effective prohibition against using the other work.[201] Creative Commons has created a searchable database on their website to try and address this issue.[202] Through the use of this database they envision being able to connect potential content donors with users.[203]

The licenses provided by Creative Commons are seen as a vehicle for creators to share their creative works.[204] This may provide several advantages to the donors of shared works including both potential economic and non-economic benefits.[205] Potential benefits claimed range from "flattery embedded in [the] wide circulation of one's work" to "the potential for undiscovered artists to be discovered and 'signed' by major labels or publishing houses."[206] Of course some of these benefits cannot be assured by the Creative Commons alone, but it can be used as a tool to achieve them.

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199 Forsythe, *supra* note 107 at 347.
200 *Id.*
201 *Id.*
202 *See* Search the Commons, https://search.creativecommons.org, (last visited Apr. 18, 2017).
203 Forsythe, *supra* note 107 at 354.
204 *Id.* at 360.
205 *See generally* Forsythe, *supra* note 107 at 359-61 (discussing some of the perceived benefits of the Creative Commons system).
206 Forsythe, *supra* note 107 at 359-60 *quoting* Berkman Center for Internet & Society at Harvard University, Executive Summary of Issues Facing Creative Commons (May 7, 2001), http://cyber.law.harvard.edu/creativecommons/exec.html

There have been several potential problems that have been identified with the Creative Commons licensing system.[207] One main criticism of the system is that it gives authors too much control over how their works will be used, and therefor strengthens the "proprietary nature of copyright law instead of weakening it."[208] The fear being that the norm will become that authors should maintain complete control of their works instead of them being shared in a community of users.[209] Reifying "the idea of romantic authorship, maintain[ing] a gap between authors and users, and uphold[ing] the individual property model of copyright law."[210]

The Creative Commons licensing system is built upon the current copyright scheme and actually relies on it to be able to function.[211] The strategy of the system is completely dependent on the proprietary nature of current copyright laws, and relies on it to have any legal force.[212] Without the idea that there is an underlying individual right in the protected work there would be no need for a license at all.

Another issue is to what extent are the Creative Commons' licenses enforceable. The claim by Creative Commons that the license will stand up in court is not guaranteed.[213] Licenses are controlled by contract law, and in the U.S. contract law is a function of state common law.[214] This could be problematic since the 1976 Copyright Act decreed that federal copyright law

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[207] *See generally* Niva Elkin-Koren, *Panel I: Intellectual Property and Public Values: What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 Fordham L. Rev. 375 (2005), *and* Miriam Bitton, *ARTICLE: Modernizing Copyright Law*, 20 Tex. Intell. Prop. L.J. 65 (2011).
[208] Miriam Bitton, *ARTICLE: Modernizing Copyright Law*, 20 Tex. Intell. Prop. L.J. 65, 86 (2011).
[209] Bitton, *supra* note 208 at 86.
[210] Shun-ling Chen, *To Surpass or to Conform – What are Public Licenses for?*, 2009 U. Ill. J.L. Tech. & Pol'y 107, 127 (2009).
[211] Forsythe, *supra* note 107 at 363, *see also* Niva Elkin-Koren, *Panel I: Intellectual Property and Public Values: What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 Fordham L. Rev. 375, 377 (2005).
[212] Niva Elkin-Koren, *Panel I: Intellectual Property and Public Values: What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 Fordham L. Rev. 375, 377 (2005).
[213] Forsythe, *supra* note 107 at 363-64.
[214] *Id.* at 364.

preempts state law.[215] While state contract law wouldn't necessarily be preempted by the federal governments overriding interest in controlling copyright interests, it could bring the legitimacy of a copyright holder's ability to license various uses of their work that would normally be controlled by federal copyright law in to question.[216]

Furthermore, licenses are a form of contract, and as such, must meet the common law requirements of mutual assent and consideration in order to be enforceable.[217] While it can be argued that the use of the work with knowledge of the terms of the attached license can constitute assent, similar to shrink-wrap licenses, the argument for consideration is more difficult.[218] Without the exchange of some form of consideration between the licensor and licensee the Creative Commons license looks more like a gift than an enforceable contractual license.[219]

The licensing system also provides little help to a copyright holder that feels that their works have been infringed upon. The responsibility of determining if there has been infringement will still be shouldered by the holder of the copyright[220] Plus any claimed infringement would only be enforceable under federal copyright law if it is determined to be outside the scope of the Creative Commons license attached to the work.[221] The broad nature of the Creative Commons licenses could make this difficult. Any other actions would have to be brought under a breach of

[215] Forsythe, *supra* note 107 at 364.
[216] *Id.*
[217] *Id.*
[218] Forsythe, *supra* note 107 at 364.
[219] *Id.* at 365.
[220] Bitton, *supra* note 208 at 89.
[221] *See* Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913, 933 (N.D. Cal. 2009) (stating that infringement actions can be brought under federal copyright laws for claims of infringement beyond the scope of any license of the work in question).

contact claim that would require a showing of monetary damages.[222] This could be difficult to do with a work that has already been dedicated for public use.[223]

Other enforcement issues may arise due to changes, or potential withdrawals, of licenses after works have been used by subsequent users. Creative Commons' licenses try and deal with this issue by not allowing owners to withdraw licenses after their works are already in circulation, but they are allowed to stop distributing their works under the license.[224] Problems may arise when dealing with derivative works whose underlying licenses are no longer available.[225] The question about whether or not those works could still be further modified seems to be open.[226]

Another concern with the use of Creative Commons' licenses is third party capture.[227] The concern is that content industries will take a work from the public domain and incorporate it into a proprietary work subject to highly restrictive terms.[228] This would have the effect of locking works under a restrictive licensing scheme that were previously available under a creative commons license.[229] Similar concerns have been dealt with by the copyleft[230] software licensing scheme by relying on copyrights in the underlying source code to keep others from capturing said code and making it proprietary.[231] This is similar to the share alike provisions found in the Creative Commons.

[222] Bitton, *supra* note 208 at 89-90.
[223] *Id.*
[224] *Id.* at 90.
[225] Bitton, *supra* note 208 at 90.
[226] *Id.*
[227] Elkin-Koren, *supra* note 212 at 398.
[228] *Id.*
[229] *Id.*
[230] Copyleft is a general method for making software free and to make all modified or extended versions of the program free as well.
[231] What is Copyleft, GNU Operating System, https://www.gnu.org/licenses/copyleft.en.html (last visited Apr. 19, 2017).

The Creative Commons has been effective in achieving its goals of providing an alternative to copyright that helps reduce transaction costs and empower individual authors and small groups to actively participate in the creative processes through the sharing of content.[232] But private ordering is only a good temporary solution when there are failures in the underlying governing systems. Creative Commons has brought the issues surrounding our current copyright regime to the forefront in hopes of instituting lasting change. Lessig himself noted this when he wrote, "Once the movement has its effect in the streets, it has some hope of having an effect in Washington."[233]

2. Other Proposed Methods

There have been many suggested changes or reactions to the current restrictive copyright laws. These range from the Open Access[234] movement and open source model[235] of software development to more complicated legal solutions such as the Gradual Dedication Model[236] or the doctrine of limited copyright abandonment.[237] These solutions all attempt to achieve the same

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[232] Elkin-Koren, *supra* note 212 at 386.
[233] *Id.* at 392 *quoting* Lawrence Lessig, *Free Culture* 257-305 (2004).
[234] Open Access is a movement to publish academic scholarly works, often the product of scientific research, in Open Access Journals or databases. These resources are then made available online at no cost. The idea is to further the exchange of knowledge that has already been paid for by the public through state and federal funding (essentially tax dollars), and to ensure that important knowledge can be accessed and built upon. Open Access, Wikipedia, https://en.wikipedia.org/wiki/Open_access (last visited Apr. 19, 2017).
[235] The open source model is a decentralized development model that encourages open collaboration through the free and public sharing of source code, blueprints, and documentation. Open-source Model, Wikipedia, https://en.wikipedia.org/wiki/Open-source_model (last visited Apr. 19, 2017).
[236] The Gradual Dedication Model, as proposed by Miriam Bitton, would divide creative works into three separate domains: The Copyrighted Works Domain, the Public Domain, and the GDM Domain. A copyright holder would be able to choose which domain they would like their work to reside in, but the GDM domain would become the new default. Under the GDM works would go through two phases. Phase one would have the work held in joint ownership with the public for a term of up to 20 years. Phase two would then have the work become part of the public domain. This model would also rely on the reinstatement of formalities. Bitton, *supra* note 208 at 102-14.
[237] Lydia Pallas Loren suggested this doctrine as a method of allowing a copyright owner to retain "the ability to enforce the copyrights that have not been granted to the public, while at the same time allowing the public to rely on the copyright owner's clear expression of intent to permit certain uses." Bitton, *supra* note 208 at 93 *quoting* Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 Geo. Mason L. Rev. 271, 278 (2007).

goal but do so by either using private ordering that leaves the root issues intact, or by further complicating the legal regime surrounding copyright. These systems are just further experimentation that will not provide a lasting solution.

E. Getting Back to Basics

When the original U.S. copyright statute was first enacted our legislators took careful consideration into the ramifications such a law would have on the welfare of our society. As a result of this consideration they attempted to create a balance between individual right and public need. In order to maintain this balance they put certain limitations in place that have been eroded over time. This erosion has been the result of a change in the focus of Congress from the rights of the public at large to the economic concerns of individuals and the content industries.

The extent of the negative impact of the new copyright regime can been seen by looking at the strength and scope of the public response to it. Through private ordering, multiple movements, and lawsuits the public has shown that it needs something that is more workable. Over the past two-hundred plus years Congress has experimented with the copyright laws; trying to keep up with growing markets and new forms of technology. They have made changes in response to both pressures from the content industries and international community. I am not suggesting that Congress is corrupt, or misguided, but rather that they have embarked on a series of changes trying to find a way to maintain the delicate balance that copyright laws require.

As Lawrence Lessig suggested, the end goal is meaningful legislative changes that will correct the balance and create a system that allows for the creation and growth of future works by having access to what has come before. In an attempt to reach that goal I suggest that we look back at what worked in the past and learn from that success.

The first step would be to reintroduce formalities into copyright law. Formalities such as registration, notice, and filing and renewal fees will provide mechanisms for the filtering out of creators that are not interested in having exclusive rights over their work. The relevant date for claiming protection would still be at the time of creation and fixation, but the formalities would require an affirmative step by the creator to show the desire to be granted protection. Copyright protection would no longer be the default.

As stated before, registration has never been a formal requirement for securing copyright protection, but having it be a requirement has several advantages. Having a registration requirement would allow for the transaction costs that plague the use and exploitation of works to be lowered by creating an accurate centralized database of protected works. This is similar to the database that the Creative Commons has created for this purpose, but instead of relying on a third party, the federal government could take this role.

This would not create a significant burden on the federal government since there are already systems in place for the registration of copyrighted works.[238] By making registration a requirement for protection better notice would be available for what works are protected and what works are part of the public domain. It would also allow for easy determination of when protected works would become part of the public domain.

The registration database would also be a useful tool to determine who the holder of a copyright is. This would not only be a benefit for those looking to use a work, but it would also be beneficial to the holder of the right. People that are looking to use a protected work will be able to locate the owner and enter into negotiations for use easier. This may create stronger incentives to create since exploiting one's work will become easier.

[238] 17 U.S.C.S. § 408 (Lexis 2017).

Notice is already a requirement under current law. This formality should remain in place in its current form. Current law requires registration as part of the process of curing a failure to attach notice to published works.[239] With registration being a requirement, the reasonable steps that are called for would be easier to accomplish, and the database would be a resource for those trying to determine an unmarked works current status.

One could argue that by requiring registration for copyrights a system would be created where works are registered by default and the new regime will become a useless effort to enrich the public domain. This is where the reinstatement of registration and renewal fees will come into play. Requiring a reasonable fee to secure a copyright will provide a form of negative incentive to register copyrights that an author has no interest in trying to exploit. Care should be taken to structure the fee in such a way that it does not become a barrier to entry, so to speak, but acts as a method of affecting a person's decision to file for a copyright.

In addition to the reintroduction of formalities the structure and length of copyright terms should be changed. The term of protection should be reverted back to a two term structure. This would allow for copyright owners to determine if it is in their interest to secure a second term of protection. In the event that the protected work is no longer of value to them they can then forgo renewal and allow the work to become part of the public domain. Any renewal fee can be structured to make sure that copyrights are not extended needlessly.

The two term structure would also allow reversion rights to remain with the creator. If the author holds the reversion right they will be in a better place to negotiate use of their work upon any renewal. But, the renewal right should be considered an interest that can be sold prior to the renewal term. This would allow for an increased incentive to create, and allow a licensee's

[239] Yen, *supra* note 4 at 187.

investment in a licensed work be maintained through negotiations. This way both incentives to create, and incentives to invest in exploitation will be in place.

The shortening of the overall copyright term will not be as important if the two term structure is put back in place. Taking current technology and global markets into consideration, a new term length should be determined. Technology has made it easier to exploit and monetize a work, and global markets have made the return higher. These facts show that it is not necessary to have term lengths that potentially last over a century in order to incentivize creation.[240] But, if an initial term of 50 years is followed by a renewal term of 50 years the public domain will still benefit. There is a potential that the formalities and renewal responsibilities will allow works that are no longer being monetized to become part of the public domain. While shorter terms would be desired, a two term structure would be step in the right direction.[241]

Finally, there needs to be rules put in place that limit how term extensions are applied. The trend of granting term extensions to existing and future works has created a system of nearly perpetual copyrights. Granted, the current terms have defined limits, but if that limit is continually extended those limits are nothing but facades. The current trend has been going on for approximately two-hundred years, and there is a real possibility that a new extension is in the pipes for 2018 when the last twenty year extension expires. Any future extensions granted should only apply to new copyrights.

I am aware that these changes would be problematic under international treaties that the U.S. is a party to such as the Berne Convention and the TRIPS agreement. The same problems that are being experienced in the U.S. are proliferating across the globe. The enclosure and shrinking of

[240] *See* 17 U.S.C.S. § 302 (LEXIS 2017) (current duration of copyright has a potential length of 120 years).
[241] An argument can be made to bring copyright more closely in line with current patent laws by limiting term lengths to around 20 years, but with the strength lobbying efforts by content industries, and the current term lengths available, it may be unrealistic to ask for such a drastic change.

the public domain is not unique to the U.S., but is being felt everywhere.[242] The U.S. plays a large role in determining global approaches to legal and policy issues. With its influence it could help update and reshape global copyright policy to be better suited to protect human culture by taking a lead instituting change.

F. Conclusion

As copyright laws become more expansive, our cultural commons, and the public domain shrinks. This means that as next generation of great thinkers and artists are born they will have less to work with, to create, to innovate, and to help shape our future. By taking a step back and looking at what has worked before we can make lasting changes to our laws that will help correct the balance needed in copyright law. The approach outlined above will get copyright laws and policy back in line with its original purpose of incentivizing creation for the public good, not for the individual benefit.

[242] More research needs to be done to fully understand the potential negative effects locking up creative, cultural, and intellectual works behind restrictive laws has on cultures and societies across the globe. Potential negative effects may actual reach further then future creativity and innovation.