

## AUTHORS, PUBLISHERS, AND PUBLIC GOODS: TRADING GOLD FOR DROSS

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### I. INTRODUCTION

Western law has historically granted more limited rights to the owners of intangible<sup>1</sup> works of authorship and invention than it has granted to the owners of tangible objects. This makes functional sense for two reasons. First, exclusion rights over intangibles are likely to impose more costs on the public than are exclusion rights

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Needless to say, not all these friends and colleagues would agree with what I say here. I am solely responsible for the views presented.

1. Inventions and works of authorship are “intangible” in the sense that they can be recreated even if they have no existence except in the mind. Thus, in Ray Bradbury’s classic, *FAHRENHEIT 451* (40th anniversary ed. 1993), book-lovers in a book-burning society could survive by memorizing the intangible arrangement of words that made up a given text. Federal copyright applies only when an intangible is “fixed in any tangible medium of expression” (that is, when the intangible arrangement is written down, filmed, recorded, painted, or otherwise embodied in a physical object). 17 U.S.C. § 102(a) (2000). That requirement serves evidentiary purposes (when something is “fixed” the world can better know what is owned), provides boundaries, and also adheres to the constitutional grant that limits Congress’s copyright powers to “Writings”. See U.S. CONST. art. I, § 8, cl. 8. Nevertheless, copyright law recognizes a continuing distinction between the intangible work of authorship, and the copy or phonorecord in which the work of authorship is embodied. See, e.g., 17 U.S.C. § 202 (ownership of copyright as distinct from ownership of material object.)

over tangibles.<sup>2</sup> Second, works of authorship and invention are capable of giving benefits inexhaustibly when shared,<sup>3</sup> and in a world

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2. Tangible items can, at least in theory, be produced via perfect competition, where price can equal marginal cost, marginal cost can equal average cost, and a hefty consumer surplus results. By contrast, intangibles that involve a high initial investment might not be produced if price equaled marginal cost, because for a copyist the marginal cost includes only the cost of physically duplicating and distributing an additional embodiment. Exclusivity allows the proprietor to charge a price above marginal cost, and thus potentially cover her average cost *including* the initial cost of creation. Unfortunately, another result of exclusivity is that fewer copies are made available, and consumer surplus is reduced, as compared with what would have occurred if incentives were not a problem or were provided by other means. *See* Harold Demsetz, *The Private Production of Public Goods*, J.L. & ECON., Apr. 1970, at 302 (discussing the economics of private and public goods); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (without copyright protection the market price of a book might be bid down to the marginal cost of copying, resulting in the author and publisher failing to recover their costs of creating the work).

Under copyright, many consumers who value the work above its marginal cost, and who are able and willing to pay a price at or above marginal cost, will be unable to purchase copies. *See id.* Similarly, many artists who value adapting and interpreting a prior work at or above the marginal cost of such adaptation, and who are able and willing to pay a price at or above its marginal cost, will be unable to purchase the licenses that copyright requires.

This reduced ability to consume or adapt is not necessarily a social loss: if the initial intangible could not have been created but for the lure of monopoly pricing, then the potential consumers and adapters are not necessarily worse off in a world *with* copyright than they would have been in a world lacking both copyright and the works it calls forth. *See* discussion *infra* Part IV (the “Nirvana fallacy”). (Note that I do not mean to deny that even as to works called forth by the incentive of copyright, copyright can make some consumers and second-generation artists worse off than they would have been in a world where neither copyright nor the desired work existed. *See* the examples collected in Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1555-59, 1567-70, 1583-1605 (1993) [hereinafter Gordon, *A Property Right in Self-Expression*]. My instant point is, rather, to concede that as to works called forth by the promise of the copyright monopoly, a social loss will not inevitably result from copyright.) However, to the extent that copyright gives broader or longer protection than would be necessary to induce a work to come forth—and some such overbreadth may be necessary in order to reach the works that *need* copyright protection in order to come forth—copyright necessarily produces social loss. The issue in the *Eldred* case is whether the Copyright Term Extension Act produces such social loss when it is *not* needed; that is, whether the extension produces losses without generating significant gains to creativity. “For the sake of the good we must submit to the evil,” said Lord Macaulay, “But the evil ought not to last a day longer than is necessary for the purpose of

filled with transaction costs, exclusion rights hamper sharing. The Constitution's Copyright and Patent Clause is explicit both in recognizing that copyrights and patents must serve the public benefit, and in articulating a primary tool needed to serve that goal: limits on duration.<sup>4</sup> Once a work has been called forth, ordinary competition (which results from free copying) will reduce the price of copying and adaptation, and expand both creative use of the work and other forms of dissemination.<sup>5</sup> The durational limit lies at the center of the *Eldred v. Ashcroft*<sup>6</sup> controversy which this Symposium addresses.

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securing the good." Macaulay Thomas Speech Before the House of Commons (Feb. 5, 1841), in 8 THE WORKS OF LORD MACAULAY 203-04 (Lady Trevelyan ed., 1906).

3. Compare, for example, the familiar image of a "tragic common": when every family in a village can graze its cows on the same field, but can individually keep the profits from the resulting milk and meat, they may put so many cows on the common that the cows trample the grass to mud. See THOMAS SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 110-15, 216-17, 231 (1978); Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1244-45. For an intangible like a song, by contrast, even the worst set of off-key singers cannot destroy the song.

Admittedly, even for intangibles there might be some problems of congestion. However, for intangibles, the far worse dangers are those that propertization poses: in particular, the possibility that too many claimants will exist, inhibiting each other's ability to use the resource. This has become known as the tragic anticommons. See, e.g., Michael A. Heller and Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, SCIENCE, May 1, 1998, at 698-701, available at <http://www.sciencemag.org/search.dtl>.

4. "The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. For further explanation, see the immediately following note, and discussion *infra* Part IV.

5. As mentioned, exclusive rights are an awkward mode of inducing the creative persons to produce intangibles. That is because intangibles are inexhaustible, and exclusivity artificially limits sharing. Even in the abstract, there is no way to both provide an inexhaustible intangible and simultaneously produce a quantity of copies that is equal to what would be available under perfect competition—except (1) by using perfect price discrimination, see Demsetz, *supra* note 2, or (2) under circumstances where incentives are otherwise available from the start, or (3) when, under the protection of a intellectual-property monopoly, the revenues so exceed initial startup costs that, at some point, profit covers the startup cost (even multiplied by risk taken), and the special monopoly can cease.

The first option, perfect price discrimination, would indeed disseminate a copy, or a permission, to everyone who values the copy or permission at or

The plaintiffs in *Eldred* attack Congress's most recent extension of the copyright term—the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).<sup>7</sup> In particular, plaintiffs question Congress's decision to apply this particular extended term retrospectively; it is hard to see any social benefit gained by the extra twenty years that the CTEA adds to the already long copyright terms possessed by works already in existence when the CTEA was passed.<sup>8</sup> This Article makes three contributions to the debate relative to both the retrospectively and prospectively applied term extensions.

First, the Article clarifies the issue of the CTEA's retrospective application. As the Article makes clear, to declare the CTEA invalid would not call into question all previous legislation in which Congress granted copyright to pre-existing works. Applying copyright to

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above marginal cost. However, perfect price discrimination accomplishes this trick by eliminating consumer surplus. See Demsetz, *supra* note 2 at 306. So even if the option were available—which in practice it is not—we might doubt its desirability.

The second option rests on the possibility that for some works, copyright is unnecessary. For example, an author's internal drive to express herself or an inventor's scientific curiosity may bring some works forth. Similarly, the goal of achieving academic tenure may call some writings and inventions into being. As another example, a patron or governmental agency might subsidize creativity and inventive activity. When such conditions are present, perfect competition may produce the optimal number of copies and adaptations without loss of incentive.

(The reader may wonder why I have omitted important factors such as lead-time advantage from this second category. Devices such as lead time, reputation, or a superior distributional system may indeed be sufficient to deter copying and generate high revenues. However, these devices provide incentives by creating temporary monopolies, and with them deadweight loss. They therefore are not examples of perfect competition, but rather of monopolies produced by self-help. They may pose different administrative costs than copyright law does, but they are not free of deadweight loss.)

The third option, ending the monopoly when most of its incentive benefits have been given, is the one the Constitution most explicitly adopts. It limits duration. See U.S. CONST. art. I, § 8, cl. 8; see also discussion *infra* Part IV.

6. *Eldred v. Ashcroft*, No. 01-618 (U.S. oral argument Oct. 9, 2002).

7. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304 (2000)).

8. See *id.* The instant Article argues that not all retrospective grants of copyright are invalid. Some are justifiable, for example, as a mode of promise-keeping that increases incentives to creative activity. My contention is that the CTEA is not justifiable in this way. See discussion *infra* Part III.A. Nor does it seem justifiable in any other way.

pre-existing works is not in itself a constitutional infirmity. The Constitution would seem to be satisfied so long as the retrospective portion of the law provides some real assistance to creativity. The problem is that the CTEA does not.

By way of contrast, consider copyright law as it existed prior to 1978. Writings were protected by state copyright so long as they were unpublished, and federal law attached only when these pre-existing works were published with proper federal copyright notice. That was a form of retrospective grant: already-existing works received federal copyright. But there was nothing unconstitutional about it. For Congress to promise that federal copyright would attach when state copyright was lost gave authors a safeguard that encouraged them to create in the first instance.<sup>9</sup> That federal grant was a form of promise-keeping to authors: create your work and when it is published, federal law will protect it. Incentives for creativity were thereby provided.

Similarly, there would be no constitutional defect in extending copyright to pre-existing works in other circumstances that provide significant encouragement to authorial activity. For example, authors may need assurance that the United States will remain sufficiently consistent with its trading partners that our authors can anticipate receiving recognition of their rights abroad.

However, the CTEA does none of these things. It does not preserve authorial expectations,<sup>10</sup> it does not make our law consistent with that of other nations,<sup>11</sup> and it does not encourage creativity<sup>12</sup>—it

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9. The rule that allowed federal copyright to attach at publication assured authors that when they circulated their work to the public—when it would be the most vulnerable to copying by strangers—federal law would prevent the free riding.

The Copyright Act of 1976 changed the effect of publication. Under the 1976 Act, federal copyright attaches as soon as an author fixes a creative work of authorship in a tangible medium of expression. *See* 17 U.S.C. § 102(a). The effective date of the 1976 Act was January 1, 1978.

Even prior to the 1976 Act, some unpublished works could be federally protected, so that the distinction between unpublished and published works was not always crucial. Nevertheless, in 1978 the line between unpublished and published works became immensely less important than it had been.

10. *See* discussion *infra* Part III.A.

11. *See* Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, No. 01-618, at 16-19 (the CTEA does not harmonize our law with Europe's, and in some ways increases discrepancies between the American and foreign regimes).

simply discourages it. At most the CTEA encourages non-creative activity: because new technology has given the output of certain noncreative physical efforts some characteristics of “public goods,”<sup>13</sup> the CTEA may possibly encourage the restoration of some films and the digitization and distribution of some other products.<sup>14</sup>

As to such possible (albeit unlikely) social gain, the Article contends that encouraging noncreative restoration and dissemination is *not among the purposes that the Framers envisaged when they adopted the Copyright Clause*.<sup>15</sup> Undoubtedly, the Framers valued dissemination, but in the eighteenth century, so long as creative persons and their assignees were protected from copying, the physical aspect of publishing could take care of itself.<sup>16</sup> This distinction is important, particularly given the weight that the District of Columbia Circuit Court of Appeals placed on the possibility that the CTEA

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12. See discussion *infra* Part III.A. This Article defines “creative” activity as the kind of activity that gives rise to its own copyright. It can include selection, arrangement, the use of aesthetic judgment, and so on. Creativity in copyright is not a high standard, but some threshold test of creativity is inherent in the constitutional term, “Authors,” U.S. CONST. art I, § 8, cl. 8, and in the statutory term, “original work of authorship.” 17 U.S.C. § 102(a). See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991).

Conversely, this Article defines “uncreative” or “noncreative” activity as effort that would not itself support a copyright.

Someone pursuing a “creative” activity—for example, someone who restores an old film in a creative way—has legal protection from copying without the CTEA: at the moment the creative work is fixed in tangible media, a new copyright arises. By contrast, for someone pursuing a “noncreative” activity—for example, the noncreative restorer or disseminator—only by piggy-backing on the original copyright can legal protection from copying be obtained. See discussion *infra* Part III.D.

13. This is discussed further *infra* Part II. Intellectual property law can be seen as an effort to cure a form of market failure stemming from the fact that intangibles, once circulated, are hard to fence off from nonpurchasers. Such third parties can copy the intangible, and resell it in competition with the originator. “Public goods” like military defense similarly cannot easily be withheld from non-payers, and they too are inexhaustible over a large range of use. Intangibles are therefore said to have “public goods” characteristics. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610-11 (1982) [hereinafter Gordon, *Fair Use as Market Failure*] and sources cited therein.

14. See discussion *infra* Part II.

15. See discussion *infra* Part II.

16. See discussion *infra* Part II, notes 35-39, 46-50 and accompanying text.

would encourage noncreative physical activity including film preservation.<sup>17</sup>

Many amici and scholars have argued that activities such as film restoration and preservation are more likely to be hurt than helped by the CTEA.<sup>18</sup> I agree, but the burden of my argument is different. I here suggest that (a) even if the CTEA contributes to solving a public goods problem faced by some persons interested in doing noncreative film restoration and dissemination (b) more than it adds to the transaction cost and anticommons problems faced by *other* film restorers and disseminators,<sup>19</sup> (c) the CTEA nevertheless can be

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17. The Circuit Court of Appeals wrote:

The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. If called upon to do so, therefore, we might well hold that the application of the CTEA to subsisting copyrights is “plainly adapted” and “appropriate” to “promot[ing] progress.”

*Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001) (citation omitted).

All this talk of film restoration should not obscure the likely real beneficiaries of the CTEA: owners of copyright in works whose investments have long been repaid, whom the CTEA will not encourage to engage in significant new work of restoration, and who will use the CTEA to seize what would otherwise have been consumer surplus for themselves.

18. *See, e.g.*, Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners at 2-3, 14, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Hal Roach Brief]. The problems here involve, *e.g.*, transaction costs (locating the owner of copyright in a long-ago created work can be difficult if not impossible), strategic behavior, and “anticommons” difficulties (when many parties have claim rights, a resource may end up unused because of difficulties coordinating the claimants). To illustrate the latter: to make copies or to perform an old movie whose copyright assignments have been returned to heirs via the termination right (*see* 17 U.S.C. §§ 203, 304), a restorer or disseminator would either need to wait until copyright expired, or would need to obtain licenses from (among others) the owner of copyright in any underlying book or story on which the movie was based, the owner of copyright in any independently created musical works used in the movie (*e.g.*, hit songs played in the background), the owner of copyright in any independently created vocal performances embedded in the musical soundtrack (*e.g.*, the sound recordings of hit songs played in the background), and the owner of copyright in the cinematography. There may be an independently created screenplay and other creative works which are separately owned as well.

19. *See* the immediately preceding note.

invalidated because the Constitution permits a strong distinction to be made between uncreative activity and creative activity.<sup>20</sup>

Because the instant retrospective term extension has only negative effects on creativity, the distinction between creative and uncreative activity helps clarify the constitutional defects of this particular retrospective term extension. For prospective term extension as well, the distinction may relieve the Court of the need to parse certain empirical claims.

Second, this Article stresses that the CTEA's negative effects on creativity are not just a matter of authors having to pay more when they want to adapt prior generations' copyrighted materials. The more pernicious evil is that term extension may prevent "diverse and antagonistic"<sup>21</sup> voices from creating exactly the works we most need them to create. The Article borrows from literature on the creative process to argue that copyright extension could erode the creative community's ability to renew itself.<sup>22</sup>

Third, the Article shows how, as an intellectual property term grows longer, the costs grow disproportionately faster than do the benefits.<sup>23</sup> That means that after some point in time, copyright

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20. See discussion *infra* notes 59-61 and accompanying text (in particular the discussion of *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)).

21. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 192 (1997), quoting with approval from *Turner Broad. Sys., Inc. v. FCC* 512 U.S. 622, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion), (quoting from *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

22. See discussion *infra* Part III.C.

23. This raises an argument analogous to that of Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits Of Uncertainty And Non-Injunctive Remedies*, 97 MICH. L. REV. 985 (1999). They write:

Legal scholars have failed to appreciate that unconstrained monopoly pricing is not a cost-justified means of rewarding patentees. The last bit of monopoly pricing produces large amounts of dead-weight loss for a relatively small amount of patentee profit. ***If society wants to use patent profits to induce innovation, it should choose the method of producing a particular level of profit that produces the least cost to society.*** But allowing patentees to raise price all the way to the monopoly level is a little like giving them a license to steal car radios—it produces a social cost (to car owners) far greater than the private benefit.

*Id.* at 987 (emphasis added).

suppresses more speech than it calls forth—and an extension such as the CTEA is likely to suppress speech without calling forth any new speech at all.<sup>24</sup> The Article also reminds the reader that the dry language of economics is talking about more than impact on Gross National Product: when an economist talks of “higher costs and lower production of new creative works,”<sup>25</sup> he is talking not only of dollars and cents, but also of human abilities to process their experience through art.

This Article does not argue for a particular level of scrutiny. Rather, it assumes that the Court will find the First Amendment applicable, and that some level of significant scrutiny will be applied. The goal of this Article is simply to offer a set of observations that may be useful to the Court at whatever analytic level it chooses to employ.

This Introduction ends with a quotation from Samuel Johnson, who succinctly sounds the basic themes:

[A] certain degree of reputation is acquired merely by approving the works of genius, and testifying a regard to the memory of authors . . . and therefore to ensure a participation of fame with a celebrated poet, many, who would, perhaps, have contributed to starve him when alive, have heaped expensive pageants upon his grave.<sup>26</sup>

Johnson’s purpose in penning these words was not primarily to condemn those who would “starve” authors, although Johnson undoubtedly *did* condemn them.<sup>27</sup> The ostensible goal of the passage was rather to call attention to a benefit at Drury Lane Theater, to be held for an author’s impoverished descendant.<sup>28</sup> The quoted

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24. See discussion *infra* Part IV.

25. Brief of George A. Akerlof et al. as Amici Curiae in support of Petitioners at 12, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Economists’ Brief*].

26. So wrote Samuel Johnson in the *General Advertiser* of 1750. From the 1750 entry in James Boswell’s *Life of Johnson*, edited from the two-volume Oxford edition of 1904 by Jack Lynch, available at <http://newark.rutgers.edu/~jlynch/Texts/BLJ/blj50.html> [hereinafter *Boswell’s Life of Johnson*].

27. See *id.* Johnson initially became a writer by necessity, not by choice, and in early days often found himself in poverty despite writing as much as he could.

28. Johnson’s primary purpose in writing this passage was to encourage attendance at the benefit theater performance for which he had written a prologue. The benefit aimed to provide money for the apparently impoverished

language contains two ironies well worth attending in the context of *Eldred*.

First, the passage suggests that posthumous honors may involve a bit of hypocrisy. While a writer is struggling or unpopular, it takes real courage to come to her aid or even to appreciate her work. Yet after the writer has succeeded, and time has proved her reputation durable, the same people who ignored the author when alive may, after the writer has become one of the “illustrious dead,”<sup>29</sup> think to give a shine to their own reputations by giving kudos to the author and money to the author’s descendants. If so, Johnson intimates that such generosity should be redirected to living authors. In our own era, federal and local governments have many options for providing aid to authors that would be more effective than copyright term extensions—such as increasing the budget of the National Endowment for the Arts or the Humanities, or the national and local museums. However, these other routes are politically more difficult than increasing the duration of copyright *post mortem auctoris*.<sup>30</sup>

Second, please note the source from which the passage from Johnson was obtained: it is a free web site.<sup>31</sup> Anyone who wants to check the full context of the words quoted can easily do so by looking at that site. If the passage were still in copyright, conceivably someone might nevertheless have put it on the Internet, but probably the process would have involved a license fee, and so would public access. The easy accessibility to Johnson’s words arises because of—not despite—their public domain status. Admittedly, this will

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and elderly granddaughter of poet John Milton. *See id.* Incidentally, retrospective term extension would not have helped the granddaughter: Milton had already sold his copyright, and English law apparently had no provision that allowed for a copyright’s recapture by heirs. *See* Macaulay Thomas Speech Before the House of Commons (Feb. 5, 1841), in 8 THE WORKS OF LORD MACAULAY 203-04 (Lady Trevelyan ed., 1906) [hereinafter Macaulay Speech of 1841], available at <http://www.johnsonhome.org/2002/11/25/0345/03329>. That Johnson himself, poking a bit of nasty fun at those who sought to polish their own reputations by attending is (I think) a characteristic Johnsonian touch.

29. *See id.*

30. *See* David Vaver, *Intellectual Property: The State of the Art*, 116 LAW Q. REV. 621, 636 (2000) (“The recent expansion of intellectual property has come to be more an end in itself than a means to the end of stimulating desirable innovation.”).

31. <http://newark.rutgers.edu/~jlynch/Texts/BLJ/blj50.html>.

not always be the case; just as some works will be disseminated more easily if they are in the public domain,<sup>32</sup> it is conceivable that other works will be disseminated more easily if the publisher or restorer can purchase an exclusive license.<sup>33</sup> My estimate is that an overly broad tool such as copyright extension will result in more negative effects than positive effects on noncreative dissemination activity.<sup>34</sup> However, even if a term extension were to generate more noncreative dissemination than would a shorter term, that increase would be outweighed by loss to creativity.

## II. PUBLIC GOODS AND PRISONER'S DILEMMAS: THE FRAMERS PERCEIVED AUTHORIAL ACTIVITY AS DIFFERENT

At the time of the Framers, publishers and restorers of old works were engaged in an enterprise whose costs followed the usual cost

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32. Boswell's *Life of Johnson* is an example. *See supra* note 26.

33. For examples of the different situations that can be faced by persons desiring to disseminate old works, compare, e.g., Brief for the Respondent at 34, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Brief for Respondent], with, e.g., Brief for Petitioners at 18-23, *Eldred v. Ashcroft*, No. 01-618, and Hal Roach Brief, *supra* note 18, at 1-3.

34. Where the copyright owner cannot be located, or where many copyright owners' consent would be necessary, the high transaction costs may prevent dissemination. In such a case, public domain status eliminates transaction costs and makes dissemination more likely. Since digitization is often an inexpensive proposition, eliminating transaction costs and license fees will often be sufficient to allow persons such as plaintiffs to anticipate a net benefit from engaging in dissemination. In other situations, it may be easy to find and obtain a license from the copyright holder, but expensive to restore or digitize the work. In such a case, where transaction costs are low but production costs are high, dissemination may happen anyway, since there are many ways to take advantage of one's effort without copyright, such as lead time. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299 (1970). Nevertheless, it is conceivable that in some subgroup of the latter class of cases, dissemination would be furthered by having a long copyright term, so that the restorer or digitizer can purchase an exclusive license. To determine what kinds of situations are more likely to occur, and what kinds of works and modes of dissemination are differentially affected, is an empirical question. More importantly, given the very different nature of the problems faced by the two classes of cases, the broad brush of copyright extension—which gives roughly a century of exclusivity to all works—is a particularly inappropriate tool.

patterns of tangible manufacturing.<sup>35</sup> If a Pennsylvania newspaper set the day's stories in type, a New York newspaper could not copy without incurring its own costs to set the same stories in its own type.<sup>36</sup> The only free riding in such a case pertained to the intellectual content of the story. There was no way for the second newspaper to free ride on the physical labor of the first entity to print the document.

The reader may think this overly simplified. Cannot the second publisher copy (free ride on) the first publisher's mode of layout, or the first publisher's choice of topics worth news coverage? The answer is yes; the second publisher could free ride on the first publisher's layout and topic choice. However, arrangement and selection are *creative* aspects of what publishers do, and are potentially entitled to copyrights of their own.<sup>37</sup> My point is not that publishers in the eighteenth century did nothing creative or nothing on which others could free ride. Rather, the point is that the *noncreative*, purely physical aspects of what publishers did in those days was not significantly susceptible to free riding. The distinction I am drawing is between creative and noncreative activity, not between authors and publishers *per se*.

The primary economic goal of copyright is to provide incentives that would otherwise be lacking.<sup>38</sup> For physical goods, ordinary, non-monopolistic competition provides adequate incentives for production. Ordinary competition also provides a low price to consumers. For the physical aspects of typesetting, then, a monopoly would have raised costs without providing any societal benefit.

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35. See EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 17 (2000) (describing how early printing presses were laborious to use and showing the requirement of typesetting).

36. *Id.*

37. See 17 U.S.C. § 103 (2000) (compilations).

38. See Demsetz, *supra* note 2 and accompanying text. Some commentators argue that intellectual property also serves to centralize control in a useful way. See Edmund W. Kitch, *Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977). However, I do not see evidence of this concern in the Framers' debates. Moreover, the centralization argument has little force when applied to copyright, a field whose merit is diversity rather than centralization. See Economists' Brief, *supra* note 25 at 12-15.

Encouraging the physical aspects of typesetting was in no way part of the Framers' goals.<sup>39</sup>

Publishing did not need a monopoly to encourage its physical and noncreative efforts because the laws of both tangible property and contract amply protect those investments of labor and money. It is only when publishers stood in authors' shoes (as licensees and assignees of authors, or as authors themselves when they made creative compilations) that publishers bore costs for something that could be copied. Only then—having obligations to pay independent authors or creative employees—would publishers have an investment that might raise their costs higher than a copier's, and only then did they have a conceivable need for copyright protection for the costs of creativity.

In short, when England abandoned the practice of giving monopolies to publishers *as* publishers and began giving copyright only to "authors,"<sup>40</sup> and when our Constitution and statutes followed suit, the implicit plan was this: To encourage the writers by a monopoly and to encourage the publishers by the ordinary economic system operating through the legal regime of tangible property and contract. Once copyright helped the writers, at least in the eighteenth century, the disseminators could take care of themselves.

In some ways, this contention is counterintuitive. It may seem that I am arguing that dissemination was not part of the Framers'

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39. See L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662* (June 28, 2002) (unpublished draft on file with author).

40. Publishers can still hold copyrights, of course, but they have to do so as authors (if they themselves do creative work), or as assignees or employers of authors. My concern is with publishers who seek to own copyright on account of noncreative activity. On publishers' role in the early history of copyright, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 37-43 (1994); see also BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967). Admittedly, publishing entities did much of the lobbying that led to copyright., see GOLDSTEIN, *supra*, and continue to influence legislation. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857, 870-82 (1987); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 *OR. L. REV.* 19 (1996). But the identity of the lobbyists who push for legislation is hardly determinative of how the legislation is to be interpreted. In all legislation, much lobbying is done by people who stand to gain monetarily. Nevertheless, they seek to persuade by pointing to the benefit the public will reap, and it is in terms of public rather than private benefit that the legislation is worded and interpreted.

goals. Far from it: the Framers of course cared about dissemination. However, at the time of the Framers, ordinary economic forces took care of dissemination's physical aspects. It was only what could be copied—the creative component—that needed legal protection against copying if it was to be disseminated.

Further, this is how the legal system operated. When copyright was given to authors rather than publishers in England's Statute of Anne<sup>41</sup> and in our own country's initial copyright statute,<sup>42</sup> noncreative disseminators could have a right to exclude only by purchasing or licensing an author's copyright.<sup>43</sup> It was that payment to the author—the investment in creativity—that copyright law sheltered. The copyright law shielded the publisher who had paid something to the author, from competition by the publisher who had paid nothing to the author.<sup>44</sup> It did not aim to protect one publisher's physical investment from competition by another publisher who made a similar physical investment of his own.<sup>45</sup>

In fact, the Framers were quite worried that a monopoly unrelated to creativity would result from the Copyright and Patent Clause. They deliberately drafted the Clause to avoid this and related dangers.<sup>46</sup>

While a monopoly over physical processes was unnecessary in the Framers' day, changing technology has now made it possible for copiers to free ride on some products of physical effort. The newspaper that puts a story in print can be photocopied, or cheaply scanned into a competitor's computer. A movie can also be duplicated at less cost than it took to restore. Similarly, someone who spends great sums compiling data that he sells in CD-ROM form can find his data copied and resold in seconds.<sup>47</sup> As a result, modern

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41. See An Act for the Encouragement of Learning, 1710, 8 Ann., c. 21 (Eng.) ("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.").

42. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1802).

43. See *id.*

44. See *id.*

45. See *id.*

46. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001) (describing how the Framers were guided by the Statute of Anne, which was designed to destroy the booksellers' monopoly of the booktrade).

47. The example is drawn from *Pro-CD v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Unfortunately, that case dangerously and improperly suggests that

publishers might claim that they, like authors, face a situation where their investments are open to dangerous free riding<sup>48</sup> because their products are “public goods”: inexhaustible, and sometimes hard to fence off from users who have not paid for the privilege of use.<sup>49</sup> Modern publishers could argue that without some form of copyright protection, they will not optimally invest in collecting, typesetting, or film restoration, which may be easily and cheaply duplicated. Such an argument was apparently made on behalf of the CTEA.<sup>50</sup>

The argument has many theoretical and empirical flaws from an economic perspective. Before returning to the historical question of the Framers’ perspective, let me discuss some of those economic arguments.

A creative or noncreative “public good” can plausibly claim to need protection from copying only when certain conditions appear. These conditions—what one might call prisoner’s dilemma

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mass-market shrinkwrap and click-through contracts should be enforceable to restrain copying. *See id.* Such contracts—including their ability to foster price discrimination—are the functional equivalents to copyright. *See* Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998). Congress, rather than private dictate, should adjust the applicable policies, and mass market contracts restraining the copying of non-creative literary works should be pre-empted. *Id.*

48. As will appear in the discussion immediately below, see notes 50-54 and accompanying text, free riding is likely to be dangerous only in limited situations that give rise to “prisoner’s dilemma.” *See* Wendy Gordon & Robert Bone, *Copyright*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 189-223 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, *On Owning Information*]; Wendy J. Gordon, *Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 853-69, 871-81 (1992) [hereinafter Gordon, *Asymmetric Market Failure*].

49. For a further definition of public goods, see *supra*, note 13.

In the early stages of writing on the economics of copyright, it was easy to overstate the dangers of underproduction supposedly faced by public goods. For an example of my own possible over-enthusiasm, see Gordon, *Fair Use as Market Failure* *supra* note 13 at 1610-11; *see also* Demsetz, *supra* note 2, at 306 (suggesting that when nonpurchasers cannot be excluded from using a public good at a reasonable cost, a system of private production “does not seem to be practical”).

50. *See supra* note 17 (quoting from *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)).

conditions<sup>51</sup>—include the simultaneous occurrence of high initial investment, lack of lead-time advantage, cheap and quick copying, absence of nonmonetary rewards, and perfect substitutability between the original product and the copy.<sup>52</sup> When one or more of the conditions are absent, creative or industrious effort can earn significant revenues even without a legal prohibition on copying. For all of these to appear simultaneously—or even for a significant number of

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51. A “prisoner’s dilemma” is a situation where parties seeking their own self-interest will probably be unable to achieve the desired benefits for themselves without some mode of coordination. A mode of coordination, such as contract, morality, or copyright law, changes the payoffs to non-cooperative behavior and generates higher results for the group. See Gordon, *Asymmetric Market Failure*, *supra* note 48, at 859-68.

52. Only if seven core conditions are present would a prisoner’s dilemma exist whose payoff structure actively discourages independent creation. These conditions are:

- (1) The cost of independent creation or production is very high.
- (2) A second party is able to copy the creation/production from its originator at a cost lower than the cost of independent creation, and no other restraint (e.g., a sense of fair play) adds significantly to the copier’s reasons for refraining from making copies.
- (3) These copies are perfect substitutes for the originator’s product, being identical to the originator’s product in regard to all characteristics that affect consumer preferences. Such characteristics include, *inter alia*: quality, reliability, number and quality of distribution networks, authenticity and associational value, and support services provided in connection with the product.
- (4) Consumers perceive the two products to be perfect substitutes. (Arguably, if this condition is met, it does not matter if the copies indeed *are* perfect substitutes.) The originator cannot rely on lead-time advantage, willingness to provide support services, or brand loyalty to distinguish his goods from the imitators’ goods.
- (5) The difference between the cost of copying and the cost of independent creation is high enough that the price the copyist charges will be significantly less than the price the originator would have to charge in order to recoup his costs of independent creation.
- (6) In the absence of an opportunity to recoup the costs of independent creation, no one will invest in creative activity. That is, nonmonetary remuneration (such as prestige, or the desire for artistic satisfaction) plays no role in inducing the originator’s creation or production.
- (7) The independent creator or producer can recoup her costs only by means of selling or licensing copies, and in doing so, she has no effective recourse to price discrimination.

The above list closely follows that in Gordon & Bone, *supra* note 48, at 199-200.

them to appear at the same time—is fairly rare.<sup>53</sup> To grant a monopoly where a monopoly is unnecessary simply raises prices, and reduces access. By definition, free riding is beneficial;<sup>54</sup> it is only in special circumstances that it can impose costs as well.

Aside from the constitutional text, then, there can be significant reasons to avoid giving publishers legal protection against free riding unless the protection is sufficiently narrowly drawn. Public goods are everywhere,<sup>55</sup> and the inexhaustibility they promise is something to be savored. The inexhaustible benefits from public goods should be made scarce if that is the only way incentives can be provided—and often there exists a wealth of other institutional alternatives for providing incentives. The very fact that public goods *are* everywhere is testament to the fact that explicit legal protection is not always required for them to come into being.

To this should be added the way that the CTEA will *aggravate* many transaction cost and anticommons problems. This has been well addressed by others.<sup>56</sup>

Although the overall effect that the CTEA would have on even noncreative activity is highly likely to be negative, from a legal

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53. The examples collected in Breyer, *supra* note 34, at 323-50, are illuminating. Also see, e.g., Björn Frank, *On an Art Without Copyright*, 49 KYKLOS 3 (1996), reprinted in INTELLECTUAL PROPERTY 49-61 (Peter Drachos ed., 1999); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L.REV. 261 (1989).

54. Free riding always produces a benefit, namely, the “ride” provided to the unauthorized user and those she serves. See, e.g., KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2, *supra* note 40 (learning is a form of free riding)

To free ride is to benefit without paying. Even for tangible goods, free riding may not cause harm: to benefit from my apple, you may gaze at its beauty (not harmful) as well as take a bite out of it (harmful). That is because every physical good has a tangible as well as an intangible aspect.

Harm is even less likely when a stranger benefits from a good that is *defined* as an inexhaustible intangible: no matter how many times a song or photograph or text is copied, the original remains intact. This characteristic applies to the “new” public goods such as computer programs and copyable restored movies, as well as to works of authorship.

55. Consider any product launch: if successful, the new product will be imitated, but product launches are immensely expensive and risky to undertake. Every industry therefore faces, on occasion, a public goods problem when it launches a new service or good. Nevertheless, product launchees continue.

56. See *supra* note 18 and sources cited therein.

perspective the most interesting question arises by assuming the opposite for the sake of argument: that the CTEA might have a net beneficial effect on noncreative restoration and publication. So let us assume *arguendo* that a significant number of restorers and publishers would need the CTEA's extra twenty years of protection against copying if they are to have incentive to engage in an optimal amount of noncreative activity.<sup>57</sup> Let us also assume *arguendo* that the CTEA could improve the incentives for this noncreative activity more than it would impair the noncreative activities of other potential restorers and publishers. Finally, let us also assume *arguendo* that American institutions could tolerate giving a property-right form of monopoly to resolve this assumed paucity of incentives.<sup>58</sup> If this were the state of the world, could Congress constitutionally use copyright to provide noncreative laborers protection against those who would free ride on their physical effort?

This is similar to the very question faced in *Feist*, and the Court answered "No."<sup>59</sup> An entity that had collected a series of names and telephone numbers sought to use copyright to prevent the data from being copied.<sup>60</sup> The Supreme Court struck down the plaintiff's copyright on the ground that no creative selection or arrangement had gone into the compilation—and that both the statute and the Constitution required such creativity as a precondition for protection.<sup>61</sup>

Conceivably, the Court in deciding *Eldred* could turn away from the direction indicated by *Feist* and could decide that the Copyright

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57. That means we are assuming many persons in their role as noncreative disseminators and restorers face a situation where, absent coordination or a device such as copyright to alter the relevant payoffs, the results would be socially and individually suboptimal—a prisoner's dilemma.

58. Copyright gives a set of entitlements that is much broader than the protections against free riding that our common-law traditions would otherwise justify. See Gordon, *On Owning Information*, *supra* note 48, at 159-197 (arguing, inter alia, that a fact-sensitive unfair competition tort, and not a property right, is the most anti-copying protection that should be allowed for noncreative works).

59. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

60. See *id.* at 341.

61. See *id.* at 346. In *Feist* the noncreative laborer sought a copyright for its own work product, see *id.* at 373, while under the CTEA, Congress protects the noncreative laborer by means of extending the copyright in someone else's creative product. In *Eldred*, the proponents of the CTEA have made much of the fact that *Feist* is distinguishable. See Brief for the Respondent, *supra* note 33, at 21-23. The distinction is there, but it is more formal than substantive.

Clause is a warrant for protecting *any* industry that both furthers the “Progress of Science”<sup>62</sup> and faces a public goods and prisoner’s dilemma problem. Such an odd and dangerous result is conceivable because the Framers, not having faced the issue of physical effort that was susceptible to free riding, left no black letter dictate one way or the other. My point, therefore, is not that the Constitution explicitly prohibits Congress from “promot[ing] Progress” by fostering monopolies on physical processes. Rather, I suggest that for the Court to find that Congress could promote “Progress” in this way, the Court would be taking a step away from its previous understandings<sup>63</sup> and from the Framers’ own conceptions of the Clause.

Further, should the Court take such a step, it would be allowing Congress to manipulate copyright and patent for the purpose of aiding any industry that has a plausible claim to promoting Progress. Few industries cannot make such a claim. A host of new special interests would enter the lobbying fray as against the interests of the creative and of the public.

Where does this leave us? If the Court wishes to keep going in the direction signaled by *Feist*, and avoid opening the copyright and patent laws to distortion, the Court should hold that weight should be given *only* to the statute’s effects on creativity, or that evaluating legislation under the Copyright Clause requires weighing the legislation’s effects on creativity *more strongly* than the legislation’s effects on noncreative dissemination—much as a given ingot of gold far outweighs a silver ingot of equal volume.<sup>64</sup>

In my view, the CTEA does not even provide a significant amount of “silver” (noncreative activity), primarily because term extension makes it *harder* to disseminate many works. Therefore, what we are really trading for the gold of creativity is not silver but merely dross.

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62. U.S. CONST. art I, § 8, cl. 8.

63. See *Feist*, 499 U.S. at 340.

64. By labeling creativity “gold” and the noncreative dissemination “silver,” I do not mean to be claiming that new works are more valuable than old. I am not even making a factual claim as to whether creating new works or restoring the old contributes more to “Progress.” Rather, I am suggesting that given the purposes of copyright, when assessing a change in the copyright regime one must give more weight to incentives to be creative than to incentives to preserve, restore, and mechanically disseminate works.

### III. BENEFITS AND COSTS TO THE CREATIVE

This Section has several parts. In the first, I will show the negligible positive effect that the retrospective extension is likely to have on creative persons. In the second, I will make vivid some of the nonmonetary burdens that any term extension will impose on the creative. In the third, I will show that the CTEA's retrospective extension only provides meaningful incentives to the noncreative. If this is so, the nation in adhering to the CTEA is at best giving up new authorship (gold) in order to obtain increased noncreative labor (silver). In adopting the CTEA, Congress intentionally or unintentionally seeks increased dissemination at the cost of a decrease in creativity.

#### *A. Retrospective Term Extension: Positive Effect on Creative Persons?*

The defenders of the CTEA have made an argument that extending the copyright term in already-existing works gives incentives to authors to generate new works.<sup>65</sup> The argument depends on the following set of propositions, all of which (except the first) are far-fetched, yet all of which must be true before the term extension of already-existing copyrights could have any impact on the creation of new works. The argument fails. Here are its necessary components:

- (1) A significant number of authors on a significant number of occasions are encouraged to create new works by the prospect of their heirs receiving royalties, or by the prospect of receiving current payment that reflects a more than trivially long term of copyright.<sup>66</sup>
- (2) A significant number of authors will be significantly less encouraged by a term of copyright that extends fifty years after

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65. See Brief for Respondent, *supra* note 33, at 31.

66. See *id.* at 26 n.17. The arguments here can easily be restated in terms of work-for-hire. For works-for-hire, the copyright owner may be a corporation who has no heirs of the body, but if an extended term is likely to be valuable to someone, that value—discounted to the present—could raise the current value of the hiring party's copyright. See the numeric example, *infra* at Part III.B. The numeric example was crafted to make the term that the non-employee author would expect to receive *match* the work-for-hire term.

their death than they would be by a copyright that extends seventy years after their death.<sup>67</sup>

(3) The rewards promised by the life-plus-50-year term, which Congress made effective in 1978, had by the time of the CTEA been eroded by technological or other changes.<sup>68</sup>

(4) Authors today perceive the erosion and believe that such reduction of profit will continue.<sup>69</sup>

(5) The discouragement that a current author would otherwise feel in facing the prospect of a reduction in profit because of technological change can be significantly reduced by extending the copyright term.<sup>70</sup>

(6) Authors will see the CTEA as a compensatory response to this diminished profit stream.<sup>71</sup>

(7) In giving an extra twenty years post mortem to works already created, the CTEA will assure current authors that they can put energy into creating new works without fear that the "value" of the term currently granted will be eroded.<sup>72</sup> This is because:

(8) Authors will interpret congressional term extension in the CTEA as a sort of guarantee that Congress will continue to extend copyright retrospectively if technology or other factors make copyrights less profitable to exploit.<sup>73</sup>

(9) Authors will respond to this perceived guarantee by creating more and better works than they would have created without the perceived guarantee.<sup>74</sup>

How do the nine propositions comport with the facts? Aside from proposition (1), they do not fare well.

Regarding (2), authors' responsiveness to copyright incentives has its limits. Not only do authors have many sources of incentives

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67. See Brief for Respondent, *supra* note 33, at 26-27 & n. 17.

68. See *id.* at 26-27.

69. See *id.* at 25-27.

70. See *id.* at 26-27.

71. See *id.* at 21.

72. See *id.* at 28-32.

73. Supporters of the CTEA make a similarly far-fetched argument regarding increases in life span creating a need for longer copyright. See *id.* at 22-23.

74. See *id.* at 30-34.

other than copyright,<sup>75</sup> but in addition, copyright's primary return—if the author's work is successful—ordinarily happens in the first few years after publication, with a sharp decrease in receipts over time. A promise of copyright in the far-distant future usually will involve a minor or nil amount of money, even if not discounted to present value. And if revenue *is* forthcoming in the far distant future, its present value is low.<sup>76</sup> Regarding (3) and (4), it is hard to see any erosion. Although private copying has increased, so have opportunities to profit through new media. Further, legal protection has steadily expanded, even apart from the CTEA. Authors in the year 2000 receive far greater legal rights—and have far more lucrative media outlets—than new authors had in the year 1950. Copyright has steadily grown stronger, both here and internationally.<sup>77</sup> As for technology, Congress, through the Digital Millennium Copyright Act, has given copyright owners immense powers, namely, governmental rights to back up the owners' technologies of self-help.<sup>78</sup>

Regarding (5) through (9), even if there had been a reduction in profit, it is hard to see that extending the term of something already unprofitable would be a reassuring response (particularly given the small current value of the long-distant extra term.)<sup>79</sup> In the numerical example that follows, I try to make this more concrete. If it is hard to imagine anyone being affected by the prospect of an income

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75. The classic work on this topic is by Justice Stephen Breyer. See Breyer, *The Uneasy Case for Copyright*, *supra* note 34; see also Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972). See also, e.g., Palmer, *supra* note 53, and Frank, *supra* note 53. One of the modes of obtaining revenue without copyright is to price discriminate. Libraries who have been largely freed of the threat of copyright infringement when they make photocopies, pay a sub silentio licensing fee because the journals charge the libraries subscription rates that are much higher than those charged to individuals. S. J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 RES. L. & ECON. 181 (1986). The article is available at [http://wwwpub.utdallas.edu/~liebowit/knowledge\\_goods/rle/rle1986.html](http://wwwpub.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html).

76. On discounting to present value, see *infra* Part III.B.

77. See Vaver, *supra* note 30, at 624-27.

78. See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863-76 (1998) (codified at 17 U.S.C. §§ 1201-1205 (2000)); see also LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 249-61 (2001) (arguing that technology coupled with law has given copyright owners large amounts of control not previously available to them).

79. See the discussion in the numerical example, *infra* at Part III.B., for discussion of discounting.

stream being increased or decreased fifty-one years after he or she has died<sup>80</sup>—and even harder still to imagine this ultra-sensitive person who receives a life-plus-seventy-year copyright under the CTEA being encouraged to work harder because she thinks that her *new* works may in the future receive a term that is longer yet.

Nevertheless, let us give the CTEA proponents the benefit of the factual doubt, and do a calculation that is fairly generous to their assumptions. Let us assume, contrary to likely fact, that an author's works will bring a constant, rather than decreasing, amount of income every year it is on the market, and examine what the present value of that income stream might be.

*B. Numerical Example: Potential Raw Benefit of Term Extension*

What follows is an examination of how an author as a reasonable economic person would perceive a stream of income potentially available in the future. The process involves mathematically discounting the future benefits to present value. What the public reaps from copyright is the value of any new work induced into existence by the author's perception of present value, minus the deadweight losses and other costs attributable to copyright. The current section addresses only the positive effects that could result from a term extension. It argues they are minor, if any. The *net* value of this particular copyright law—how any positive effects weigh against the extension's negative effects—is the subject of later sections.

Let us imagine, for example, an author who anticipates that a writing of hers would bring her or her heirs \$1,000 every year from the moment of creation until copyright ends. Assume the author is sixty in 2002, and that actuarial tables tell her she can expect to live another twenty-five years, to 2027.<sup>81</sup> If in 2002 she were deciding

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80. In Lord Macaulay's words:

We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action.

Macaulay Speech of 1841, *supra* note 28, at 200.

81. The example is premised on a sixty-year-old author. A younger author would anticipate having a longer term. This "life plus" structure of the law is potentially counterproductive: as Macaulay argued, a term hinging on the life

whether to write a new book, under the pre-CTEA copyright law she would expect her copyright to expire in 2077. Assuming a five percent rate of interest and no inflation, and assuming that she values income to her heirs as highly as she values income to herself (unlikely, given that she may never meet some of them),<sup>82</sup> the present value of this seventy-five years of receiving \$1000 yearly would be \$19,490.<sup>83</sup> She would, therefore, be willing to invest at least \$19,490 in time, money, and opportunity cost, in creating the work. (I say she would invest “at least” that amount, because there likely are intrinsic satisfactions to the work, as well as nonmonetary advantages such as reputation that will increase the present value of the work to her above its potential for earning income.)

Of that \$19,490 in present value, \$18,260 represents the present value of the first fifty years of income, and a mere \$1,230 represents the present value attributable to the following twenty-five years of income.<sup>84</sup> (The sharp drop is easily explained: the more far away a piece of income is, the less its prospect is worth now.) In sum, under the pre-CTEA copyright law of “life plus fifty,”<sup>85</sup> the sixty-year-old author’s copyright will probably<sup>86</sup> expire in 2077, and the present value attributable to her doing the new book is \$19,490.

If the CTEA is upheld, another twenty years of income will go to her heirs.<sup>87</sup> What is the present value of the additional income stream, assuming that \$1,000 continued to be earned every year be-

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of the author gives the longest period of legal protection to “juvenile” works, and the shortest period to “mature” works. Yet works “written in maturity” tend to be more valuable. If it is thought necessary to give more incentive, terms should be defined by a certain term, rather than by a “life plus” formula. See Macaulay Thomas Speech Before the House of Commons (Apr. 6, 1842), in 8 THE WORKS OF LORD MACAULAY 210-16 (Lady Trevelyan ed., 1906) [hereinafter Macaulay Speech of 1842]. Also available at the website identified in footnote 28.

82. See Macaulay Speech of 1841, *supra* note 28, at 200.

83. Affidavit of Hal. R. Varian para. 5-9, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430) [hereinafter Varian Affidavit], available at <http://cyber.law.harvard.edu/eldredvreno/varian.pdf>.

84. See *id.*

85. See *id.*

86. I say “probably” because the longer the author lives, the longer her copyright term will be.

87. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998) (codified as amended at 17 U.S.C. §302 (2000)).

tween 2077 and 2097? It is \$320, raising the 2002 present value from \$19,490 to \$19,810.<sup>88</sup> That \$320 is a very small sum compared to the whole and is likely to have small or zero marginal incentive effect, which is gained at the disproportionate expense of the public.<sup>89</sup> (I will return to the issue of disproportion below.)<sup>90</sup> Nevertheless, under the terms of my hypothetical, the CTEA would make the new book worth an additional \$320 to the author. Conceivably, that prospect may add to her incentives. (Probably not, but conceivably). But even so, how will she be persuaded to do new work by learning that not only her new work, but also existing works will gain the extra twenty years of protection? For our author to be persuaded to do new work by the retrospective increases, she would have to interpret that aspect of the CTEA as a promise that Congress will in the future retrospectively increase the term that her 2002 works will have under the CTEA's life plus seventy years, to a term that is longer yet. Further, she would have to believe that such a promise, if fulfilled, would make a financial difference to her.

Recall that adding the extra twenty years at a distance of life-plus-fifty was worth only \$320 in present value because of the many years that would pass between the author's decision to create (today) and the potential revenue (far in the future). By the same logic, extending the term again from life-plus-seventy to life-plus-ninety would have a present value far less than \$320—and the present value of an extension to life-plus-ninety would need to be *further* reduced because of the inevitable risk that Congress could not fulfill the

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88. See Varian Affidavit at para. 5-9, *Eldred* (No. 99-5430).

89. See Liebowitz, *supra* note 75, at Figure 2 and accompanying explanation.

Macaulay argued that “[a] monopoly of sixty years produces twice as much evil as a monopoly of thirty years, and thrice as much evil as a monopoly of twenty years.” Macaulay Speech of 1841, *supra* note 28, at 200. This is mathematically correct if by “evil” he meant the costs to the public without regard to the offsetting benefits that copyright also brings. Taking both into account, however, Macaulay underestimated.

The offsetting benefits are higher, and the costs lower, in the first years of a monopoly than in its later years. The deadweight loss caused by increases in monopoly duration grows at a far faster rate than the incentive effect does. See Liebowitz, *supra* note 75, and my discussion of his thesis *infra* Part IV. A monopoly of sixty years imposes more than twice as much deadweight loss (exclusive of the impact of discounting) as does a monopoly of thirty years.

90. See *infra* Part III.C.

“promise.” It is absurd too imagine therefore that a conditional “promise” to extend copyright beyond life-plus-seventy would make a difference to the author.<sup>91</sup>

It is also important to note an internal inconsistency. To argue as the proponents of the CTEA do, that authors should expect that Congress will give such further extensions,<sup>92</sup> assumes what CTEA advocates usually try to deny: that unless cabined by the instant case, copyrights will continually increase in duration in the future.

### C. Costs to the new generations of authors

Increasing a copyright’s term increases the costs of new creation.<sup>93</sup> We noted that our hypothetical creator’s copyright would have expired, under pre-CTEA law, in 2077.<sup>94</sup> A young creator in 2078 may be inspired, irritated, or frankly captured by our creator’s 2002 work. He may have no road except that road. As one artist has said:

Creative people are prisoners. That is to say that they get “captivated,” and the only way out is to beat a path away from the point of captivity. If my attention is “captured,” it is impossible to simply get away. The bars are not physical. They are produced by the intellectual, the emotional, or, more usually, a combination of the two. But, they are as functional as any jail cell you will ever construct in the material world . . . .<sup>95</sup>

The key to the cell is *permission* to use the artifact that has so captured the artist. Unfortunately, sometimes licenses will not be granted. As Lord Macaulay argued:

I seriously fear that, if such a measure as this [copyright extension] should be adopted, many valuable works will be ei-

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91. See *supra* Part III.A. (the implausible and many-part argument that seeks to portray the CTEA as part of a promise-keeping or reputation-enhancing move by Congress). Compare this with the immediate incentive effect of giving federal copyright to existing works upon publication, which was the law prior to 1978. See *supra* note 9 and accompanying text.

92. See Brief for Respondent, *supra* note 33 at 30-34.

93. See Landes & Posner, *supra* note 2, at 361-63.

94. See *supra* Part III.B.

95. J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889 (1993). For further examples, see Gordon, *A Property Right in Self Expression*, *supra* note 2, at 1567-73.

ther totally suppressed or grievously mutilated . . . . [T]hat the danger is not chimerical may easily be shown . . . .<sup>96</sup>

. . . .  
One of the most instructive, interesting, and delightful books in our language is Boswell's *Life of Johnson*.<sup>97</sup> Now it is well known that Boswell's eldest son considered this book, considered the whole relation of Boswell to Johnson, as a blot in the escutcheon of the family. He thought, not perhaps altogether without reason, that his father had exhibited himself in a ludicrous and degrading light. And thus he became so sore and irritable that at last he could not bear to hear the life of Johnson mentioned. Suppose that the law had been what my honorable and learned friend wishes to make it. Suppose that the copyright of Boswell's *Life of Johnson* had belonged, as it well might, during sixty years, to Boswell's eldest son. What would have been the consequence? An unadulterated copy of the finest biographical work in the world would have been as scarce as the first edition of Camden's *Britannia*.<sup>98</sup>

A prominent modern example involves Margaret Mitchell's saga of the South, *Gone With the Wind*. The Mitchell estate denied permission for a realistic version of *Gone With the Wind*, insisting (among other things) that interracial sexual relations be banished from any sequel.<sup>99</sup> Alice Randall wrote a parodic sequel, *The Wind Done Gone*, without the permission of the copyright owner. Seeking to examine the world-view of *Gone With the Wind* and heal some of the hurts that book caused, Randall made her central character interracial: the daughter born from the union of Mammy (an African-American slave) and Mammy's owner (a white man, Scarlett's father). The Mitchell estate, unsurprisingly, sued Randall. Initially the estate was successful. Sale of *The Wind Done Gone* was enjoined.<sup>100</sup>

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96. Macaulay Speech of 1841, *supra* note 28, at 204.

97. Boswell's biography is the source of the material from Johnson quoted earlier, *supra* note 26.

98. Macaulay Speech of 1841, *supra* note 28, at 206.

99. *See SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001).

100. *See SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

Randall would not have been sued if the copyright in *Gone With the Wind* had not been extended. Yes, Randall wrote the book despite the CTEA, and might have been awarded fair use treatment eventually.<sup>101</sup> Nevertheless, no one can deny that the extension of copyright in Margaret Mitchell's book drastically increased the cost of Alice Randall's book (and she was rare in having a publisher willing to bear extensive legal costs). Alice Randall is the prototype of the creative copier who should be encouraged.

Not all persons similarly situated will be as courageous (or as lucky) as Randall was. The fragility of speech is well known—iconoclasts may be silent if their target icons are both well funded and entitled to sue.

There is a moral and constitutional aspect here as well. The cure for bad speech is more speech.<sup>102</sup> Predecessor authors should not be entitled to harm us and then use copyright to prevent us from having redress.<sup>103</sup>

In a recent interview, Randall made clear that *Gone With the Wind* had injured her and many other African-Americans. Although as a young girl Randall loved *Gone with the Wind*, as an adult she came to realize she would have been better off never having read the book—she says now that if blindness would have enabled her to avoid reading it, she would rather have been “born blind”.<sup>104</sup>

Psychologists tell us that not only must we speak of our traumas to decrease their hold over us, but also that being required to keep silent inflicts an *additional* trauma.<sup>105</sup> It may not be sufficient to

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101. The case settled. For its history, see *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

102. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence.”).

103. See generally Gordon, *A Property Right in Self-Expression*, *supra* note 2.

104. See the “Connection” website for July 16, 2001 with guest Alice Randall talking about her book, *THE WIND DONE GONE* (2001), at <http://www.theconnection.org/archive/2001/07/0716b.shtml>.

105. See, e.g., ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* (Hildegard & Hunter Hannum trans., 2001):

It is not the suffering caused by frustration. . . that leads to emotional illness but rather the fact that the child is forbidden by the parents to experience and articulate this suffering, the pain at being wounded. . .

*write about* those traumas in order to exorcise them: one may need to relive and *rewrite* them. The process of aesthetic growth may require recasting the works that for good or ill have shaped an artist's inner life. In the words of Harold Bloom, the serious work of a poet begins with his "creative misprision" of the works that came before.<sup>106</sup> One must work through one's predecessors—both in the sense of reading and interpreting, and sometimes in the sense of speaking in their forms, using their tropes or settings or characters—sometimes finding one's own voice only by listening to how it alters the telling of a known story.

Like all of us, artists often have little choice about what is meaningful to them; if the road is blocked, expression is blocked.<sup>107</sup> Some of the blockage that copyright imposes may be tolerated as necessary—but the CTEA's virtual century of exclusivity is not necessary. What is lost is more than the individual artist's ability to find his or her voice, for artists are spokespersons as well: they serve their audiences as well as themselves.<sup>108</sup>

It is difficult to speak of what makes an author. Lewis Hyde in his evocative book, *The Gift*, suggests that an important part of the process is the living relation between the artist and what he receives.<sup>109</sup> The beauty of the physical world and the life within predecessor artists' work create in the receiving artist a sense of gratitude. The artist repays the gift by his own creation—so that

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Children are not allowed to reproach their gods—their parents and teachers.

*Id.* at 252.

[I]t is not the trauma itself that is the source of illness but the unconscious, repressed, hopeless despair over not being allowed to give expression to what one has suffered. . . .

*Id.* at 259

106. See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973).

107. See Boggs, *supra* note 95.

108. As a college student, I found the Air Pirates' satires of Disney characters exhilarating and, in a subtle way, freeing. When Disney sued, the Air Pirates parodies were enjoined as copyright infringements, and taken off the shelves. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). For more about the Air Pirates, see Gordon, *A Property Right in Self-Expression*, *supra* note 2, at 1602-04.

109. See LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY*, at xi-xvii (1979). By "erotic," Hyde is referring primarily to emotional rather than physical connections among persons.

gratitude becomes a catalyst (or better, a nutrient fluid) fostering new creativity. Hyde points out at least two things that can interfere with this necessary gratitude: monetary payment, and a sense of calculation.<sup>110</sup>

In my mind, the danger lies less in a need to pay, than in a need to calculate. Imagine a composer inspired by a book that she read as a child to make an opera of it. Can you imagine her genuine impulse of creativity surviving the calculating process? Calculating the license cost; comparing the cost of that license with the license to use other books; manufacturing an inspiration to match whatever book bore a license fee she can afford . . . that is not the way that many of our best creative people operate. Those whose motivation is intrinsic<sup>111</sup> are not free to calculate, to search for the cheapest license or the author's heir who doesn't object to being reinterpreted and criticized.

Many copyrighted works may be produced solely for money. Nevertheless, everyday experience and psychological research both suggest that as a society we benefit most from those works produced by persons whose aesthetic is internally driven.<sup>112</sup> Today's artists need money to live on, of course, as did their predecessors. But at some point the lever that extracts payment discourages the later author much more than it feeds the earlier.

*D. Why the Positive Effects, If Any, Affect Noncreative More Than Creative Activity*

Economically speaking, exclusivity can both help and hurt.<sup>113</sup> When exclusivity *does* help, only noncreative copiers need to piggy-

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110. *See id.* at chs. 3, 8.

111. Theresa Amabile and other social psychologists have determined that, in many instances, external motivation in the form of rewards can increase the *quantity* of creative work, but is likely to decrease its *quality*. Intrinsic motivation tends to produce better work. *See* TERESA M. AMABILE, ET AL., CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY (1996).

112. *Id.* (by implication).

113. At one extreme is the tragic commons, which can be remedied by exclusivity; at the other is the tragic anticommons, which can be remedied by giving common privileges of use. *See* Heller & Eisenberg, *supra* note 3, and sources cited therein.

In regard to the CTEA, one can envisage several scenarios. In one, restoring or digitizing an old work is very expensive, and a prisoner's dilemma ex-

back on a long-dead author's copyright. By comparison, the creative person who translates or adapts or arranges something in the public domain gets her *own* copyright, and starts a new copyright term running.<sup>114</sup> She does not need to license from a prior generation copyright owner in order to obtain exclusivity; she has it as of her own right. Therefore, the translator, transmuted, or other creative copier cannot benefit from an extended copyright in pre-existing works, except by the attenuated and implausible argument sketched above.<sup>115</sup>

Therefore, the instant retrospective term extension can at best increase the amount of noncreative copies in the world. Creative users of past works do not need extensions of copyright term in order to have protection against copying, for their work starts copyright anew.<sup>116</sup>

If this term extension encourages anyone, therefore, it encourages the *noncreative*. In the process it makes things more difficult for the creative author, such as Alice Randall, who wants to address her culture's iconic works by inhabiting their shells and showing audiences their unexpected dimensions and hidden rooms. To favor the uncreative over the creative turns copyright on its head.

#### IV. THE ECONOMISTS' BRIEF

An amicus brief filed by several prominent economists suggests that the CTEA is not economically desirable.<sup>117</sup> Their brief, while excellent, could have been even stronger. Because the brief chooses

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ists that makes it risky for anyone to engage in the restoration or digitization unless he or she can obtain protection against copying. In another, restoring or digitizing an old work is inexpensive, or a labor of love, or can expect to reap monetary rewards without need of copyright. In a third, tangled questions of ownership prevent any restoration of an old work until it enters the public domain. The question of whether CTEA helps or hurts the noncreative depends on which scenarios predominate.

114. See 17 U.S.C. § 103 (2000). See *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d. Cir. 1994) (derivative work is copyrightable if it is sufficiently original).

115. See discussion *supra* Part III.A. (the implausible and many-part argument that seeks to portray the CTEA as part of a promise-keeping or reputation-enhancing move by Congress).

116. See 17 U.S.C. § 103; see also, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.07[C] (2002).

117. See *generally* Economists' Brief, *supra* note 25 (where seventeen economists contributed to the brief discussing the economics of the CTEA).

not to discuss what Demsetz called the “Nirvana Fallacy,”<sup>118</sup> the brief fails to show how as the duration of copyright increases, the costs that copyright imposes increase disproportionately in relation to its benefits. This Article suggests how the economic presentation could be fleshed out.

A threshold issue needs first to be disposed of: the proper locus for comparing social cost and social benefit. A casual reader of the Economists’ Brief might think that the economists mean to compare “the additional cost of term extension” with “the additional compensation for creating new works.”<sup>119</sup> However, the social benefit envisaged by the brief is not the “additional compensation.”<sup>120</sup> The social benefit is, rather, what the additional compensation calls forth: an increase in the quantity or quality of works over what would have been produced under a shorter term.<sup>121</sup> This clarification may help resolve a confusion that occasionally arises.

Commentators sometimes criticize the standard argument for limited duration on the ground that it seems to compare (1) future

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118. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-4 (1969) (discussing Nirvana Fallacy).

119. Indeed, the two are linked in seeming parallel. See Economists’ Brief, *supra* note 25, at 11.

120. Admittedly, one could construct a social welfare function in which the copyright owners’ revenues (independent of incentives) constitutes a social benefit. However, this is neither what the brief intended, see Economists’ Brief, *supra* note 25, at 10 (“benefits, in the form of additional incentives to create”), nor is this a social welfare function that ordinary economic analyses of copyright would invoke.

The pursuit of justice is also a social benefit, of course, albeit one not easily measured. Would the added compensation (independent of incentives) serve justice? I doubt it. Even to someone like me, who is convinced of the justice of some copyright as an institution, the long term of the CTEA exceeds most plausible claims of justice-based entitlement. See Jane C. Ginsburg, Wendy J. Gordon, Arthur R. Miller, & William F. Patry, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?* 18 CARDOZO ARTS & ENT. L.J. 651, 674-686 (2000) (speech of W. Gordon). Thus, while I have argued that creators have some claim to reward independent of incentives, Wendy J. Gordon, *An Inquiry Into The Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989), when I examined creators’ justice claims in more depth I concluded that the claims, though real, were quite limited. See Gordon, *A Property Right in Self-Expression*, *supra* note 2; Gordon, *On Owning Information*, *supra* note 48.

121. See Economists’ Brief, *supra* note 25, at 10 (“benefits, in the form of additional incentives to create”),

royalties discounted to present value with (2) undiscounted future deadweight costs. Since future gains and losses should be treated the same way—either both discounted, or both not discounted—this criticism would be powerful, if it accurately described the economic basis for limited duration. But the criticism misdescribes the argument it seeks to attack.

On the benefits side what is weighed is not the future royalties, but the value of new or improved works brought forth. Admittedly, whether new or better works appear is a matter of author perception and motivation, and authors may indeed discount as part of their calculations; nevertheless, what matters for social value is not the authors' perception but the work they produce in response to it. Copyright's contribution to that work's value is weighed in the same way as copyright's contribution to societal cost. Thus, the standard argument, employed in the Economists' Brief and elsewhere, does treat gains and losses symmetrically.<sup>122</sup>

Similarly, it is worth clarifying the *nature* of the social cost imposed by term extension. As the Economists' Brief makes clear, this cost is not solely monetary.<sup>123</sup> For both audiences and creators, the cost is one of experience. Audiences have less access to their culture if monopoly keeps the price of copies high, and term extension will also make it harder for young authors to make new works—particularly works that reshape the cultural reality the authors themselves have experienced.<sup>124</sup> The works foregone may be com-

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122 For example, one can do the computation with no discounting on either side: comparing the undiscounted future deadweight costs with the similarly undiscounted value of new works bought forth by the copyright monopoly. Alternatively, one can do the computation with discounting on both sides: (1) determine what future royalties would be, then (2) determine how many new or better works those royalties would induce and (3) how those improvements or additions would be valued by the persons who experience them, then (4) discount that stream of future benefit to present value, and only then (5) compare the result with the present value of the future deadweight costs.

123. See Economists' Brief, *supra* note 25.

124. See Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 L. & CONTEMP. PROBS. 93 (1992) (suggesting that just as early man drew pictures of the beasts, wood and water around him, contemporary artists must—to capture and deal with their environment—depict what surrounds and influences them, including artifacts that others have made); Gordon, *A Property Right*, *supra* note 2, (arguing that under natural law, a new generation of artists should have a right equal to that of their predecessors to recreate and transform their environment, even if today's environment is largely man-made).

mercial and trivial, or heartfelt and culturally crucial: the “social cost” of copyright extension includes both.

Now let us turn to the Nirvana Fallacy and systematic disproportion between cost and benefit that arises as copyright term extends.

In assessing the costs associated with the copyright monopoly, many analysts compare the price and number of copies that “could have been made” under perfect competition, with the price and number of copies under the partial monopoly of copyright. They use the label “deadweight loss” to identify the social benefit that could have been achieved if copies had been available at a competitive price, a benefit which is “lost” under copyright. However, for items that need the copyright monopoly to come into existence, there is no level of competitive price and quantity with which to compare. To believe otherwise would mean believing in a Nirvana where, impossibly, pure competition coexists with works that need monopoly to come into existence.

Therefore, in assessing the social cost of intellectual property, one should not consider it a social cost that a work called forth by the monopoly is sold by its owner at a price higher than the owner could have demanded in a perfectly competitive world. As to that work, there is only benefit created by the amount of copyright protection needed to call the work forth. When do “deadweight losses” arise? They arise when there is extra copyright protection beyond what is needed to call forth the work. The deadweight loss that should count is that attributable to extra amounts of protection—amounts of protection that stifle speech without creating new speech.

At first blush, this insight might seem to aid the proponents of the CTEA, since the argument suggests that deadweight losses are overstated in many conventional analyses.<sup>125</sup> However, as Stanley Liebowitz has shown, the insight has an even more powerful implication: that the cost of monopoly increases at a far faster rate than the incentive effect does.<sup>126</sup> Taking into account only the deadweight loss attributable to unnecessary copyright protection makes it easier to see the costs of long copyright terms. Every year of added duration brings additions to the group of works as to which copyright

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125. It would indeed be an error to count all works as generating deadweight loss.

126. See Liebowitz, *supra* note 75 at Figure 2 and accompanying explanation.

generates deadweight loss,<sup>127</sup> and subtractions from the group as to which copyright provides a social benefit.

To see that, let us backtrack to basics. Different writings require different incentives. Some works would have come into being without any copyright at all; some would have come into being with a promise of five years of copyright protection; some would have come into being with a promise of ten years of protection; and so on. Only when a work would have come into existence without the need of a particular monopoly provision, should that provision be counted as generating a deadweight loss. This applies to provisions about duration as well. Every year that copyright lasts, more and more works fall into the category of *works that did not need a copyright term this long* to be produced.

Consider, for example, a copyright duration of five years. Assume there is a work for which the author needed the full five-year term to be induced to produce the work. Let us assume the work in question is an interpretive translation of *Beowulf*<sup>128</sup> called "*Beowulf Transmuted*." For "*Beowulf Transmuted*," a five-year copyright term generates no loss: if the book is valuable, its value is a gain attributable to that five-year copyright.<sup>129</sup> However high in price and small in quantity the copies of "*Beowulf Transmuted*" might be, they are a pure gain compared to an alternative state of shorter copyright in which this version of *Beowulf* did not exist.

This is not true as to works that would have come into being with a term of less than five years: for a work that needed only three years of copyright to come into being, a five-year term generates two years of deadweight loss. Nevertheless, it is true that as to "*Beowulf Transmuted*," copyright so far contributes to society a pure gain. If enough works are like "*Beowulf Transmuted*" in needing a full five years of copyright to come into being, their value will outweigh the deadweight loss attributable to the grant of a full five-year term to

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127. *Id.* In this and succeeding paragraphs of the instant section, my analysis is heavily indebted to that of Liebowitz.

128. *BEOWULF* (Michael Alexander ed., 1995).

129. The work's existence is also attributable to many other contributing causes, such as the translator's efforts, dictionaries she may have employed, and, of course, the sources of the first *Beowulf*. When I speak of the work's being "attributable to" copyright, I mean only that copyright is one of its many causes-in-fact.

the other works. If so, an increase to a five-year copyright term would be efficient.

What happens in year six? I have already stipulated that the author of "*Beowulf Transmuted*" would have written it so long as she anticipated copyright protection would last five years. If copyright ended at five years, in year six the book would be in existence, and could be reproduced and sold competitively. Per-copy price would go down and the quantity in circulation would rise.

By contrast, if copyright continued in the sixth year, the book would be sold at a higher price to fewer people. Under copyright it would thus generate less benefit than it could in the absence of copyright. The decrease is "deadweight loss" attributable to the extra year of protection. In assessing the value of a sixth year of copyright, then, an economist would put "*Beowulf Transmuted*" into the category of works for which copyright generates a loss—although for the fifth year of the copyright's duration, the book had belonged in the category of works for which copyright generated a social benefit.

Every year, more and more works make the transition from the plus to the minus category. The same book for which copyright generated no deadweight loss in year *Y* (because its author needed as incentive a copyright whose term continued through that year), may generate deadweight loss the next year. Should the Court uphold the term of "life plus seventy," every book and film that would have come into existence even without the extra twenty years falls into the category of contributing to deadweight loss. Given the tiny increase in present revenues that prospective term extension can bring (and only present perception of benefit can serve as inducement to persons operating in the present), it is hard to see that the value of the few new works called forth by term extension will outweigh the costs.

The following graph, modeled closely on one by Liebowitz,<sup>130</sup> depicts the pattern. Each additional year of copyright generates gains and losses. By plotting changes in the cumulative totals for each year, one can see how little benefit—or possibly how much actual harm—a hundredth year of copyright would generate as com-

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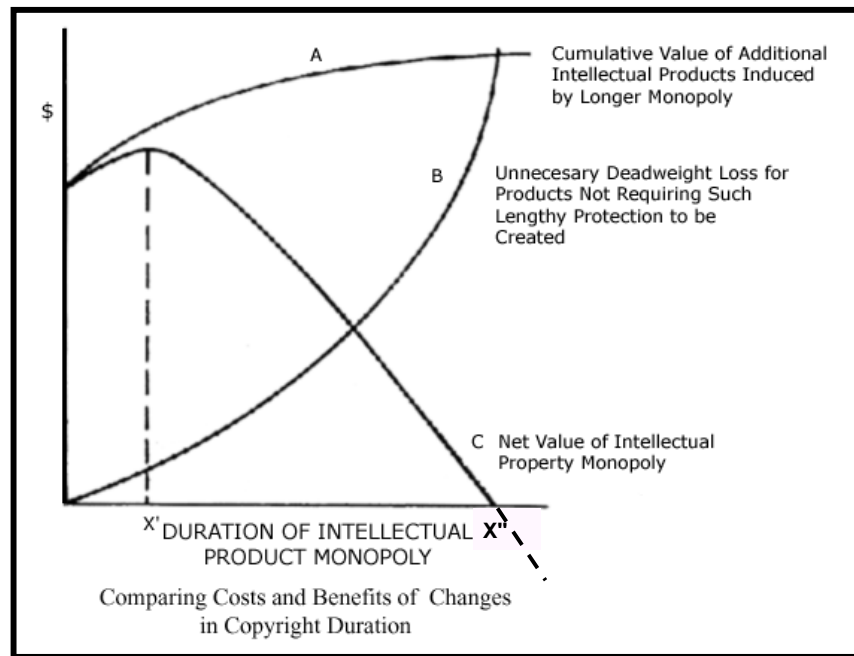
130. Liebowitz, *supra* note 75, at Figure 2. Note that the graph is based on certain factual assumptions, essentially following those of Arnold Plant in his classic essay. ARNOLD PLANT, THE ECONOMIC ASPECTS OF COPYRIGHT IN BOOKS, 48 *ECONOMICA* 167 (1934).

Fall 2002]

TRADING GOLD FOR DROSS

195

pared to a shorter term. (Note, incidentally, that for the sake of simplicity the graph does not discount to present value for either costs or benefits. It reflects cumulative costs and benefits, treating each year's monetary impact equally. By contrast, *authors* will likely discount to present value when deciding if a flow of far-future royalties is worth getting to their desks earlier in the morning. The *chart* merely reflects a set of assumptions about what authors are likely to do and how markets typically function. )



On the graph, increases in copyright duration are measured by proceeding rightward along the horizontal axis, and monetary value is measured on the vertical. The points that make up Curve A represent the “cumulative value of additional intellectual products induced by [the] longer monopoly.”<sup>131</sup> Curve B represents the cumulative “unnecessary deadweight loss” caused by any copyright provision that gives an additional year of protection to “products not requiring such lengthy protection to be produced.”<sup>132</sup> Since there are each year

131. Liebowitz, *supra* note 75, at Figure 2.

132. *Id.*

more and more products for which a given extra year of protection is excessive, Curve B rises as copyright duration increases. Curve C represents the difference between the two curves: the net value of the additional year's intellectual property monopoly, whether positive or negative.

Over some range, an increase in duration will bring an increase in the value of additional intellectual products induced by the longer monopoly (Curve A). As durations increase, that rate of increase is likely to become progressively less steep (also Curve A), denoting that as copyright terms grow longer, less creativity is induced by extra periods of protection. That lessening is likely to occur because more-distant income has less incentive impact today, because sales tend to occur relatively early in a work's life, and because as copyright gets lengthier, most of the works that are potentially going to be created have received sufficient payment in the first few years or decades to overcome the costs of creating them. Curve A thus becomes flatter as the copyright term increases. By contrast, the deadweight loss for products not requiring a particular length of protection in order to be created (Curve B) rises more and more steeply as time progresses: the deadweight loss grows significantly larger every year as the extending term becomes excessive as to more and more works.<sup>133</sup>

As mentioned, Curve C measures the difference between the gain and the loss caused by a given year of copyright (A minus B). Curve C thus shows the net value to society of the added year of intellectual property monopoly. The duration corresponding to the peak of Curve C is marked by an X' on the horizontal axis. This is the durational year in which copyright produces its highest net gain. When at a given copyright duration, Curve C begins to slope down, this means that adding to the copyright term decreases society's well being.

If the deadweight loss grows significantly large relative to the value of new books induced, society would receive less value from copyright than it would from having only the works that a non-copyright regime could have brought forth (and having access to them unconstrained by legal monopoly). The durational year when

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133. The reason for that increase in deadweight loss is more fully outlined *supra*, in the paragraphs preceding the graph.

the value of copyright thus heads into negative territory is marked by X".<sup>134</sup>

The graph is intended to show a hypothesized set of relationships, and accordingly bears no numbers. Nevertheless, one may make educated guesses. For most works I would imagine that the peak year of durational productivity (where X' appears) would come at a copyright term of fifty years or much shorter. When Congress extended copyright to fifty-six years,<sup>135</sup> and *a fortiori* when the Copyright Act of 1976 further extended copyright duration to "life plus fifty,"<sup>136</sup> I would guess we were moved to a duration significantly to the right of X'. That is, even if the terms set by the Copyright Act of 1909 and 1976 did not put us beyond X", they put us already in the realm where copyright was growing progressively less valuable to society. Were the CTEA to be upheld, I believe we would be definitely moving into territory to the right of X": durations after which each year of additional protection actually reduces our society's welfare, and where the value of Curve C goes deeper and deeper into negative numbers as term is further extended. At that point we would be better off without copyright, than to have a copyright with a term so long.

When one understands that the reduction in social value is a matter not merely of Gross National Product, but also of words not spoken and spokesmen silenced, that is a matter of consequence.

## V. CONCLUSION

The constitutional text allows, and even suggests, that when the Supreme Court assesses the constitutionality of copyright legislation, it should weigh effects on creativity more heavily than effects on noncreative activity. The CTEA has at best the potential for minor positive effects, most of which (if any) will adhere to noncreative activities. At the same time, the CTEA will impose strong negative effects, many of which will be felt by creative activities. Moreover, the negative effects grow larger the longer duration extends. If

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134. The label showing X" appears to the lower right of the graph.

135. See 17 U.S.C. § 24 (1909).

136. See Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

copyright is the “engine of free expression,”<sup>137</sup> then the CTEA is an engine that is broken: it burns oil and drives us nowhere.

Should the Court accept the differential weighing of creative and noncreative activities, the Court would not need a precise and detailed empirical examination to determine the CTEA’s unacceptability. Given the great difference in weight that gold and silver have, one does not need a perfect scale in order to determine, as between a nugget of each metal, which is heavier and more valuable.

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