

IV. Copyright Formalities and Duration

Until now, our study of copyright law has focused principally on metaphysical matters like originality, the difference between idea and expression, and the nature of authorship. In this chapter, we shift to more technical matters related to copyright. This chapter explores the **formalities** that copyright law has long had in place and how they have changed in more recent years, as well as the rules and policies underlying copyright **duration**, as well as **renewals** and **terminations of transfer**.

A. Formalities

Copyright law's formalities are procedural mechanisms with which one must or is encouraged to comply. From the very first copyright statute in 1790, Congress required that authors comply with certain formalities, such as registering their copyrights and giving notice of their copyright. Failure to comply with these requirements either terminated the copyright or prevented it from arising in the first place.

However, in a process that began in earnest with the 1976 Act and culminated in successor legislation—most importantly, U.S. accession to the Berne Convention in 1989—Congress pared back, and in some instances entirely discarded, copyright formalities. Under current law, as discussed in Chapter II, copyright arises the moment an original work of authorship is fixed in a tangible medium of expression. Formalities like registration and notice, though encouraged, are not required as conditions of protection.

Beginning with the 1976 Act, then, the United States moved from a “conditional” copyright system that premised the existence and continuation of copyright on compliance with formalities to an “unconditional” system with a reduced set of voluntary formalities that play a more minor role.

Nonetheless, formalities still play an important role in copyright law for two reasons. First, the diminishment of formalities over time applies only prospectively, so older works—those that started copyright protection before these diminishments—continue to be affected by the prior rules. Second, most of these formalities have not disappeared. Even though they are no longer required, there are still sometimes hefty incentives to comply with them. For these reasons, understanding copyright formalities is important to any lawyer working in copyright law. Each subsection below will typically explore three sets of rules: those under the 1909 Act (all works published before January 1, 1978), those under the 1976 Act (all works fixed on or after January 1, 1978 but before U.S. accession to the Berne Convention, and all works fixed but unpublished before January 1, 1978), and those following U.S. accession to the Berne Convention (all works fixed on or after March 1, 1989).

The following sections in turn consider **publication**, copyright **notice**, **registration**, **deposit**, and other formalities. In exploring the legal requirements of each formality, we also consider the policy reasons for and against that formality. That said, there are some policy considerations generally applicable to the role of formalities in a copyright system.

First consider why it might be advisable to diminish, if not eliminate, the importance of formalities in copyright law. Most critically, artists—even sophisticated ones—can inadvertently abandon copyright rights they would prefer to have by overlooking precise compliance with one or more of copyright's formalities. Many artists might not even realize there are formalities with which to comply in the first instance. This might particularly be the case for foreign artists, because foreign countries long ago moved away from copyright formalities. Many foreign artists therefore have long assumed that the United States does not require formalities as prerequisite to securing or maintaining copyright protection. Formalities also make obtaining copyright protection more expensive. Formalities thus undermine any goal of providing copyright protection readily.

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Moreover, because other countries have moved away from requiring formalities, U.S. formalities undermine efforts at international harmonization of copyright law.

Now consider, by contrast, the useful purposes that formalities can serve. A copyright registry—a centralized database of all copyrighted works—can provide helpful information about these works to third parties. In particular, it enables would-be users of a work to determine quickly and inexpensively whether the work in question is indeed subject to copyright, and, if so, from whom to seek a license. This interest might be more critical than with regard to real estate or personal property. The property interest protected by copyright is intangible. Unlike real estate or personal property, the property embodied in copyright has no unique physical existence. A painting, a book, and an iPhone containing an audio recording are all physical objects, but the expression fixed in each of them may, absent the workings of the law, freely be copied and ownership of copies transferred. Therefore, although the question of who owns a particular copy of a book presents no more difficulty than does ownership of any particular piece of personal property, the question of who owns rights in the expression contained in the book most often cannot be answered simply by understanding who owns the book. Copyright formalities can create the information about ownership that mere possession of a copyrighted work could not.

Formalities also serve the purpose of allowing authors to distinguish between works for which they desire copyright protection—by complying deliberately with copyright formalities—and those for which they do not. This might be especially important given how many copyrightable works we all create constantly.

For more on these policy issues, see Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010); Christopher Jon Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

1. Publication

Until January 1, 1978, when the 1976 Act took effect, American federal copyright protection began not with fixation, but with publication of copies of a qualifying work (or registration of an unpublished work). Moreover, until 1978, state law—often but not always common law—would automatically protect unpublished works upon creation without the need to comply with any formalities. This state law protection would last until publication. Upon publication, the work would forfeit state law protection and be protected, if at all, by federal copyright law.

The doctrine that publication divests common law protection had long ago been established by the U.S. Supreme Court in *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (1834). (Note that following the implementation of the 1976 Act, which expanded federal copyright protection to cover all fixed works (published and unpublished alike), state protection concomitantly contracted to cover only the unfixed works that do not qualify under the expanded federal regime. From then forward, all fixed works fell exclusively under the federal copyright regime. We study the extent of federal copyright law’s preemption of state laws in Chapter X.) For a thorough treatment of copyright protection under state law, see 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (2023).

Under the 1909 Act, one could secure federal protection upon publication only if one complied with all statutory formalities, discussed in the sections that follow. Act of Mar. 4, 1909, ch. 320, §§ 9-22. The implication is that one’s published work would (exit state law protection and) move into the public domain if one did not comply with all statutory formalities.

On or after January 1, 1978, with the switch to fixation as trigger of federal copyright protection, publication became less relevant to establishing a work’s status under copyright law. Nonetheless, it remains occasionally

relevant, because some of the 1976 Act's provisions turn on whether a work is published. For example, the deposit provision—discussed in section 4—applies only to published works. 17 U.S.C. §§ 407(a)-(d). As another example, the duration rule governing anonymous and pseudonymous works and works made for hire—discussed in section B.1—is applied in part based on the year of first publication of a work. 17 U.S.C. § 302(c). Additionally, the availability of statutory damages and attorney's fees can turn on when a work was registered in relation to the work's publication. *Id.* § 412.

1909 Act	1976 Act	Post-Berne
Publication (or registration of an unpublished work) a requisite to federal copyright protection	Publication sometimes relevant when a specific copyright provision turns on publication or lack thereof	No change from 1976 Act

Table 1: significance of publication

Understanding what does and does not constitute a “publication” remains crucial for works claiming protection under the 1909 Act. The 1909 Act did not define what constitutes a publication. (The only statutory clue to the meaning of “publication” lies in § 26 of the 1909 Act, which stated that the date of publication for a work “of which copies are reproduced for sale or distribution ... shall be held to be the earliest date when copies of the first authorized edition were *placed on sale, sold, or publicly distributed* by the proprietor of the copyright or under his authority.” (emphasis added)) Beyond that fragment, which provides only the most general guidance, courts considering when publication takes place under the 1909 Act have had to craft their own rules.

What does and does not constitute a publication is also sometimes relevant for works claiming protection under the 1976 Act. Unlike the 1909 Act, the 1976 Act defines “publication.” According to § 101, “publication” is

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

As you read the following case construing the 1909 Act, consider how much the court's explication of “publication” matches your intuitive understanding of what a publication is. Which of the policies underlying copyright law is a requirement of publication designed to serve? Should it matter whether Martin Luther King, Jr.'s speech was extemporaneous or planned?

Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.

194 F.3d 1211 (11th Cir. 1999)

ANDERSON, C.J.:

[1] The Estate of Martin Luther King, Jr., Inc. brought this copyright infringement action against CBS, Inc. after CBS produced a video documentary that used, without authorization, portions of civil rights leader Dr. Martin Luther King's famous “I Have a Dream” speech at the March on Washington on August 28, 1963. The district court granted summary judgment to CBS on the ground that Dr. King had engaged in a general publication of the speech, placing it into the public domain. We now reverse....

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[2] The facts underlying this case form part of our national heritage and are well-known to many Americans. On the afternoon of August 28, 1963, the Southern Christian Leadership Conference held the March on Washington to promote the growing civil rights movement. The events of the day were seen and heard by some 200,000 people gathered at the March, and were broadcast live via radio and television to a nationwide audience of millions of viewers. The highlight of the March was a rousing speech that Dr. Martin Luther King, Jr., the SCLC's founder and president, gave in front of the Lincoln Memorial. The Speech contained the famous utterance, "I have a dream ...," which became symbolic of the civil rights movement. The SCLC had sought out wide press coverage of the March and the Speech, and these efforts were successful; the Speech was reported in daily newspapers across the country, was broadcast live on radio and television, and was extensively covered on television and radio subsequent to the live broadcast.

[3] On September 30, 1963, approximately one month after the delivery of the Speech, Dr. King took steps to secure federal copyright protection for the Speech under the Copyright Act of 1909, and a certificate of registration of his claim to copyright was issued by the Copyright Office on October 2, 1963. Almost immediately thereafter, Dr. King filed suit in the Southern District of New York to enjoin the unauthorized sale of recordings of the Speech and won a preliminary injunction on December 13, 1963.

[4] For the next twenty years, Dr. King and the Estate enjoyed copyright protection in the Speech and licensed it for a variety of uses, and renewed the copyright when necessary. In 1994, CBS entered into a contract with the Arts & Entertainment Network to produce a historical documentary series entitled "The 20th Century with Mike Wallace." One segment was devoted to "Martin Luther King, Jr. and The March on Washington." That episode contained material filmed by CBS during the March and extensive footage of the Speech (amounting to about 60% of its total content). CBS, however, did not seek the Estate's permission to use the Speech in this manner and refused to pay royalties to the Estate. The instant litigation ensued.

[5] On summary judgment, the district court framed the issue as "whether the public delivery of Dr. King's speech ... constituted a general publication of the speech so as to place it in the public domain." After discussing the relevant case law, the district court held that Dr. King's "performance coupled with such wide and unlimited reproduction and dissemination as occurred concomitant to Dr. King's speech during the March on Washington can be seen only as a general publication which thrust the speech into the public domain." Thus, the district court granted CBS's motion for summary judgment. The Estate now appeals to this Court....

[6] Because of the dates of the critical events, the determinative issues in this case are properly analyzed under the Copyright Act of 1909, rather than the Copyright Act of 1976 that is currently in effect. The question is whether Dr. King's attempt to obtain statutory copyright protection on September 30, 1963 was effective, or whether it was a nullity because the Speech had already been forfeited to the public domain via a general publication.

[7] Under the regime created by the 1909 Act, an author received state common law protection automatically at the time of creation of a work. This state common law protection persisted until the moment of a general publication.³ When a general publication occurred, the author either forfeited his work to the public domain, or, if he had theretofore complied with federal statutory requirements, converted his common law copyright into a federal statutory copyright.

[8] In order to soften the hardship of the rule that publication destroys common law rights, courts developed a distinction between a "general publication" and a "limited publication." Only a general publication divested a

³ We stress that in this area of the law the word "publication" is a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term.

common law copyright. A general publication occurred when a work was made available to members of the public at large without regard to their identity or what they intended to do with the work. Conversely, a non-divesting limited publication was one that communicated the contents of a work to a select group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale. The issue before us is whether Dr. King's delivery of the Speech was a general publication.

[9] Numerous cases stand for the proposition that the performance of a work is not a general publication.

[10] It appears from the case law that a general publication occurs only in two situations. First, a general publication occurs if tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work. Second, a general publication may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public. However, the case law indicates that restrictions on copying may be implied, and that express limitations in that regard are deemed unnecessary.

[11] The case law indicates that distribution to the news media, as opposed to the general public, for the purpose of enabling the reporting of a contemporary newsworthy event, is only a limited publication. For example, in *Public Affairs Assoc., Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), the court said that general publication occurs only when there is "a studied effort not only to secure publicity for the contents of the addresses through the channels of information, but to *go beyond customary sources of press or broadcasting* in distributing the addresses to any interested individual." (emphasis added) Although the *Rickover* court ultimately held that a general publication had occurred, it contrasted the "limited use of the addresses by the press for fair comment," i.e., limited publication, with "the unlimited distribution to anyone who was interested," i.e., general publication. This rule comports with common sense; it does not force an author whose message happens to be newsworthy to choose between obtaining news coverage for his work and preserving his common-law copyright....

[12] With the above principles in mind, in the summary judgment posture of this case and on the current state of this record, we are unable to conclude that CBS has demonstrated beyond any genuine issue of material fact that Dr. King, simply through his oral delivery of the Speech, engaged in a general publication making the Speech available to members of the public at large without regard to their identity or what they intended to do with the work. A performance, no matter how broad the audience, is not a publication; to hold otherwise would be to upset a long line of precedent. This conclusion is not altered by the fact that the Speech was broadcast live to a broad radio and television audience and was the subject of extensive contemporaneous news coverage. We follow the above cited case law indicating that release to the news media for contemporary coverage of a newsworthy event is only a limited publication.⁴ ...

⁴ We emphasize the summary judgment posture of this case, which necessitates that we disregard evidence that may be important or even dispositive at trial. In other words, in this summary judgment posture, we consider only the evidence with respect to which there is no genuine issue of material fact. This evidence includes only the fact of the oral delivery of the Speech to a large audience and the fact that the sponsors of the event including Dr. King sought and successfully obtained live broadcasts on radio and television and extensive contemporary coverage in the news media. In this regard, we do not consider at this stage of the litigation two potentially important pieces of evidence brought to our attention by CBS. First, an advance text of the Speech was apparently available in a press tent on the day of the speech. According to an eyewitness affidavit submitted by CBS, members of the public at large—not merely the press—were permitted access to the press tent and were given copies of the advance text. However, the Estate has proffered affidavits which contradict the statements of the CBS witness, and suggest that access was controlled by the SCLC within reasonable means. Moreover, the Estate argues that much of the content of the Speech was generated extemporaneously by Dr. King and was not contained in this advance text—an argument that we do not consider but that can be explored by the district court. Finding genuine issues of material fact with respect to the availability of the advance text to the general public, the district court disregarded CBS's allegations

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[13] The district court held that “the circumstances in this case take the work in question outside the parameters of the ‘performance is not a publication’ doctrine.” These circumstances included “the overwhelmingly public nature of the speech and the fervent intentions of the March organizers to draw press attention.” Certainly, the Speech was one of a kind—a unique event in history. However, the features that make the Speech unique—e.g., the huge audience and the Speech’s significance in terms of newsworthiness and history—are features that, according to the case law, are not significant in the general versus limited publication analysis. With respect to the huge audience, the case law indicates that the general publication issue depends, not on the number of people involved, but rather on the fact that the work is made available to the public without regard to who they are or what they propose to do with it....

[14] With respect to the significance of the Speech in terms of newsworthiness and history, the case law again suggests that this feature should not play a substantial role in the analysis. As noted above, the D.C. Circuit in *Rickover* indicated that the wide press distribution of the speeches at issue there would not alone have constituted a general publication....

[15] The district court cited *Letter Edged in Black Press, Inc. v. Public Bldg. Comm’n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970), CBS’s best case, in support of its reasoning In *Letter Edged in Black*, the question was whether the city had dedicated a Picasso sculpture (located in front of the Chicago Civic Center) to the public domain by general publication....

[16] The district court likened the instant case to *Letter Edged in Black* on the ground that there was a lack of restriction on copying and free allowance of reproduction by the press. However, we do not believe the analogy fits—at least not at this summary judgment stage. Significantly, in *Letter Edged in Black* there were manifestations of the city’s intent to distribute generally among the public at large that have no parallels in the evidence we can consider in the instant summary judgment posture. The city gave photographs of the sculpture to the public, not merely the press, upon request. The city commercially sold a postcard featuring the sculpture. Copying was apparently widespread at an exhibit of the sculpture, and the city took no action to curtail copying and photographing by the public. At trial, CBS may well produce evidence that brings the instant case on all fours with *Letter Edged in Black*,⁶ but the present state of the record does not support the analogy

[17] Because there exist genuine issues of material fact as to whether a general publication occurred, we must reverse the district court’s grant of summary judgment for CBS.... Of course, we express no opinion on the eventual merits of this litigation. The judgment of the district court is reversed and remanded for further proceedings not inconsistent with this opinion.

in this regard. We agree, and do likewise.

Second, CBS has produced a September 1963 issue of the SCLC’s newsletter in which the text of the Speech was reprinted in its entirety, with no copyright notice. The newsletter was widely circulated to the general public. Indeed, at oral argument, the Estate conceded that this reprinting of the Speech and wide distribution of the newsletter would constitute a general publication, if it were authorized by Dr. King. However, the Estate has raised the issue that Dr. King did not authorize this reprinting and distribution of the Speech. Finding genuine issues of fact in this regard, the district court disregarded this evidence. We agree, and do likewise....

⁶ For example, if the SCLC’s reprinting of the text of the Speech in the September 1963 newsletter was authorized, *see supra* note 4, that reprinting might be analogous to the public distribution of photographs in *Letter Edged in Black*. Similarly, if CBS were to adduce evidence that Dr. King or his agents offered copies of the Speech indiscriminately to any member of the public who requested them, e.g., through the availability of the advance text in the press tent, that would make the facts of the instant case closer to those of *Letter Edged in Black*.

COOK, J., concurring in part and dissenting in part: ...

[18] ... I would hold that no publication, general or limited, occurred because Dr. King's delivery of his "I Have A Dream" speech was a mere performance of that work, and performance simply cannot constitute a publication regardless of (1) the size of the audience involved, or (2) efforts to obtain widespread contemporary news coverage under circumstances that may have allowed the copying of the work. It is my belief that this analysis (1) differs significantly from one which is premised on a limited publication theory, and (2) also avoids the legal fiction of declaring that Dr. King's "I Have A Dream" speech, as a limited publication, was communicated to a select group for a narrow purpose, a holding that has been generally criticized by commentators....

NOTES

1. Noted copyright scholar Benjamin Kaplan bemoaned courts' definitions of publication under the 1909 Act: "The concept of publication has been seriously distorted and now bedevils much of the law of copyright." Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 488-89 (1955). One reason that courts' definitions under the 1909 Act were confusing is that courts often sought explicitly to minimize forfeiture of federal copyright. The more readily that an act qualified as publication, the more easily authors could inadvertently lose both their federal rights, by not complying with the requisite formalities, and their state rights by having published the work. Courts sought to prevent such forfeitures by creating the categories of general publication and limited publication. Only a general publication would divest a state law copyright. By contrast, a limited publication would not. Scholars generally understand some of courts' more strained understandings of general and limited publication as courts seeking to avoid forfeiture of copyright. *E.g.*, Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 322-23 (2010). For an empirical study of judicial decisions on publication, see Deborah R. Gerhardt, *Copyright Publication: An Empirical Study*, 87 NOTRE DAME L. REV. 135 (2011).

2. A second reason that courts' definitions of publication might be confusing is because technologies of dissemination have changed so substantially over time. American copyright law first made publication a key moment in a world of dissemination of works via print, when it was more straightforward to understand what counted as a publication. However, with the advent of non-print forms of dissemination, such as movie theater showings, television broadcasts, and internet websites, it became harder to understand what constitutes a publication. The *King* case demonstrates this growing difficulty with its conclusion that a speech broadcast on television to millions of people does not constitute a general publication.

The legislative history leading up to the 1976 Act emphasizes the outdatedness of the concept of publication as one reason to move away from requiring it as a condition of federal copyright protection. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 129-30 (1976) ("'Publication,' perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, 'publication' could serve as a practical dividing line between common law and statutory protection, this is no longer true.").

3. Why did copyright law include a publication requirement in the first place? One reason is that publication tended to correlate with economic exploitation of a work. Another is that publication is a moment that deposit with the Copyright Office (discussed below in section 4) becomes easy. Do copyright's underlying policies coincide with one or both of these explanations? Do these explanations support or undermine a decision to exclude performances of a work from a definition of publication? For more on the rationales for excluding performances from the definition of publication, see 1 NIMMER ON COPYRIGHT § 4.08.

2. Copyright Notice

All U.S. copyright statutes from the first American copyright statute in 1790 through 1976 have included a notice requirement. The legislative history leading up to the 1976 Act listed four purposes of copyright notice:

1. It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;
2. It informs the public as to whether a particular work is copyrighted;
3. It identifies the copyright owner; and
4. It shows the date of publication.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 143 (1976). Weighed against these benefits is the possibility of inadvertent forfeiture of copyright protection should one neglect to include copyright notice. *Id.* As you review the rules for copyright notice under the 1909 Act, the 1976 Act, and following U.S. accession to the Berne Convention, consider how well the rules strike a balance between these various interests.

The 1909 Act required, as a condition of copyright protection, that proper copyright notice be affixed to copies of a work upon publication. 17 U.S.C. §§ 9, 18-20 (1909). To be valid, the notice had to contain (1) the word “Copyright,” the abbreviation “Copr.,” or the © symbol; (2) the name of the copyright owner; and (3) for printed literary, musical, and dramatic works, the date of first publication. *Id.* § 18. Notice had to appear in a precise location toward the beginning of books, periodicals, and musical works. *Id.* § 19. For other works like motion pictures, the location of the required notice was not prescribed. *Coventry Ware, Inc. v. Reliance Frame Co.*, 288 F.2d 193, 194-95 (2d Cir. 1961). Works lacking valid notice upon publication moved into the public domain.

The 1976 Act principally carried forward the 1909 Act’s requirements as to the content of copyright notice, except that the date of first publication became required for all works. 17 U.S.C. § 401(b) (1976). The new law prospectively gave more flexibility as to where notice could be placed by requiring it to “be affixed to ... copies in such manner and location as to give reasonable notice of the claim of copyright.” *Id.* § 401(c) (1976). It also continued to require notice upon publication as a condition of copyright protection. *Id.* §§ 401-402 (1976). That said, the Act diminished the consequences of not affixing proper notice: instead of injecting those works into the public domain, the law gave an opportunity to cure defective notice through “a reasonable effort ... made to add notice to all copies ... that are distributed to the public in the United States after the omission has been discovered” and registration within five years after publication without notice. *Id.* § 405(a)(2) (1976).

Because the Berne Convention bars formalities as a condition of copyright protection, Congress changed the rules on notice when the United States acceded to the Berne Convention. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7. It left the provisions of the 1976 Act governing notice principally intact but prospectively made complying with these provisions optional. 17 U.S.C. § 401(a) (“Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section *may* be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.” (emphasis added)). As an incentive to provide this optional notice, Congress added that if the copyright owner complies with the notice rules, “no weight shall be given to ... a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages” with limited exception. *Id.* § 401(d). (We discuss this defense in Chapter VIII. Variations on this defense had been available as well under the 1909 and 1976 Acts for innocent infringers of works that had omitted notice but were excused for doing so.)

1909 Act	1976 Act	Post-Berne
Proper notice required to maintain copyright protection	Proper notice required to maintain copyright protection, but 5-year opportunity to cure inadequate notice	Provision of notice optional, though notice eliminates an innocent infringer defense
Proper notice requires (1) ©, Copr., or Copyright; (2) name of copyright owner; (3) (for some works) date of first publication	Same as 1909 Act, but date of first publication required for all works	No change from 1976 Act
Proper notice must be in a specific location for books, periodicals	Notice must be in a manner and location that gives reasonable notice	No change from 1976 Act

Table 2: notice rules

There are some specialized notice rules for certain types of works. For example, since the 1976 Act, the notice requirement is satisfied for each contribution to a collective work if the collective work as a whole has a single compliant notice. 17 U.S.C. § 404(a).

NOTES

1. The evolution of copyright law's notice rules might seem like minor tweaks to formalities. Arguably, however, the law's changes to notice rules effectuate a much bigger systemic shift: they are key to switching copyright from an opt-in system—in which a work's owner had to act deliberately by affixing notice and registering (as discussed in the next section)—to an opt-out system—in which copyright protection is provided to all copyrightable works whether or not the work's owner desires copyright protection. For an argument that this switch to an opt-out system has been harmful to copyright's goals and that the United States might move back to an opt-in system without running afoul of its Berne Convention obligations, see James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Jon Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

2. Given that works lacking copyright notice can no longer be presumed to be in the public domain, copying such works without a thorough investigation can be dangerous. For some works, known as **orphan works**, their owner cannot be found even after a reasonably diligent search. There have been proposals, thus far unsuccessful, to amend copyright law to allow for the use of orphan works. The issue of orphan works became particularly acute in the context of the Google Book Search project, in which Google scanned books so they could be searched and viewed in part online. (We review litigation regarding this project in Chapter VI.) Many of the books that Google wanted to scan—often out of print and obscure—were orphan works. Omitting these books from the project would diminish the utility of Google's book search software. For an exploration of orphan works, proposed legislation, and the Google Book Search project, see James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y U.S.A. 497 (2011); Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WISC. L. REV. 479.

3. Although copyright notice can be helpful for putting the public on notice of copyright interests, what is to stop a publisher from putting a copyright notice on a work that is in the public domain (because it is either uncopyrightable or its copyright has already expired)? The Copyright Act contains no legal disincentive, such as

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a fine, for false claims of ownership of public domain materials. For an argument that copyright law should penalize this “copyfraud,” particularly because it discourages the public from freely using materials in the public domain, see Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026 (2006). As Mazzone describes it, “[f]alse copyright notices appear on modern reprints of Shakespeare’s plays, Beethoven’s piano scores, greeting card versions of Monet’s Water Lilies, and even the U.S. Constitution. Archives claim blanket copyright in everything in their collections. Vendors of microfilmed versions of historical newspapers assert copyright ownership.”

4. Fixation itself might be seen as providing notice that copyright might exist in the fixed work. For an exploration of how well fixation serves the notice functions that copyright can provide, see Lydia Pallas Loren, *Fixation as Notice in Copyright Law*, 96 B.U. L. REV. 939 (2016).

3. Registration

The value of registration has been to provide for third parties a written record of copyright ownership in a work. Over the course of American copyright history, as with the other formalities, registration has moved from being required to increasingly optional.

Under the 1909 Act, registration was optional until the last year of the first copyright term (then twenty-eight years, as discussed below in section B). If registration would occur within that period, the copyright owner would be entitled to a renewal term of an additional twenty-eight years. If not, the work would move into the public domain upon the end of the first term. Act of Mar. 4, 1909, ch. 320, §§ 23-24. The Copyright Renewal Act of 1992 made the renewal term automatic for all works published from 1964 through 1977, thereby removing the requirement that the renewal term was contingent on registration before the renewal period for these works. Pub. L. 102-307, 106 Stat. 264. Nonetheless, the 1992 law instituted incentives to register copyright before the renewal period, including broader rights over derivative works in the renewal term. 17 U.S.C. § 304(a)(4)(A).

The 1909 Act also made registration of a work a prerequisite to maintaining an infringement action. Act of Mar. 4, 1909, ch. 320, § 12. Under the 1976 Act, copyright registration remained prerequisite to an infringement suit with little exception. 17 U.S.C. § 411(a) (1976).

The 1976 Act also provided incentives to register copyright. For one thing, a copyright owner could recover statutory damages and attorney’s fees for infringement of a work only if the owner registered copyright in the work before the infringement began (or within a grace period). *Id.* § 412 (1976). By contrast, under the 1909 Act, a copyright owner could recover statutory damages or attorney’s fees without having registered the work before infringement began. A second incentive to register copyright in a work is that the registration provides *prima facie* validity of the copyright so long as registration happens within five years of the work’s first publication. *Id.* § 410(c) (1976). Although the 1909 Act had the same evidentiary advantage, it was indifferent to how soon the registration was filed. Act of Mar. 4, 1909, ch. 320, § 55.

Following U.S. accession to the Berne Convention, the 1976 Act’s registration rules and incentives principally remain in place with one major exception. Registration is still prerequisite to an infringement lawsuit, but only for “any United States work” made after March 1, 1989. 17 U.S.C. § 411(a). Foreign works made after this time are exempt from registration before an infringement suit over them.

The Copyright Office examines registration applications to ensure that a work at issue is copyrightable and otherwise complies with copyright law. *Id.* § 410(a). If the Office determines that the work has complied with copyright’s requirements, it will register copyright in the work and issue a certificate of registration. *Id.* Otherwise, it will refuse registration. *Id.* § 410(b). That said, if copyrightability is uncertain, the Copyright Office

will register the work under a “Rule of Doubt” and rely on subsequent litigation to sort out any problems. COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 607.

If registration is refused, the applicant may seek judicial review of the denial in the U.S. District Court for the District of Columbia. 5 U.S.C. §§ 701-706. Alternatively, the applicant can still commence an action for infringement but must serve upon the Register of Copyrights notice of the action with a copy of the complaint. 17 U.S.C. § 411(a). The Register is authorized, but not required, to “become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register’s failure to become a party shall not deprive the court of jurisdiction to determine that issue.” *Id.*

1909 Act	1976 Act	Post-Berne
Registration optional until last year of first copyright term (and only mandatory for renewal of works first published before 1964)	Registration optional, but provides <i>prima facie</i> evidence of validity and permits possible recovery of statutory damages and attorney’s fees	No change from 1976 Act
Registration a prerequisite to lawsuit	Registration a prerequisite to lawsuit	Registration a prerequisite to lawsuit only for U.S. works

Table 3: registration rules

NOTES

1. Does the 1988 change to registration rules comply with the Berne Convention requirement that copyright not be subject to formalities? Why this change? As David Nimmer explains in his treatise, “although United States citizens were somewhat disadvantaged by Congress’s action, at least no non-U.S. Berne claimants could contend that the United States was setting up impermissible formal roadblocks to the protection of their copyrights.” 1 NIMMER ON COPYRIGHT § 7.16.

2. How do copyright law’s registration rules align with copyright’s goals? In evaluating the fit, consider what must be done to register a work: deposit the work (as discussed in the next section), complete an application requiring principally procedural details about the work—such as the copyright owner’s name, the work’s title, the publication year if published, the year in which the work was completed, and the category of copyrightable subject matter—and pay a fee. 17 U.S.C. §§ 408-409; 37 C.F.R. § 202.3.

Note also that to secure a copyright registration, the applicant is not asked to say anything about the work’s content. Does this help or undermine copyright’s policy goals? For more on this issue, see Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719 (2009); Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018).

3. There had been a circuit split as to whether the “registration of [a] copyright claim has been made” within the meaning of § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or only once the Copyright Office acts on that application. This determination affects when a copyright holder can bring an infringement lawsuit. The U.S. Supreme Court resolved this split, holding that registration of a copyright claim occurs when the Copyright Office registers a copyright, at which point a copyright holder can file an infringement suit. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296 (2019).

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4. The Supreme Court recently clarified that an applicant’s “[l]ack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration,” meaning that the registration is valid despite the inaccuracy. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 595 U.S. 178, 182 (2022) (construing 17 U.S.C. § 411(b)(1) on the validity of a registration certificate).

5. One consequence of a registration scheme is that scholars can study the demographics of copyright registrations, the range of subject matter being registered, and so forth. A study analyzing over fifteen million works registered in the Copyright Office from 1978 through 2012 is Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46 (2018). Among other data, they report that over two-thirds of authors in registered works are men, that Black authors register music works at rates significantly higher than those of other races and ethnicities, and that the authors of literary works are on average ten years older than the authors of music works.

4. Deposit

Deposit is closely linked to registration, not only because registration of a work requires its deposit but also because its goal is to provide the Library of Congress—via the Copyright Office—copies of copyrighted works to bolster registration’s written record.

The 1909 Act required the prompt deposit of two complete copies of the best published edition of the work with the Copyright Office. Act of Mar. 4, 1909, ch. 320, § 12. Like registration, deposit was also a prerequisite to an infringement suit. *Id.* The Copyright Office could also demand deposit. *Id.* § 13. Failure to comply with such a demand in a timely fashion (three months for U.S. works) resulted in forfeiture of the copyright and a fine. *Id.*

The 1976 Act principally carried forward the 1909 Act requirements, 17 U.S.C. §§ 407, 408, 411(a) (1976), with an important exception. Failure to comply with a Copyright Office demand for deposit within three months of the demand no longer resulted in copyright forfeiture but only in a civil fine. *Id.* § 407(d) (1976).

Following U.S. accession to the Berne Convention, deposit is a prerequisite to an infringement lawsuit only for U.S. works. *Id.* §§ 408, 411(a).

1909 Act	1976 Act	Post-Berne
Sanctions for failure to comply with demand for deposit, including copyright forfeiture	Fine is only sanction for failure to comply with demand for deposit	No change from 1976 Act
Deposit a prerequisite to lawsuit	Deposit a prerequisite to lawsuit	Deposit a prerequisite to lawsuit only for U.S. works

Table 4: deposit rules

NOTES

1. A study by the Copyright Office emphasizes another principal purpose of deposit: “it has materially assisted the Library [of Congress] in building its collections on all aspects of American history, literature, law, music, and social culture.” ELIZABETH K. DUNNE, DEPOSIT OF COPYRIGHTED WORKS, COPYRIGHT OFFICE STUDY NO. 20, at 30 (Comm. Print 1960). For a further argument that there should be a digital deposit requirement, see Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013 (2007).

2. The deposit requirements for a copyrighted work are different for software than for other works. Rather than require deposit of the entire work, as is usually the case when registering copyright in the work, the Copyright Office permits a copyright applicant to submit only small portions of the program and keep the rest secret. In particular, an applicant can satisfy the deposit requirement by submitting “[t]he first and last 25 pages or equivalent units of the source code.” 37 C.F.R. § 202.20(c)(2)(vii)(A)(1). If the applicant is also claiming the source code as a trade secret, the applicant can satisfy the deposit requirement by submitting even less code. *Id.* § 202.20(c)(2)(vii)(A)(2). Additionally, the Copyright Office will register copyright in a software program even if only the object code—and not the source code—is provided, but it will register the copyright only under a rule of doubt because it has not examined the source code. *Id.* § 202.20(c)(2)(vii)(B). Is it acceptable to treat computer software differently than other categories of copyrightable subject matter in terms of how much needs to be disclosed to register copyright? For more on this issue, see Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 715-16.

3. How plausible is it to comply with the deposit requirement for the latest technologies? Consider webpages, online databases, and social media.

4. The U.S. Court of Appeals for the D.C. Circuit recently held that the requirement that a copyright owner deposit physical copies of a published work or else face a fine (separate from a requirement that a registrant deposit physical copies) is an unconstitutional taking of private property, particularly because “the requirement to turn over copies of the works is not a condition of attaining (or retaining) copyright protection in them, [so] the demand to forfeit property cannot be justified as the conferral of a benefit—i.e., copyright protection—in exchange for property.” *Valancourt Books, LLC v. Garland*, 82 F.4th 1222 (D.C. Cir. 2023). The court also suggested that the unconstitutionality could be averted by allowing copyright owners to abandon their copyright to avoid mandatory deposit (there are cases setting out the requirements for finding copyright abandonment, which are summarized in the Restatement of Copyright (Restatement of the Law, Copyright, Tentative Draft No. 3, § 54)). The court did not rule on the constitutionality of the Copyright Office’s offer during litigation “to accept electronic copies in lieu of physical copies.” In view of the court’s reasoning, do you think the deposit requirement under the 1909 Act effects an unconstitutional taking?

5. Other Formalities

This section addresses two other formalities, recordation of transfer and domestic manufacture.

a. Recordation of Transfer

The Copyright Office provides rules on recordation of transfer. According to § 205(a), “[a]ny transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office.” The Register of Copyrights will record the document, upon receipt with a fee, and return it with a certificate of recordation. *Id.* § 205(b). So long as the document specifically identifies the work and the work has been registered, the recordation serves as “constructive notice of the facts stated in the recorded document.” *Id.* § 205(c). An unrecorded transfer is void against a subsequent bona fide purchaser for value who records first. *Id.* § 205(d).

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1909 Act	1976 Act	Post-Berne
Unrecorded transfer void against a subsequent bona fide purchaser for value	No change from 1909 Act	No change from 1909 Act
Recordation not prerequisite to lawsuit	Recordation a prerequisite to lawsuit	Recordation not prerequisite to lawsuit

Table 5: recordation of transfer rules

Under the 1976 Act, recordation of transfer was made a prerequisite to an infringement suit by someone claiming to be copyright owner by virtue of the transfer. 17 U.S.C. § 205(d) (1976). Congress eliminated this requirement when the United States acceded to the Berne Convention. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 5.

b. Domestic Manufacture

The 1909 Act provided that to be protected by copyright, any printed book or periodical in the English language and any printed book or periodical of domestic origin in any language had to be printed within the United States, according to specified requirements regarding type set and the like. Act of Mar. 4, 1909, ch. 320, § 15. The law also provided exemptions for certain categories of works, like those in raised characters for the blind. *Id.* This requirement developed out of earlier prohibitions on copyright protection for foreign authors. For an exploration of the nationalist policies underlying this requirement and other aspects of copyright history, see Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17 (2002).

Courts tended to read the Act's requirement of domestic manufacture liberally, lest many works be found to be in violation of the requirement. For example, the federal government urged and convinced one court that a copyright owner complied with the requirement so long as the owner first published the work in a domestic manufactured edition and thereafter published it in another country. *Hoffenberg v. Kaminstein*, 396 F.2d 684 (D.C. Cir. 1968).

In 1955, the United States ratified the Universal Copyright Convention, which prospectively permitted foreign authors of works first printed abroad in the English language to secure copyright protection without running afoul of the manufacture provision. Universal Copyright Convention art. III.1.

A variation of the domestic manufacture requirement carried forward into the 1976 Act. 17 U.S.C. § 601 (1976). It was set to expire—and did—on July 1, 1986. All works on or after this date have complete copyright protection regardless of the location of manufacture.

6. Restoration

As can be seen from the previous sections, before U.S. accession to the Berne Convention, failure to comply with copyright formalities led to the loss of U.S. copyright protection. Yet Article 18 of the Berne Convention requires retroactive protection of foreign works that lost protection for failing to satisfy the formalities imposed by domestic laws.

In 1994, Congress opted to comply with this aspect of the Berne Convention. It passed a law, codified in § 104A, restoring copyright protection for certain works originating from countries that are members of the Berne

Convention or the World Trade Organization on January 1, 1996. Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809. Section 104A applies to “restored works,” which it defines in section (h)(6) as:

an original work of authorship that— ...

*(B) is not in the public domain in its source country through expiration of term of protection;
[and]*

(C) is in the public domain in the United States due to—

(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; ... [or]

(iii) lack of national eligibility.

Copyright protection in such a work was restored as of January 1, 1996 (with some exceptions), *id.* § 104A(a)(1)(A), and “shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.” *Id.* § 104A(a)(1)(B).

Pursuant to § 104A, copyright was restored to some very prominent works, including J.R.R. Tolkien’s *Lord of the Rings* trilogy, Pablo Picasso’s *Guernica*, Fritz Lang’s *Metropolis*, the works of M.C. Escher, Sergei Prokofiev’s *Peter and the Wolf*, the Pippi Longstocking books, and Alfred Hitchcock’s films including *The Man Who Knew Too Much*.

Many third parties had relied on these works being in the public domain and had used them accordingly. Although § 104A grants the full panoply of rights and remedies in restored works for infringing acts occurring on or after the date of restoration, *id.* § 104A(d)(1), it also gave “reliance parties” a period of immunity to wind down their activities that were now infringing, *id.* § 104A(d)(2). Specifically, before suing for infringement, the owner of the restored copyright needs to give notice of intent to enforce the restored copyright. This notice can be constructive, by filing with the Copyright Office within twenty-four months of the date of restoration, “a notice of intent to enforce the restored copyright,” *id.* § 104A(d)(2)(A)(i), or actual, by serving a reliance party with that notice of intent, *id.* § 104A(d)(2)(B)(i). Then, the owner of the restored copyright must provide twelve months of immunity following notice. *Id.* § 104A(d)(2).

The constitutionality of § 104A was at issue in the U.S. Supreme Court’s decision in *Golan v. Holder*, discussed below in section B.2.

B. Duration

This section addresses the rules and policies of copyright duration. We principally explore the very different frameworks for calculating and evaluating duration under the 1909 Act and the 1976 Act, the latter applying to all works created on or after January 1, 1978, and works fixed but not published before that date.

1. Duration Rules

The precise duration of copyright has changed significantly since the first American copyright law in 1790. That law provided 14 years of protection from the date of a work’s publication, which was renewable for an additional

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14 years if the author survived the first term. Act of May 31, 1790, ch. 15, 1 Stat. 124. Since then, copyright duration has undergone expansion after expansion.

Fast forward to the 1909 Act. It provides protection for 28 years from the date of first publication, before the end of which the copyright holder could renew the copyright for a further term of 28 years. Act of Mar. 4, 1909, ch. 320, § 23. When the 1976 Act was enacted, it tacked on 19 additional years of protection for works published before 1978, to bring duration for pre-1976 Act works into line with those under the 1976 Act. 17 U.S.C. § 304 (1976). In 1998, the Sonny Bono Term Extension Act added another 20 years of protection for these works. Pub. L. No. 105-298, 112 Stat. 2827.

Adding those numbers together (28 + 28 + 19 + 20), the total possible protection for 1909 Act works is 95 years. This calculation is mostly straightforward, except it is important to keep in mind that works that entered the public domain before the enactment of the 1976 Act did not get the 19 additional years of protection. Nor did works that entered the public domain before the 1998 term extension get its 20 additional years of protection. For example, works published in 1922 could have 75 years of protection and fell into the public domain in 1997, thereby not securing the 20-year extension in 1998.

Additionally, as discussed above with regard to registration (section I.A.3), Congress made all renewals automatic in 1992. Before then, many copyright owners had accidentally lost the renewal term by neglecting to register copyright in time. Congress did not retroactively revive protection for works that had already passed into the public domain due to failure to renew copyright. As of 1992, however, a copyright owner did not need to file for renewal. Therefore, works published before 1964 (28 years before 1992) in which the copyright owner did not renew copyright are not protected. By contrast, works published between 1964 and January 1, 1978—works that entered their renewal period automatically once the 1992 change took effect but before the 1976 Act took effect—were renewed automatically and have 95 years of protection, assuming the copyright owner complied with the requisite formalities.

The 1976 Act made two major changes to calculating duration. First, under the 1976 Act, copyright protection starts at fixation (Chapter II) rather than at publication (section A.1). Second, copyright protection under the 1976 Act lasts for the lifetime of the author plus 50 years, instead of a fixed term. 17 U.S.C. § 302 (1976). As with works under the 1909 Act, the Sonny Bono Term Extension Act in 1998 added another 20 years of protection for works under the 1976 Act, bringing copyright duration to lifetime of the author plus 70 years. Pub. L. No. 105-298, 112 Stat. 2827. As 17 U.S.C. § 302 currently spells out:

Copyright in a work created on or after January 1, 1978, subsists from its creation and, [with some exceptions], endures for a term consisting of the life of the author and 70 years after the author's death.

These two changes under the 1976 Act to when copyright protection starts and how long it lasts raised complexities for certain categories of works: joint works, works created by a pseudonymous or anonymous author, works made for hire (and thus potentially authored by a business entity rather than an individual), and works that were unpublished as of January 1, 1978. None of these works can be handled straightforwardly by § 302. For joint works, it is unclear which of the multiple authors' lifetimes to use to calculate duration. For works by an anonymous or pseudonymous author, one might not know the author's identity to calculate the author's lifetime. For works made for hire, how does and should one compute the lifetime of a business entity? For works that were created but unpublished before the 1976 Act went into effect, should some older ones whose author died more than 50 years earlier fall immediately into the public domain? Because of these complexities, the 1976 Act created special duration rules for each of these categories of works.

For joint works prepared by two or more authors who did not work for hire, § 302(b) provides that

the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

For anonymous works, pseudonymous works, and works made for hire, § 302(c) provides a different formula to calculate duration:

the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.

(Section 302(c) specifies one way in which “publication” is still important under the 1976 Act.)

All works that were unpublished as of January 1, 1978, were—by definition—not protected under the 1909 Act. As discussed above in section A.1, some states provided this category of works an infinite term of protection so long as the works remained unpublished. The 1976 Act removed this category of works from the auspices of state law and brought them within its scope. Section 303 provides that the duration rule for this category of works is generally the same as for other works, as set out in § 302. That said, there was a worry that the rules set out in § 302 are unfair when works by authors that had long ago died were brought into the scope of the 1976 Act and therefore might get no protection (such as if the author had died in 1927, more than 50 years before the effective date of the 1976 Act). Congress addressed this issue in § 303(a) by providing a minimum term of copyright protection for previously unpublished works, which in its current form provides:

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

That is, for this category of works, the duration is based on the relevant rule in § 302, but if that rule would yield an expiration date before December 31, 2002, the copyright will last until December 31, 2002. Congress also provided an additional incentive to publish works created but unpublished as of January 1, 1978, by granting a potential 45 years of additional protection if the work is published on or before December 31, 2002. For an analysis of the large corpus of works that fell into the public domain on January 1, 2003, as a result of this rule, see R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 TEX. L. REV. 585 (2007).

For the most part, the 1976 Act switch that keyed duration to the author's lifetime made copyright notice less important, because (except for a limited number of categories of works, such as works made for hire) one can no longer ascertain duration by looking at the publication year in a copyright notice. The Act appreciates that determination of an author's death date can be harder to determine than a work's publication year. Section 302(e) therefore contains a presumption of an author's death:

After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that [its] records ... disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefits of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

In these cases, a third party can presume, without legal consequence, that a work has fallen into the public domain.

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One additional change made by the 1976 Act is set out in § 305, which provides that its copyright terms “run to the end of the calendar year in which they would otherwise expire.” (Previously, under the 1909 Act, a copyright term had instead expired based on the actual date of publication, rather than at the end of the calendar year at issue. Act of Mar. 4, 1909, ch. 320, § 23.)

In 2018, Congress granted copyright-like protection to pre-1972 sound recordings, and it created specific duration rules for this category of works: 95 years from the first publication, plus a transition period depending on the year of first publication:

- Until December 31, 2021, for sound recordings first published pre-1923;
- 5 years for recordings first published between 1923 and 1946, for a total of 100 years from first publication;
- 15 years for recordings first published between 1947 and 1956, for a total of 110 years from first publication; and
- Until February 15, 2067, for recordings first published between 1957 and February 15, 1972.

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 1401(a)(2)(B), 132 Stat. 3676 (2018).

Statutory Category	General Duration Rule
1909 Act	28-year term + 28-year renewal term + 19-year extension + 20-year extension = 95 years
1976 Act – general rule	Lifetime of the author + 70 years
1976 Act – joint works	Lifetime of last surviving author + 70 years
1976 Act – anonymous works, pseudonymous works, & works made for hire	Shorter of 95 years from first publication and 120 years from creation
1976 Act – works created and unpublished before January 1, 1978	If not published before the beginning of 2003, the later of the relevant § 302 rule and December 31, 2002. If published before the beginning of 2003, the later of the relevant § 302 rule and December 31, 2047.
Music Modernization Act – pre-1972 sound recordings	95 years from the first publication, plus a transition period depending on the year of first publication

Table 6: duration rules

NOTE

1. Calculate when copyright expires in the following situations:

- a) On February 10, 1945, Allison completes a novel set in the fashion industry. She publishes the novel on February 10, 1948, complying with the requisite formalities. She does not renew the copyright. She dies on March 1, 2020. When does her copyright expire?
- b) Instead, on February 10, 1968, Allison first publishes her novel. She does not renew the copyright. She dies on March 1, 2020. When does her copyright expire?
- c) Instead, on February 10, 1985, Allison writes a novel set in the fashion industry. She publishes the novel on February 10, 1986. She dies on March 1, 2020. When does her copyright expire?
- d) Instead, on February 10, 1985, Allison writes half of a book of poetry. On February 10, 2018, she writes the other half. She publishes the book a month later. She dies on March 1, 2020. When does her copyright expire?
- e) Instead, on February 10, 1985, Allison performs five poems she has created as part of an improvisational performance for over 100 people. She dies on March 1, 2020. Shortly thereafter, a fan who attended the performance writes up Allison's five poems from memory and posts them online. When does Allison's copyright expire?
- f) Instead, on February 10, 1985, Allison writes a book of poetry and publishes it soon after. On April 1, 1990, Emma releases an album comprising twelve of Allison's poems from the book set to Emma's own music. Allison is interviewed discussing how happy she is that Emma released this album. Emma dies on March 1, 2020. Allison dies on March 1, 2050. When do their copyrights expire?
- g) Instead, on February 10, 1985, Allison writes a book of poetry and publishes it soon after. On April 1, 1990, Allison hires Emma to set any twelve of her poems to music at Emma's discretion. On May 1, 1990, Emma releases an album comprising twelve of Allison's poems from the book set to Emma's music. Emma dies on March 1, 2020. Allison dies on March 1, 2050. When do their copyrights expire?
- h) Instead, on February 10, 1968, Allison writes a novel, which she is too afraid to publish. Upon her death on March 1, 2020, her husband is instructed in her will to publish the novel. He publishes the novel on April 1, 2021. When does copyright in the novel expire?

2. Duration Policy

With copyright's duration rules set out, it is worthwhile to explore the policies underpinning Congress's duration choices over time as well as the constitutionality of repeated extensions of copyright duration.

First, consider why Congress switched from a duration rule based on a fixed term to one based on an author's lifetime. The legislative history underlying the 1976 Act gives many reasons for this change, including accounting for increased average life expectancies for authors and for the longer commercial life of works. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 134 (1976).

Congress also observed that a "very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death." *Id.* at 135. This disparity had already "provoked consider[able] resentment and some proposals for retaliatory legislation." *Id.* Reciprocal protection through conformity with international practice, Congress thought, would redound to the benefit of American authors.

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Another reason provided is that it would simplify matters. Before, a person inquiring into whether a work was in the public domain for purposes of, for example, licensing, would need to look at the work's date of registration or publication. But now an author's copyrights would all expire simultaneously, a "definite, determinable event, and it would be the only date that a potential user would have to worry about." *Id.* at 134.

But the change also created additional offsetting complications. As the Copyright Office noted, it would be easier to measure copyright duration with a fixed term commencing with the work's creation or publication. REGISTER OF COPYRIGHTS, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 48 (Comm. Print 1961). While an author is still alive, one could not definitively compute a copyright's duration with a life-plus-years structure. Even when the author has died, information about the author's date of death might not be readily accessible. *Id.* By contrast, one can measure a fixed copyright duration once one knows when the copyright commenced. *Id.* Additionally, a fixed duration could be employed across the board regardless of the type of copyrighted work, whereas a life-plus-years format would necessitate treating certain works—like anonymous works—differently. *Id.* at 48-49.

When Congress switched from a fixed term to a life-plus-years structure, Congress set out to make the new structure statistically equivalent to the fixed term it was providing for certain categories of works like works made for hire. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 138 (1976). Therefore, the switch from a fixed term was not principally about extending copyright duration, but about changing the way duration is measured.

Jeanne Fromer suggests that this switch can be understood as an **expressive incentive** to authors to induce the creation of valuable works, not by offering a financial motivation, but by protecting creators' labor and personhood interests and employing rhetoric communicating concern for these interests:

It is often noted that copyright duration is one of copyright law's most visible components to authors, if not the most visible. One way to provide incentive for people to create, then, is to use a durational structure that is particularly salient to creators. The structure of copyright duration can be seen as doing just that by invoking the author's personhood interests as an incentive. By setting the author's lifetime as the essential variable of copyright protection, copyright law shields works in an author-centered way: for the author's lifetime (and a fixed terms of years following that). The author's lifetime is arguably the duration for which the author's personhood interest in his or her works remains most important, in that the author is associating his or her works with self-concept and building a reputation. Duration with a life-plus-years term is keyed to the author himself or herself, also sending a signal of how important the author is in copyright law. For all of these reasons, copyright's durational structure can serve as an expressive incentive, which can be particularly helpful to advancing copyright's goal of encouraging artistic creations.

*Were copyright law to provide a statistically equivalent duration of a fixed term, it might not offer the same incentive to authors because it would not be offering protection for the author's personhood or signaling any solicitude for it. Keying duration to the work's creation or registration, as was once done, signals the work's importance at the author's expense. The current durational structure, by contrast, assures the author that protection will attach for the author's lifetime (and then some). In fact, Professors Avishalom Tor and Dotan Oliar show, in an experiment, that individuals prefer a life-plus-years term like Congress implemented to a comparable fixed term. Avishalom Tor & Dotan Oliar, Incentive to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for *Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437, 480-81 (2002).*

[This] understanding also makes sense of how authors seem to get treated differently for copyright duration. When two people create nearly identical works at different points in their lifetimes—one, say, the day before death and the other, say, fifty years before death—they will receive different terms of protection (seventy years in the first example and 120 in the second). When the same author creates two works—one early in life and another later on—copyright protection for both will expire at the same time, meaning different protective terms for each work. These results seem unfair from the narrower vantage point of rewarding equal term lengths to all similarly situated people or works. However, by viewing duration as an expressive incentive, these differential lengths make sense. If protection of the author's personhood interests is an important goal, awarding a term that takes account of the author's particular circumstances fulfills that goal in a way the equivalent fixed term across the board does not.

Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1801-03 (2012). It should be noted that although the switch to a "life plus" structure for the copyright term can be explained by reference to a theory of expressive incentives, that does not as easily justify copyright protection beyond the lifetime of an author (even though it can "act[] like an insurance policy, giving some certain degree of protection, when a person creates a copyrightable work toward the end of [their] life," as Fromer explains it). Indeed, Deven Desai argues that post-mortem protection is unjustified, especially because "[e]vidence suggests that authors' children are often poor custodians of works, extracting rent and hindering the creative process rather than contributing to further creation " Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 222. The switch of a "life plus" structure also does not explain Congress's repeated extensions of the copyright term. Just as international harmonization was cited as a key motive for switching to a lifetime-plus-50-year term in the 1976 Act, harmonization with the duration rules of the European Union was cited as a principal basis for adding 20 years of protection to the copyright term in the 1998 term extension act. S. REP. NO. 315, 104th Cong. (1996). This act was also sometimes called "The Mickey Mouse Protection Act," because the Walt Disney Company had been lobbying for this term extension to delay the entry into the public domain of Mickey Mouse, who had first appeared in the *Steamboat Willie* film in 1928. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001). *But see* Zvi S. Rosen, *Who Framed Mickey Mouse?*, 73 U. KAN. L. REV. 41 (2024) (maintaining that Disney "was neither the primary advocate for term extension nor the most vocal"). (Instead of falling into the public domain in 2003, the term extension provided Disney with another 20 years of protection until 2023.

As you read the following case that challenges the constitutionality of the 1998 20-year copyright term extension, consider whether the extension fits well with copyright's purposes and whether any lack of fit ought to affect the law's constitutionality. Is the Supreme Court granting appropriate deference to Congress? What are the key disagreements between Justice Ginsburg's majority opinion and Justice Breyer's dissenting opinion? Are copyright protections and the First Amendment in tension?

Eric Eldred v. John D. Ashcroft

537 U.S. 186 (2003)

GINSBURG, J.:

[1] This case concerns the authority the Constitution assigns to Congress to prescribe the duration of copyrights. The Copyright and Patent Clause of the Constitution, Art. I, § 8, cl. 8, provides as to copyrights: "Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings." In 1998, in the measure here under inspection, Congress enlarged the duration of copyrights by 20 years. Copyright Term Extension Act (CTEA), Pub. L. 105–298, §§ 102(b) and

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(d), 112 Stat. 2827–28 (amending 17 U.S.C. §§ 302, 304). As in the case of prior extensions, principally in 1831, 1909, and 1976, Congress provided for application of the enlarged terms to existing and future copyrights alike.

[2] Petitioners are individuals and businesses whose products or services build on copyrighted works that have gone into the public domain. They seek a determination that the CTEA fails constitutional review under both the Copyright Clause’s “limited Times” prescription and the First Amendment’s free speech guarantee. Under the 1976 Copyright Act, copyright protection generally lasted from the work’s creation until 50 years after the author’s death. Under the CTEA, most copyrights now run from creation until 70 years after the author’s death. Petitioners do not challenge the “life-plus-70-years” timespan itself. “Whether 50 years is enough, or 70 years too much,” they acknowledge, “is not a judgment meet for this Court.” Congress went awry, petitioners maintain, not with respect to newly created works, but in enlarging the term for published works with existing copyrights. The “limited Tim[e]” in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend. As to the First Amendment, petitioners contend that the CTEA is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations.

[3] In accord with the District Court and the Court of Appeals, we reject petitioners’ challenges to the CTEA. In that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations....

[4] We evaluate petitioners’ challenge to the constitutionality of the CTEA against the backdrop of Congress’ previous exercises of its authority under the Copyright Clause. The Nation’s first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. The 1790 Act’s renewable 14-year term applied to existing works (*i.e.*, works already published and works created but not yet published) and future works alike. Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years). Both times, Congress applied the new copyright term to existing and future works; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective.

[5] In 1976, Congress altered the method for computing federal copyright terms. For works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work’s creation, not—as in the 1790, 1831, and 1909 Acts—its publication; protection would last until 50 years after the author’s death. In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works. For anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first.

[6] These new copyright terms, the 1976 Act instructed, governed all works not published by its effective date of January 1, 1978, regardless of when the works were created. For published works with existing copyrights as of that date, the 1976 Act granted a copyright term of 75 years from the date of publication, a 19-year increase over the 56-year term applicable under the 1909 Act.

[7] The measure at issue here, the CTEA, installed the fourth major duration extension of federal copyrights. Retaining the general structure of the 1976 Act, the CTEA enlarges the terms of all existing and future copyrights by 20 years. For works created by identified natural persons, the term now lasts from creation until 70 years after the author’s death. This standard harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993. For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first.

[8] Paralleling the 1976 Act, the CTEA applies these new terms to all works not published by January 1, 1978. For works published before 1978 with existing copyrights as of the CTEA's effective date, the CTEA extends the term to 95 years from publication. Thus, in common with the 1831, 1909, and 1976 Acts, the CTEA's new terms apply to both future and existing copyrights.³ ...

[9] Petitioners' suit challenges the CTEA's constitutionality under both the Copyright Clause and the First Amendment. On cross-motions for judgment on the pleadings, the District Court entered judgment for the Attorney General The court held that the CTEA does not violate the "limited Times" restriction of the Copyright Clause because the CTEA's terms, though longer than the 1976 Act's terms, are still limited, not perpetual, and therefore fit within Congress' discretion. The court also held that "there are no First Amendment rights to use the copyrighted works of others."

[10] The Court of Appeals for the District of Columbia Circuit affirmed.... Copyright, the court reasoned, does not impermissibly restrict free speech, for it grants the author an exclusive right only to the specific form of expression; it does not shield any idea or fact contained in the copyrighted work, and it allows for "fair use" even of the expression itself.

[11] A majority of the Court of Appeals also upheld the CTEA against petitioners' contention that the measure exceeds Congress' power under the Copyright Clause. Specifically, the court rejected petitioners' plea for interpretation of the "limited Times" prescription not discretely but with a view to the "preambular statement of purpose" contained in the Copyright Clause: "To promote the Progress of Science." ...

[12] Judge Sentelle dissented in part. He concluded that Congress lacks power under the Copyright Clause to expand the copyright terms of existing works.

[13] We granted certiorari to address two questions: whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights violates the First Amendment. We now answer those two questions in the negative and affirm....

[14] We address first the determination of the courts below that Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe "limited Times" for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.

[15] The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Tim[e]" as applied to future copyrights. Petitioners contend, however, that existing copyrights extended to endure for that same term are not "limited." Petitioners' argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever "fixed" or "inalterable." The word "limited," however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: "confine[d] within certain bounds," "restrain[ed]," or "circumscribe[d]." S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785); see T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) ("confine[d] within certain bounds"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1312 (1976) ("confined within limits"; "restricted in extent, number, or duration"). Thus understood, a timespan appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when

³ Petitioners argue that the 1790 Act must be distinguished from the later Acts on the ground that it covered existing *works* but did not extend existing *copyrights*. The parties disagree on the question whether the 1790 Act's copyright term should be regarded in part as compensation for the loss of any then existing state- or common-law copyright protections. Without resolving that dispute, we underscore that the First Congress clearly did confer copyright protection on works that had already been created.

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applied to existing copyrights. And as we observe [below], there is no cause to suspect that a purpose to evade the “limited Times” prescription prompted Congress to adopt the CTEA.

[16] To comprehend the scope of Congress’ power under the Copyright Clause, a page of history is worth a volume of logic. History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.... [The] First Congress accorded the protections of the Nation’s first federal copyright statute to existing and future works alike. Since then, Congress has regularly applied duration extensions to both existing and future copyrights.

[17] Satisfied that the CTEA complies with the “limited Times” prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.

[18] The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain. As respondent describes, a key factor in the CTEA’s passage was a 1993 European Union directive instructing EU members to establish a copyright term of life plus 70 years. Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States.

[19] In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.

[20] In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress’ power under the Copyright Clause....

[21] Petitioners’ Copyright Clause arguments rely on several novel readings of the Clause. We next address these arguments and explain why we find them unpersuasive....

[22] Petitioners contend that even if the CTEA’s 20-year term extension is literally a “limited Tim[e],” permitting Congress to extend existing copyrights allows it to evade the “limited Times” constraint by creating effectively perpetual copyrights through repeated extensions. We disagree.

[23] As the Court of Appeals observed, a regime of perpetual copyrights “clearly is not the situation before us.” Nothing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the “limited Times” constraint. Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to “limited Times” that the 1831, 1909, and 1976 Acts did not. Those earlier Acts did not create perpetual copyrights, and neither does the CTEA....

[24] Petitioners dominantly advance a series of arguments all premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author. They pursue this main theme under three headings. Petitioners contend that the CTEA’s extension of existing copyrights (1) overlooks the

requirement of “originality,” (2) fails to “promote the Progress of Science,” and (3) ignores copyright’s *quid pro quo*.

[25] Petitioners’ “originality” argument draws on *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In *Feist*, we observed that “[t]he *sine qua non* of copyright is originality,” and held that copyright protection is unavailable to “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” Relying on *Feist*, petitioners urge that even if a work is sufficiently “original” to qualify for copyright protection in the first instance, any extension of the copyright’s duration is impermissible because, once published, a work is no longer original.

[26] *Feist*, however, did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability, *i.e.*, the “creative spark” a work must have to be eligible for copyright protection at all. Explaining the originality requirement, *Feist* trained on the Copyright Clause words “Authors” and “Writings. The decision did not construe the “limited Times” for which a work may be protected, and the originality requirement has no bearing on that prescription.

[27] More forcibly, petitioners contend that the CTEA’s extension of existing copyrights does not “promote the Progress of Science” as contemplated by the preambular language of the Copyright Clause. To sustain this objection, petitioners do not argue that the Clause’s preamble is an independently enforceable limit on Congress’s power. Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of “limited Times” must be “determined in light of that specified end.” The CTEA’s extension of existing copyrights categorically fails to “promote the Progress of Science,” petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.

[28] As petitioners point out, we have described the Copyright Clause as both a grant of power and a limitation, and have said that “[t]he primary objective of copyright” is “[t]o promote the Progress of Science,” *Feist*, 499 U.S., at 349. The constitutional command, we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a system that promotes the Progress of Science.¹⁸

[29] We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives. The justifications we earlier set out for Congress’ enactment of the CTEA provide a rational basis for the conclusion that the CTEA “promote[s] the Progress of Science.” ...

[30] Closely related to petitioners’ preambular argument, or a variant of it, is their assertion that the Copyright Clause “imbeds a *quid pro quo*.” They contend, in this regard, that Congress may grant to an “Autho[r]” an “exclusive Right” for a “limited Tim[e],” but only in exchange for a “Writin[g].” Congress’ power to confer copyright protection, petitioners argue, is thus contingent upon an exchange: The author of an original work receives an “exclusive Right” for a “limited Tim[e]” in exchange for a dedication to the public thereafter.

¹⁸ Justice STEVENS’ characterization of reward to the author {in an omitted dissent} as “a secondary consideration” of copyright law, understates the relationship between such rewards and the “Progress of Science.” As we have explained, “[t]he economic philosophy behind the [Copyright] [C]ause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly, copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. The profit motive is the engine that ensures the progress of science. Rewarding authors for their creative labor and “promot[ing] ... Progress” are thus complementary; as James Madison observed, in copyright “[t]he public good fully coincides ... with the claims of individuals.” Justice BREYER’s assertion that “copyright statutes must serve public, not private, ends” similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.

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Extending an existing copyright without demanding additional consideration, petitioners maintain, bestows an unpaid-for benefit on copyright holders and their heirs, in violation of the *quid pro quo* requirement.

[31] We can demur to petitioners’ description of the Copyright Clause as a grant of legislative authority empowering Congress to secure a bargain—this for that. But the legislative evolution earlier recalled demonstrates what the bargain entails. Given the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend, as the “this” offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time. Congress could rationally seek to “promote ... Progress” by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term....

[32] For the several reasons stated, we find no Copyright Clause impediment to the CTEA’s extension of existing copyrights....

[33] Petitioners separately argue that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment. We reject petitioners’ plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression....

[34] In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. As we [have] said, this idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression. Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.

[35] Second, the “fair use” defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. Codified at 17 U.S.C. § 107, the defense provides: “[T]he fair use of a copyrighted work, including such use by reproduction in copies ..., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The fair use defense affords considerable latitude for scholarship and comment and even for parody....

[36] The CTEA protects authors’ original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary....

[37] As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause. Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms. The wisdom of Congress’ action, however, is not within our

province to second-guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.

STEVENS, J.: dissenting. ...

BREYER, J.: dissenting.

[38] The Constitution's Copyright Clause grants Congress the power to "*promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings.*" Art. I, § 8, cl. 8 (emphasis added). The statute before us, the 1998 Sonny Bono Copyright Term Extension Act, extends the term of most existing copyrights to 95 years and that of many new copyrights to 70 years after the author's death. The economic effect of this 20-year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science"—by which word the Framers meant learning or knowledge.

[39] The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them....

[40] The "monopoly privileges" that the Copyright Clause confers are neither unlimited nor primarily designed to provide a special private benefit. This Court has made clear that the Clause's limitations are judicially enforceable. And, in assessing this statute for that purpose, I would take into account the fact that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related.

[41] The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an engine of free expression, the second assuring that government throws up no obstacle to its dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised.

[42] Consequently, I would review plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully than reference to this Court's traditional Copyright Clause jurisprudence might suggest. There is no need in this case to characterize that review as a search for congruence and proportionality, or as some other variation of what this Court has called intermediate scrutiny. Rather, it is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality—though less hard than precedent might justify.

[43] Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related

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objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' choice is clearly wrong....

[44] This statute, like virtually every copyright statute, imposes upon the public certain expression-related costs in the form of (1) royalties that may be higher than necessary to evoke creation of the relevant work, and (2) a requirement that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission. The first of these costs translates into higher prices that will potentially restrict a work's dissemination. The second means search costs that themselves may prevent reproduction even where the author has no objection. Although these costs are, in a sense, inevitable concomitants of copyright protection, there are special reasons for thinking them especially serious here.

[45] First, the present statute primarily benefits the holders of existing copyrights, *i.e.*, copyrights on works already created. And a Congressional Research Service (CRS) study prepared for Congress indicates that the added royalty-related sum that the law will transfer to existing copyright holders is large. In conjunction with official figures on copyright renewals, the CRS Report indicates that only about 2% of copyrights between 55 and 75 years old retain commercial value—*i.e.*, still generate royalties after that time. But books, songs, and movies of that vintage still earn about \$400 million per year in royalties. Hence, (despite declining consumer interest in any given work over time) one might conservatively estimate that 20 extra years of copyright protection will mean the transfer of several billion extra royalty dollars to holders of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty "reward."

[46] The extra royalty payments will not come from thin air. Rather, they ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived....

[47] A second, equally important, cause for concern arises out of the fact that copyright extension imposes a "permissions" requirement—not only upon potential users of "classic" works that still retain commercial value, but also upon potential users of *any other work* still in copyright....

[48] The ... permissions requirement can inhibit or prevent the use of old works (particularly those without commercial value): (1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain....

[49] ... [T]o some extent costs of this kind accompany any copyright law, regardless of the length of the copyright term. But to extend that term, preventing works from the 1920's and 1930's from falling into the public domain, will dramatically increase the size of the costs just as—perversely—the likely benefits from protection diminish. The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder....

[50] The majority ... invokes the "fair use" exception, and it notes that copyright law itself is restricted to protection of a work's expression, not its substantive content. Neither the exception nor the restriction, however, would necessarily help those who wish to obtain from electronic databases material that is not there—say, teachers wishing their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Such harm, and more will occur despite the 1998 Act's exemptions and despite the other "First Amendment safeguards" in which the majority places its trust....

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

copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller.... Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), it seems fair to say that, for example, a 1% likelihood of earning \$100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today.

[52] What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account? The Court itself finds no evidence to the contrary....

[53] I am not certain why the Court considers it relevant in this respect that “[n]othing ... warrants construction of the [1998 Act’s] 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.” Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution’s limits. After all, the statute was named after a Member of Congress, who, the legislative history records, “wanted the term of copyright protection to last forever.” 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono)....

[54] In any event, the incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension’s economic-incentive effect could justify the serious expression-related harms earlier described. And, of course, in respect to works already created—the source of many of the harms previously described—the *statute creates no economic incentive at all*.

[55] Second, the Court relies heavily for justification upon international uniformity of terms. Although it can be helpful to look to international norms and legal experience in understanding American law, in this case the justification based upon foreign rules is surprisingly weak. Those who claim that significant copyright-related benefits flow from greater international uniformity of terms point to the fact that the nations of the European Union have adopted a system of copyright terms uniform among themselves. And the extension before this Court implements a term of life plus 70 years that appears to conform with the European standard. But how does “uniformity” help to justify this statute?

[56] Despite appearances, the statute does *not* create a uniform American–European term with respect to the lion’s share of the economically significant works that it affects—*all* works made “for hire” and *all* existing works created prior to 1978. With respect to those works the American statute produces an extended term of 95 years while comparable European rights in “for hire” works last for periods that vary from 50 years to 70 years to life plus 70 years. Neither does the statute create uniformity with respect to anonymous or pseudonymous works.

[57] The statute does produce uniformity with respect to copyrights in new, post-1977 works attributed to natural persons. But these works constitute only a subset (likely a minority) of works that retain commercial value after 75 years. And the fact that uniformity comes so late, if at all, means that bringing American law into conformity with this particular aspect of European law will neither encourage creation nor benefit the long-dead author in any other important way....

[58] In sum, the partial, future uniformity that the 1998 Act promises cannot reasonably be said to justify extension of the copyright term for new works. And concerns with uniformity cannot possibly justify the extension of the new term to older works, for the statute there creates no uniformity at all.

[59] ... [S]everal publishers and filmmakers argue that the statute provides incentives to *those who act as publishers* to republish and to redistribute older copyrighted works. This claim cannot justify this statute, however, because the rationale is inconsistent with the basic purpose of the Copyright Clause—as understood by the Framers and by this Court. The Clause assumes an initial grant of monopoly, designed primarily to encourage creation, followed by termination of the monopoly grant in order to promote dissemination of

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already-created works. It assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence....

[60] ... [T]he statute's legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports. I recognize that Congress has sometimes found that suppression of competition will help Americans sell abroad—though it has simultaneously taken care to protect American buyers from higher domestic prices. In doing so, however, Congress has exercised its commerce, not its copyright, power. I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant's monopoly power, likely leading to higher prices both at home and abroad, *solely* in order to produce higher foreign earnings. That objective is not a *copyright* objective. Nor, standing alone, is it related to any other objective more closely tied to the Clause itself. Neither can higher corporate profits alone justify the grant's enhancement. The Clause seeks public, not private, benefits.

[61] Finally, the Court mentions as possible justifications "demographic, economic, and technological changes"—by which the Court apparently means the facts that today people communicate with the help of modern technology, live longer, and have children at a later age. The first fact seems to argue not for, but instead against, extension. The second fact seems already corrected for by the 1976 Act's life-plus-50 term, which automatically grows with lifespans. And the third fact—that adults are having children later in life—is a makeweight at best, providing no explanation of why the 1976 Act's term of 50 years after an author's death—a longer term than was available to authors themselves for most of our Nation's history—is an insufficient potential bequest. The weakness of these final rationales simply underscores the conclusion that emerges from consideration of earlier attempts at justification: There is no legitimate, serious copyright-related justification for this statute....

[62] The Court is concerned that our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress. It is concerned about the implications of today's decision for the Copyright Act of 1976—an Act that changed copyright's basic term from 56 years (assuming renewal) to life of the author plus 50 years. It is concerned about having to determine just how many years of copyright is too many—a determination that it fears would require it to find the "right" constitutional number, a task for which the Court is not well suited.

[63] I share the Court's initial concern, about intrusion upon the decisionmaking authority of Congress. But I do not believe it intrudes upon that authority to find the statute unconstitutional on the basis of (1) a legal analysis of the Copyright Clause's objectives; (2) the total implausibility of any incentive effect; and (3) the statute's apparent failure to provide significant international uniformity. Nor does it intrude upon congressional authority to consider rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary. We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright protection," for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance—at the far outer boundaries of the Clause—is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude....

[64] Neither do I share the Court's aversion to line-drawing in this case. Even if it is difficult to draw a single clear bright line, the Court could easily decide (as I would decide) that this particular statute simply goes too far. And such examples—of what goes too far—sometimes offer better constitutional guidance than more absolute-sounding rules....

[65] This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

[66] I have set forth the analysis upon which I rest these judgments. This analysis leads inexorably to the conclusion that the statute cannot be understood rationally to advance a constitutionally legitimate interest. The statute falls outside the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress. I would hold the statute unconstitutional.

[67] I respectfully dissent....

NOTES

1. Given that Congress did not again extend the copyright term, the works that were due to move into the public domain in 1999 fell into the public domain in 2019. Without a copyright term extension, are there any things that copyright owners can do for near-expiring works to garner continuing protection? Are there things they should be forbidden from doing? For an exploration of these issues, see Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395.

2. Taking Congress's 1998 copyright term extension as a starting point, Richard Posner and William Landes propose indefinitely renewable copyrights (the possibility of an infinite number of finite term extensions). Richard A. Posner & William M. Landes, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). Arguing from an economic vantage point, they maintain that copyrights are unlikely to be renewed infinitely and that having works in the public domain can be economically inefficient. Are you convinced that copyright owners would not renew their copyrights indefinitely under such a system? Is their proposal good or bad copyright policy?

3. In an empirical study of recorded music sales and streaming, Kristelia García and Justin McCrary show that most copyrighted music earns most of its lifetime revenue in the 5-10 years following initial release. Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351 (2019). Based on their study, they propose that duration rules ought to be "based on the [relatively short] commercial viability of the average work" because "the societal cost of strong copyright protection that goes beyond the point of commercial viability outweighs the benefit to both creators and consumers as the marginal return on this protection decreases sharply." They advocate that in setting duration rules, policymakers ought to focus on the average work rather than the atypical work with long-term commercial viability.

The following case challenges the constitutionality of copyright restoration under § 104A. Consider how this challenge differs from *Eldred*. Should those differences matter as a constitutional matter?

Lawrence Golan v. Eric H. Holder, Jr.

565 U.S. 302 (2012)

GINSBURG, J.:

[1] Members of the Berne Union {under its 1886 Convention for the Protection of Literary and Artistic Works} agree to treat authors from other member countries as well as they treat their own. Nationals of a member country, as well as any author who publishes in one of Berne’s 164 member states, thus enjoy copyright protection in nations across the globe. Each country, moreover, must afford at least the minimum level of protection specified by Berne. The copyright term must span the author’s lifetime, plus at least 50 additional years, whether or not the author has complied with a member state’s legal formalities. And, as relevant here, a work must be protected abroad unless its copyright term has expired in either the country where protection is claimed or the country of origin.

[2] A different system of transnational copyright protection long prevailed in this country. Until 1891, foreign works were categorically excluded from Copyright Act protection. Throughout most of the 20th century, the only eligible foreign authors were those whose countries granted reciprocal rights to U.S. authors and whose works were printed in the United States. For domestic and foreign authors alike, protection hinged on compliance with notice, registration, and renewal formalities.

[3] The United States became party to Berne’s multilateral, formality-free copyright regime in 1989. Initially, Congress adopted a “minimalist approach” to compliance with the Convention. The Berne Convention Implementation Act of 1988 (BCIA), 102 Stat. 2853, made only those changes to American copyright law that [were] clearly required under the treaty’s provisions. Despite Berne’s instruction that member countries—including “new accessions to the Union”—protect foreign works under copyright in the country of origin, the BCIA accorded no protection for “any work that is in the public domain in the United States.” Protection of future foreign works, the BCIA indicated, satisfied Article 18. Congress indicated, however, that it had not definitively rejected “retroactive” protection for preexisting foreign works; instead it had punted on this issue of Berne’s implementation, deferring consideration until “a more thorough examination of Constitutional, commercial, and consumer considerations is possible.” ...

[4] The landscape changed in 1994. The Uruguay round of multilateral trade negotiations produced the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).... The WTO gave teeth to the Convention’s requirements: Noncompliance with a WTO ruling could subject member countries to tariffs or cross-sector retaliation. The specter of WTO enforcement proceedings bolstered the credibility of our trading partners’ threats to challenge the United States for inadequate compliance with Article 18....

[5] Congress’ response to the Uruguay agreements put to rest any questions concerning U.S. compliance with Article 18. Section 514 of the URAA [Uruguay Round Agreement Act] {codified in 17 U.S.C. § 104A} extended copyright to works that garnered protection in their countries of origin, but had no right to exclusivity in the United States for any of three reasons: lack of copyright relations between the country of origin and the United States at the time of publication; lack of subject-matter protection for sound recordings fixed before 1972; and failure to comply with U.S. statutory formalities (e.g., failure to provide notice of copyright status, or to register and renew a copyright).

[6] Works that have fallen into the public domain after the expiration of a full copyright term—either in the United States or the country of origin—receive no further protection under § 514. Copyrights “restored” under URAA § 514 “subsist for the remainder of the term of copyright that the work would have otherwise been granted ... if the work never entered the public domain.” Prospectively, restoration places foreign works on an equal footing with their U.S. counterparts; assuming a foreign and domestic author died the same day, their works will enter the public domain simultaneously. Restored works, however, receive no compensatory time for the period of exclusivity they would have enjoyed before § 514’s enactment, had they been protected at the outset in the United States. Their total term, therefore, falls short of that available to similarly situated U.S. works.

[7] The URAA’s disturbance of the public domain hardly escaped Congress’ attention. Section 514 imposed no liability for any use of foreign works occurring before restoration. In addition, anyone remained free to copy and use restored works for one year following § 514’s enactment. Concerns about § 514’s compatibility with the Fifth Amendment’s Takings Clause led Congress to include additional protections for “reliance parties”—those who had, before the URAA’s enactment, used or acquired a foreign work then in the public domain. Reliance parties may continue to exploit a restored work until the owner of the restored copyright gives notice of intent to enforce—either by filing with the U.S. Copyright Office within two years of restoration, or by actually notifying the reliance party. After that, reliance parties may continue to exploit existing copies for a grace period of one year. Finally, anyone who, before the URAA’s enactment, created a “derivative work” based on a restored work may indefinitely exploit the derivation upon payment to the copyright holder of “reasonable compensation,” to be set by a district judge if the parties cannot agree....

[8] In 2001, petitioners {who include orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works § 514 removed from the public domain} filed this lawsuit challenging § 514. They maintain that Congress, when it passed the URAA, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations. The District Court granted the Attorney General’s motion for summary judgment....

[9] The Court of Appeals for the Tenth Circuit affirmed in part. The public domain, it agreed, was not a “threshold that Congress” was powerless to “traverse in both directions.” But § 514, as the Court of Appeals read our decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), required further First Amendment inspection. The measure “‘altered the traditional contours of copyright protection,’” the court said—specifically, the “bedrock principle” that once works enter the public domain, they do not leave. The case was remanded with an instruction to the District Court to address the First Amendment claim in light of the Tenth Circuit’s opinion.

[10] On remand, the District Court’s starting premise was uncontested: Section 514 does not regulate speech on the basis of its content; therefore the law would be upheld if “narrowly tailored to serve a significant government interest.” Summary judgment was due petitioners, the court concluded, because § 514’s constriction of the public domain was not justified by any of the asserted federal interests: compliance with Berne, securing greater protection for U.S. authors abroad, or remediation of the inequitable treatment suffered by foreign authors whose works lacked protection in the United States.

[11] The Tenth Circuit reversed. Deferring to Congress’ predictive judgments in matters relating to foreign affairs, the appellate court held that § 514 survived First Amendment scrutiny. Specifically, the court determined that the law was narrowly tailored to fit the important government aim of protecting U.S. copyright holders’ interests abroad.

[12] We granted certiorari to consider petitioners’ challenge to § 514 under both the Copyright Clause and the First Amendment, and now affirm....

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[13] We first address petitioners' argument that Congress lacked authority, under the Copyright Clause, to enact § 514. The Constitution states that "Congress shall have Power ... [t]o promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their ... Writings." Art. I, § 8, cl. 8. Petitioners find in this grant of authority an impenetrable barrier to the extension of copyright protection to authors whose writings, for whatever reason, are in the public domain. We see no such barrier in the text of the Copyright Clause, historical practice, or our precedents....

[14] The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain. Petitioners' contrary argument relies primarily on the Constitution's confinement of a copyright's lifespan to a "limited Tim[e]." "Removing works from the public domain," they contend, "violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires."

[15] Our decision in *Eldred* is largely dispositive of petitioners' limited-time argument. There we addressed the question whether Congress violated the Copyright Clause when it extended, by 20 years, the terms of existing copyrights. Ruling that Congress acted within constitutional bounds, we declined to infer from the text of the Copyright Clause "the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" "The word 'limited,'" we observed, "does not convey a meaning so constricted." Rather, the term is best understood to mean "confine[d] within certain bounds," "restrain [ed]," or "circumscribed." The construction petitioners tender closely resembles the definition rejected in *Eldred* and is similarly infirm....

[16] The difference, petitioners say, is that the limited time had already passed for works in the public domain. What was that limited term for foreign works once excluded from U.S. copyright protection? Exactly "zero," petitioners respond. We find scant sense in this argument, for surely a "limited time" of exclusivity must begin before it may end.

[17] Carried to its logical conclusion, petitioners persist, the Government's position would allow Congress to institute a second "limited" term after the first expires, a third after that, and so on. Thus, as long as Congress legislated in installments, perpetual copyright terms would be achievable. As in *Eldred*, the hypothetical legislative misbehavior petitioners posit is far afield from the case before us. In aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored foreign authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights....

[18] Petitioners' ultimate argument as to the Copyright and Patent Clause concerns its initial words. Congress is empowered to "promote the Progress of Science and useful Arts" by enacting systems of copyright and patent protection. Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.

[19] The "Progress of Science," petitioners acknowledge, refers broadly to "the creation and spread of knowledge and learning." They nevertheless argue that federal legislation cannot serve the Clause's aim unless the legislation "spur[s] the creation of ... new works." Because § 514 deals solely with works already created, petitioners urge, it "provides no plausible incentive to create new works" and is therefore invalid....

[20] The creation of at least one new work, however, is not the sole way Congress may promote knowledge and learning. In *Eldred*, we rejected an argument nearly identical to the one petitioners rehearse. The *Eldred* petitioners urged that the "CTEA's extension of existing copyrights categorically fails to 'promote the Progress of Science,' ... because it does not stimulate the creation of new works." In response to this argument, we held that the Copyright Clause does not demand that each copyright provision, examined discretely, operate to

induce new works. Rather, we explained, the Clause “empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.” ...

[21] Considered against this backdrop, § 514 falls comfortably within Congress’ authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne promotes the diffusion of knowledge. A well-functioning international copyright system would likely encourage the dissemination of existing and future works....

[22] We have no warrant to reject the rational judgment Congress made....

[23] We next explain why the First Amendment does not inhibit the restoration authorized by § 514....

[24] Petitioners attempt to distinguish their challenge from the one turned away in *Eldred*. First Amendment interests of a higher order are at stake here, petitioners say, because they—unlike their counterparts in *Eldred*—enjoyed “vested rights” in works that had already entered the public domain. The limited rights they retain under copyright law’s “built-in safeguards” are, in their view, no substitute for the unlimited use they enjoyed before § 514’s enactment. Nor, petitioners urge, does § 514’s “unprecedented” foray into the public domain possess the historical pedigree that supported the term extension at issue in *Eldred*.

[25] However spun, these contentions depend on an argument we considered and rejected above, namely, that the Constitution renders the public domain largely untouchable by Congress. Petitioners here attempt to achieve under the banner of the First Amendment what they could not win under the Copyright Clause: On their view of the Copyright Clause, the public domain is inviolable; as they read the First Amendment, the public domain is policed through heightened judicial scrutiny of Congress’ means and ends. As we have already shown, the text of the Copyright Clause and the historical record scarcely establish that once a work enters the public domain, Congress cannot permit anyone—not even the creator—to copyright it. And nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain. Neither this challenge nor that raised in *Eldred*, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author’s viewpoint....

[26] Section 514, we add, does not impose a blanket prohibition on public access. Petitioners protest that fair use and the idea/expression dichotomy “are plainly inadequate to protect the speech and expression rights that Section 514 took from petitioners, or ... the public”—that is, “the unrestricted right to perform, copy, teach and distribute the *entire* work, for any reason.” ...

[27] But Congress has not put petitioners in this bind. The question here, as in *Eldred*, is whether would-be users must pay for their desired use of the author’s expression, or else limit their exploitation to “fair use” of that work. Prokofiev’s *Peter and the Wolf* could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev’s U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers....

[28] Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors. The judgment § 514 expresses lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not. The judgment of the Court of Appeals for the Tenth Circuit is therefore

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Affirmed.

Justice KAGAN took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice ALITO joins, dissenting.

[29] In order “[t]o promote the Progress of Science” (by which term the Founders meant “learning” or “knowledge”), the Constitution’s Copyright Clause grants Congress the power to “secur[e] for limited Times to Authors ... the exclusive Right to their ... Writings.” Art. I, § 8, cl. 8. This “exclusive Right” allows its holder to charge a fee to those who wish to use a copyrighted work, and the ability to charge that fee encourages the production of new material. In this sense, a copyright is, in Macaulay’s words, a “tax on readers for the purpose of giving a bounty to writers”—a bounty designed to encourage new production. As the Court said in *Eldred*, “[t]he economic philosophy behind the [Copyright] [C]ause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”

[30] The statute before us, however, does not encourage anyone to produce a single new work. By definition, it bestows monetary rewards only on owners of old works—works that have already been created and already are in the American public domain. At the same time, the statute inhibits the dissemination of those works, foreign works published abroad after 1923, of which there are many millions, including films, works of art, innumerable photographs, and, of course, books—books that (in the absence of the statute) would assume their rightful places in computer-accessible databases, spreading knowledge throughout the world. In my view, the Copyright Clause does not authorize Congress to enact this statute. And I consequently dissent....

[31] The possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection. The Constitution’s words, “exclusive Right,” “limited Times,” “Progress of Science,” viewed through the lens of history underscore the legal significance of what the Court in *Eldred* referred to as the “economic philosophy behind the Copyright Clause.” That philosophy understands copyright’s grants of limited monopoly privileges to authors as private benefits that are conferred for a public reason—to elicit new creation.

[32] Yet, as the Founders recognized, monopoly is a two-edged sword. On the one hand, it can encourage production of new works. In the absence of copyright protection, anyone might freely copy the products of an author’s creative labor, appropriating the benefits without incurring the nonrepeatable costs of creation, thereby deterring authors from exerting themselves in the first place. On the other hand, copyright tends to restrict the dissemination (and use) of works once produced either because the absence of competition translates directly into higher consumer prices or because the need to secure copying permission sometimes imposes administrative costs that make it difficult for potential users of a copyrighted work to find its owner and strike a bargain. Consequently, the original British copyright statute, the Constitution’s Framers, and our case law all have recognized copyright’s resulting and necessary call for balance.

[33] At the time the Framers wrote the Constitution, they were well aware of Britain’s 18th-century copyright statute, the Statute of Anne, 8 Anne, ch. 19 (1710), and they were aware of the legal struggles that produced it. That statute sought in part to control, and to limit, preexisting monopolies that had emerged in the book trade as a result of the Crown’s having previously granted special privileges to royal favorites. The Crown, for example, had chartered the Stationers’ Company, permitting it to regulate and to censor works on the government’s behalf. The Stationers had thereby acquired control over the disposition of copies of published works, from which emerged the Stationers’ copyright—a right conferred on company members, not authors, that was deemed to exist in perpetuity.

[34] To prevent the continuation of the booksellers' monopoly and to encourage authors to write new books, Parliament enacted the Statute of Anne. It bore the title: "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." And it granted authors (not publishers) and their assignees the "sole Right and Liberty of printing" their works for limited periods of time *in order to encourage them "to compose and write useful Books."* (emphasis added) As one historian has put it, "[t]he central plank of the ... Act was ... a cultural *quid pro quo*. To encourage 'learned Men to compose and write useful Books' the state would provide a guaranteed, if temporally limited, right to print and reprint those works." Deazley, *The Myth of Copyright at Common Law*, 62 CAMB. L.J. 106, 108 (2003). At first, in their attempts to minimize their losses, the booksellers argued that authors had a perpetual common-law copyright in their works deriving from their natural rights as creators. But the House of Lords ultimately held in *Donaldson v. Beckett*, 1 Eng. Rep. 837 (1774), that the Statute of Anne had transformed any such perpetual common-law copyright into a copyright of a limited term designed to serve the public interest....

[35] The upshot is that text, history, and precedent demonstrate that the Copyright Clause places great value on the power of copyright to elicit new production. Congress in particular cases may determine that copyright's ability to do so outweighs any concomitant high prices, administrative costs, and restrictions on dissemination. And when it does so, we must respect its judgment. But does the Clause empower Congress to enact a statute that withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes—all *without providing any additional incentive* for the production of new material? That is the question before us. And, as I have said, I believe the answer is no. Congress in this statute has exceeded what are, under any plausible reading of the Copyright Clause, its permissible limits....

[36] Thus, while the majority correctly observes that the dissemination-restricting harms of copyright normally present problems appropriate for legislation to resolve, the question is whether the Copyright Clause permits Congress seriously to exacerbate such a problem by taking works out of the public domain without a countervailing benefit. This question *is* appropriate for judicial resolution. Indeed, unlike *Eldred* where the Court had to decide a complicated line-drawing question—when is a copyright term too long?—here an easily administrable standard is available—a standard that would require works that have already fallen into the public domain to stay there.

[37] The several, just mentioned features of the present statute are important, for they distinguish it from other copyright laws. By removing material from the public domain, the statute, in literal terms, "abridges" a preexisting freedom to speak....

[38] Taken together, these speech-related harms (*e.g.*, restricting use of previously available material; reversing payment expectations; rewarding rent-seekers at the public's expense) at least show the presence of a First Amendment interest. And that is enough. For present purposes, I need not decide whether the harms to that interest show a violation of the First Amendment. I need only point to the importance of interpreting the Constitution as a single document—a document that we should not read as setting the Copyright Clause and the First Amendment at cross-purposes. Nor need I advocate the application here of strict or specially heightened review. I need only find that the First Amendment interest is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright-related justifications for the serious harms, including speech-related harms, which the Act seems likely to impose....

[39] The majority makes several other arguments. First, it argues that the Clause does not require the "creation of at least one new work," but may instead "promote the Progress of Science" in other ways. And it specifically mentions the "dissemination of existing and future works" as determinative here.... But ordinarily a copyright—since it is a *monopoly* on copying—*restricts* dissemination of a work once produced compared to a competitive

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market. And simply making the industry richer does not mean that the industry, when it makes an ordinary *forward-looking* economic calculus, will distribute works not previously distributed....

[40] Moreover, the argument proves too much. It is the kind of argument that the Stationers' Company might well have made and which the British Parliament rejected....

[41] This argument, whatever its intrinsic merits, is an argument that directly concerns a private benefit: how to obtain more money from the sales of existing products. It is not an argument about a public benefit, such as how to promote or to protect the creative process....

[42] ... [T]he majority [also] argues that this statutory provision is necessary to fulfill our Berne Convention obligations. The Treaty, in Article 18, says that the "Convention shall apply to all works which, at the moment of its coming into force [*i.e.*, 1989 in the case of the United States] have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." The majority and Government say that this means we must protect the foreign works at issue here. And since the Berne Convention, taken as a whole, provides incentives for the creation of new works, I am willing to speculate, for argument's sake, that the statute might indirectly encourage production of new works by making the United States' place in the international copyright regime more secure.

[43] Still, I cannot find this argument sufficient to save the statute. For one thing, this is a dilemma of the Government's own making. The United States obtained the benefits of Berne for many years despite its failure to enact a statute implementing Article 18. But in 1994, the United States and other nations signed the Agreement on Trade-Related Aspects of Intellectual Property Rights, which enabled signatories to use World Trade Organization dispute resolution mechanisms to complain about other members' Berne Convention violations. But at that time the Government, although it successfully secured reservations protecting other special features of American copyright law, made no effort to secure a reservation permitting the United States to keep some or all restored works in the American public domain. And it made no effort to do so despite the fact that Article 18 explicitly authorizes countries to negotiate exceptions to the Article's retroactivity principle.

[44] For another thing, the Convention does not require Congress to enact a statute that causes so much damage to public domain material. Article 18(3) also states that "the respective countries shall determine, each in so far as it is concerned, *the conditions of application of this principle*." Congress could have alleviated many of the costs that the statute imposes by, for example, creating forms of compulsory licensing, requiring "restored copyright" holders to provide necessary administrative information as a condition of protection, or insisting upon "reasonable royalties." ...

[45] The fact that, by withdrawing material from the public domain, the statute inhibits an important preexisting flow of information is sufficient, when combined with the other features of the statute that I have discussed, to convince me that the Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.

[46] I respectfully dissent from the Court's contrary conclusion.

NOTES

1. The *Golan* majority suggests that Congress enacted the URAA, and restored rights in works that had been in the public domain, as part of its effort to comply with the Berne Convention. For an argument that Berne actually provided the United States with substantial latitude to grant a more limited form of protection than Congress granted in § 104A, see Daniel J. Gervais, *Golan v. Holder: A Look at the Constraints Imposed by the Berne Convention*, 64 VAND. L. REV. EN BANC 147 (2011).

2. One might read Justice Ginsburg's majority opinions in *Eldred* and *Golan* as each being centrally occupied with equality. In that vein, *Eldred* might be seen as putting existing and future copyrights on par with one another and *Golan* might be viewed as undoing unjust subordination of foreign authors by restoring their copyrights to put them on equal footing with U.S. authors. For a detailed analysis along these lines and a critique of this approach, see JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* 87-155 (2022).

C. Renewals

Recall that under the 1909 Act, copyright had to be renewed to get a second 28-year term. While the 1976 Act prospectively created a single copyright term—thus obviating renewal going forward—it retained renewal for works already protected under the 1909 Act. Can you think why Congress retained the renewal structure for 1909 Act works even as it eliminated it for new works?

In addition, for works already under protection, the 1976 Act added 19 years to the renewal term. 17 U.S.C. § 304(a)(3) (1976). Then, the 1998 change added another 20 years to copyright duration for all works. 17 U.S.C. §§ 304(a)(3), (b). Given the total possible copyright term for 1909 Act works, renewals will continue to be relevant until 2072 (95 years after 1977, just before the 1976 Act went into effect).

Congress saw the renewal term as a way to give authors a second bite at the copyright apple. As the legislative history of the 1909 Act explains:

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, ... it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

H.R. REP. NO. 2222, 60th Cong., 2d Sess., at 14 (1909). Does it make sense to treat copyright interests differently than other property, for which there is no second bite at the apple?

Under the 1976 Act, § 304(a)(1)(C) sets out who is entitled to rights in the renewal term (aside from special circumstances such as for works made for hire). In its current form, the statute provides:

In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

1. *the author of such work, if the author is still living,*
2. *the widow, widower, or children of the author, if the author is not living,*
3. *the author's executors, if such author, widow, widower, or children are not living, or*
4. *the author's next of kin, in the absence of a will of the author,*

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

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The section sets out successive classes of people who get the renewal rights, starting with the author if the author is still alive and proceeding through various heirs or executors, if not. The 1909 Act had set out the same successive classes of people entitled to renewal rights. Act of Mar. 4, 1909, ch. 320, § 23.

Two fundamental questions arise with regard to renewals: (1) Should authors and heirs be able to recapture some aspects of the renewal term once it has been assigned? (2) How should the law handle derivative works during the renewal term, when the works were created under an initial grant before the renewal term? The following case addresses both questions. Does the decision strike the right balance between authors and heirs? Does it strike the right balance between initial authors and authors of derivative works? What about the public interest?

James Stewart v. Sheldon Abend

495 U.S. 207 (1990)

O'CONNOR, J.:

[1] The author of a pre-existing work may assign to another the right to use it in a derivative work. In this case the author of a pre-existing work agreed to assign the rights in his renewal copyright term to the owner of a derivative work, but died before the commencement of the renewal period. The question presented is whether the owner of the derivative work infringed the rights of the successor owner of the pre-existing work by continued distribution and publication of the derivative work during the renewal term of the pre-existing work....

[2] Cornell Woolrich authored the story "It Had to Be Murder," which was first published in February 1942 in *Dime Detective Magazine*. The magazine's publisher, Popular Publications, Inc., obtained the rights to magazine publication of the story and Woolrich retained all other rights. Popular Publications obtained a blanket copyright for the issue of *Dime Detective Magazine* in which "It Had to Be Murder" was published.

[3] The Copyright Act of 1909 provided authors a 28-year initial term of copyright protection plus a 28-year renewal term. In 1945, Woolrich agreed to assign the rights to make motion picture versions of six of his stories, including "It Had to Be Murder," to B.G. De Sylva Productions for \$9,250. He also agreed to renew the copyrights in the stories at the appropriate time and to assign the same motion picture rights to De Sylva Productions for the 28-year renewal term. In 1953, actor Jimmy Stewart and director Alfred Hitchcock formed a production company, Patron, Inc., which obtained the motion picture rights in "It Had to Be Murder" from De Sylva's successors in interest for \$10,000.

[4] In 1954, Patron, Inc., along with Paramount Pictures, produced and distributed "Rear Window," the motion picture version of Woolrich's story "It Had to Be Murder." Woolrich died in 1968 before he could obtain the rights in the renewal term for petitioners as promised and without a surviving spouse or child. He left his property to a trust administered by his executor, Chase Manhattan Bank, for the benefit of Columbia University. On December 29, 1969, Chase Manhattan Bank renewed the copyright in the "It Had to Be Murder" story Chase Manhattan assigned the renewal rights to respondent Abend for \$650 plus 10% of all proceeds from exploitation of the story.

[5] "Rear Window" was broadcast on the ABC television network in 1971. Respondent then notified petitioners Hitchcock (now represented by cotrustees of his will), Stewart, and MCA Inc., the owners of the "Rear Window" motion picture and renewal rights in the motion picture, that he owned the renewal rights in the copyright and

that their distribution of the motion picture without his permission infringed his copyright in the story. Hitchcock, Stewart, and MCA nonetheless entered into a second license with ABC to rebroadcast the motion picture. In 1974, respondent filed suit against these same petitioners, and others, in the United States District Court for the Southern District of New York, alleging copyright infringement. Respondent dismissed his complaint in return for \$25,000.

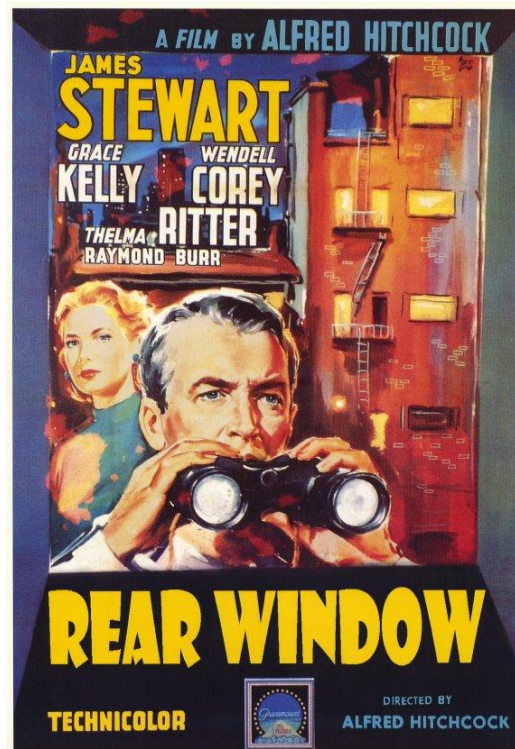


Figure 49: poster of Alfred Hitchcock's *Rear Window* film

[6] Three years later, the United States Court of Appeals for the Second Circuit decided *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (1977), in which it held that the owner of the copyright in a derivative work may continue to use the existing derivative work according to the original grant from the author of the pre-existing work even if the grant of rights in the pre-existing work lapsed. Several years later, apparently in reliance on *Rohauer*, petitioners re-released the motion picture in a variety of media....

[7] Respondent then brought the instant suit in the United States District Court for the Central District of California against Hitchcock, Stewart, MCA, and Universal Film Exchanges, a subsidiary of MCA and the distributor of the motion picture. Respondent's complaint alleges that the re-release of the motion picture infringes his copyright in the story because petitioners' right to use the story during the renewal term lapsed when Woolrich died before he could register for the renewal term and transfer his renewal rights to them....

[8] The District Court granted petitioners' motions for summary judgment based on *Rohauer* Respondent appealed to the United States Court of Appeals for the Ninth Circuit

[9] The Court of Appeals reversed The issue before the court ... was whether petitioners were entitled to distribute and exhibit the motion picture without respondent's permission despite respondent's valid copyright in the pre-existing story. Relying on the renewal provision of the 1909 Act, respondent argued before the Court of Appeals that because he obtained from Chase Manhattan Bank, the statutory successor, the renewal right free and clear of any purported assignments of any interest in the renewal copyright, petitioners' distribution and publication of "Rear Window" without authorization infringed his renewal copyright. Petitioners responded that they had the right to continue to exploit "Rear Window" during the 28-year renewal period because

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Woolrich had agreed to assign to petitioners' predecessor in interest the motion picture rights in the story for the renewal period.

[10] Petitioners also relied, as did the District Court, on the decision in *Rohauer*. In *Rohauer*, the Court of Appeals for the Second Circuit held that statutory successors to the renewal copyright in a pre-existing work ... could not "depriv[e] the proprietor of the derivative copyright of a right ... to use so much of the underlying copyrighted work as already has been embodied in the copyrighted derivative work, as a matter of copyright law." The Court of Appeals in the instant case rejected this reasoning, concluding that even if the pre-existing work had been incorporated into a derivative work, use of the pre-existing work was infringing unless the owner of the derivative work held a valid grant of rights in the renewal term.

[11] The court relied on *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), in which we held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues. An assignee of the renewal rights takes only an expectancy: "Until [the time for registration of renewal rights] arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. A purchaser of such an interest is deprived of nothing. Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may not occur." The Court of Appeals reasoned that "[i]f *Miller Music* makes assignment of the full renewal rights in the underlying copyright unenforceable when the author dies before effecting renewal of the copyright, then, *a fortiori*, an assignment of part of the rights in the underlying work, the right to produce a movie version, must also be unenforceable if the author dies before effecting renewal of the underlying copyright." Finding further support in the legislative history of the 1909 Act and rejecting the *Rohauer* court's reliance on the equities and the termination provisions of the 1976 Act, the Court of Appeals concluded that petitioners received from Woolrich only an expectancy in the renewal rights that never matured; upon Woolrich's death, Woolrich's statutory successor, Chase Manhattan Bank, became "entitled to a renewal and extension of the copyright," which Chase Manhattan secured "within one year prior to the expiration of the original term of copyright." Chase Manhattan then assigned the existing rights in the copyright to respondent....

[12] Petitioners would have us read into the Copyright Act a limitation on the statutorily created rights of the owner of an underlying work. They argue in essence that the rights of the owner of the copyright in the derivative use of the pre-existing work are extinguished once it is incorporated into the derivative work, assuming the author of the pre-existing work has agreed to assign his renewal rights. Because we find no support for such a curtailment of rights in either the 1909 Act or the 1976 Act, or in the legislative history of either, we affirm the judgment of the Court of Appeals....

[13] The right of renewal found in § 24 [of the 1909 Act] provides authors a second opportunity to obtain remuneration for their works. Section 24 provides:

[T]he author of [a copyrighted] work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright.

[14] Since the earliest copyright statute in this country, the copyright term of ownership has been split between an original term and a renewal term. Originally, the renewal was intended merely to serve as an extension of the original term; at the end of the original term, the renewal could be effected and claimed by the author, if

living, or by the author's executors, administrators, or assigns. In 1831, Congress altered the provision so that the author could assign his contingent interest in the renewal term, but could not, through his assignment, divest the rights of his widow or children in the renewal term. The 1831 renewal provisions created an entirely new policy, completely dissevering the title, breaking up the continuance and vesting an absolutely new title *eo nomine* in the persons designated. In this way, Congress attempted to give the author a second chance to control and benefit from his work. Congress also intended to secure to the author's family the opportunity to exploit the work if the author died before he could register for the renewal term....

[15] In its debates leading up to the Copyright Act of 1909, Congress elaborated upon the policy underlying a system comprised of an original term and a completely separate renewal term. The renewal term permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested. "[U]nlike real property and other forms of personal property, [a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation." 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 9.02, p. 9–23 (1989). If the work proves to be a great success and lives beyond the term of twenty-eight years, it should be the exclusive right of the author to take the renewal term, and the law should be framed so that the author could not be deprived of that right. With these purposes in mind, Congress enacted the renewal provision of the Copyright Act of 1909. With respect to works in their original or renewal term as of January 1, 1978, Congress retained the two-term system of copyright protection in the 1976 Act.

[16] Applying these principles in *Miller Music*, this Court held that when an author dies before the renewal period arrives, his executor is entitled to the renewal rights, even though the author previously assigned his renewal rights to another party. An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period.... If the author dies before that time, the next of kin obtain the renewal copyright free of any claim founded upon an assignment made by the author in his lifetime. These results follow not because the author's assignment is invalid but because he had only an expectancy to assign; and his death, prior to the renewal period, terminates his interest in the renewal which by § 24 vests in the named classes.... Thus, the renewal provisions were intended to give the author a second chance to obtain fair remuneration for his creative efforts and to provide the author's family a "new estate" if the author died before the renewal period arrived.

[17] An author holds a bundle of exclusive rights in the copyrighted work, among them the right to copy and the right to incorporate the work into derivative works. By assigning the renewal copyright in the work without limitation, as in *Miller Music*, the author assigns all of these rights. After *Miller Music*, if the author dies before the commencement of the renewal period, the assignee holds nothing. If the assignee of all of the renewal rights holds nothing upon the death of the assignor before arrival of the renewal period, then, *a fortiori*, the assignee of a portion of the renewal rights, *e.g.*, the right to produce a derivative work, must also hold nothing. Therefore, if the author dies before the renewal period, then the assignee may continue to use the original work only if the author's successor transfers the renewal rights to the assignee. Application of this rule to this case should end the inquiry. Woolrich died before the commencement of the renewal period in the story, and, therefore, petitioners hold only an unfulfilled expectancy. Petitioners have been deprived of nothing. Like all purchasers of contingent interests, [they took] subject to the possibility that the contingency may not occur....

[18] The reason that our inquiry does not end here, and that we granted certiorari, is that the Court of Appeals for the Second Circuit reached a contrary result in *Rohauer*. Petitioners' theory is drawn largely from *Rohauer*. The Court of Appeals in *Rohauer* attempted to craft a "proper reconciliation" between the owner of the pre-existing work, who held the right to the work pursuant to *Miller Music*, and the owner of the derivative work, who had a great deal to lose if the work could not be published or distributed. Addressing a case factually similar to this case, the court concluded that even if the death of the author caused the renewal rights in the pre-existing work to revert to the statutory successor, the owner of the derivative work could continue to exploit

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that work. The court reasoned that the 1976 Act and the relevant precedents did not preclude such a result and that it was necessitated by a balancing of the equities:

[T]he equities lie preponderantly in favor of the proprietor of the derivative copyright. In contrast to the situation where an assignee or licensee has done nothing more than print, publicize and distribute a copyrighted story or novel, a person who with the consent of the author has created an opera or a motion picture film will often have made contributions literary, musical and economic, as great as or greater than the original author.... [T]he purchaser of derivative rights has no truly effective way to protect himself against the eventuality of the author's death before the renewal period since there is no way of telling who will be the surviving widow, children or next of kin or the executor until that date arrives.

[19] The Court of Appeals for the Second Circuit thereby shifted the focus from the right to use the pre-existing work in a derivative work to a right inhering in the created derivative work itself. By rendering the renewal right to use the original work irrelevant, the court created an exception to our ruling in *Miller Music* and, as petitioners concede, created an "intrusion" on the statutorily created rights of the owner of the pre-existing work in the renewal term.

[20] Though petitioners do not, indeed could not, argue that its language expressly supports the theory they draw from *Rohauer*, they implicitly rely on § 6 of the 1909 Act, which states that "dramatizations ... of copyrighted works when produced with the consent of the proprietor of the copyright in such works ... shall be regarded as new works subject to copyright under the provisions of this title." Petitioners maintain that the creation of the "new," *i.e.*, derivative, work extinguishes any right the owner of rights in the pre-existing work might have had to sue for infringement that occurs during the renewal term.

[21] We think ... that this conclusion is neither warranted by any express provision of the Copyright Act, nor by the rationale as to the scope of protection achieved in a derivative work. It is moreover contrary to the axiomatic copyright principle that a person may exploit only such copyrighted literary material as he either owns or is licensed to use. The aspects of a derivative work added by the derivative author are that author's property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work. So long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work....

[22] Properly conceding there is no explicit support for their theory in the 1909 Act, its legislative history, or the case law, petitioners contend, as did the court in *Rohauer*, that the termination provisions of the 1976 Act, while not controlling, support their theory of the case. For works existing in their original or renewal terms as of January 1, 1978, the 1976 Act added 19 years to the 1909 Act's provision of 28 years of initial copyright protection and 28 years of renewal protection. For those works, the author has the power to terminate the grant of rights at the end of the renewal term and, therefore, to gain the benefit of that additional 19 years of protection. See § 304(c). In effect, the 1976 Act provides a third opportunity for the author to benefit from a work in its original or renewal term as of January 1, 1978. Congress, however, created one exception to the author's right to terminate: The author may not, at the end of the renewal term, terminate the right to use a derivative work for which the owner of the derivative work has held valid rights in the original and renewal terms. See § 304(c)(6)(A). The author, however, may terminate the right to create new derivative works. *Ibid.* For example, if petitioners held a valid copyright in the story throughout the original and renewal terms, and the renewal term in "Rear Window" were about to expire, petitioners could continue to distribute the motion picture even if respondent terminated the grant of rights, but could not create a new motion picture version of the story. Both the court in *Rohauer* and petitioners infer from this exception to the right to terminate an intent by Congress to prevent authors of pre-existing works from blocking distribution of derivative works. In other words, because Congress decided not to permit authors to exercise a third opportunity to benefit from a work

incorporated into a derivative work, the Act expresses a general policy of undermining the author's second opportunity. We disagree....

[23] In fact, if the 1976 Act's termination provisions provide any guidance at all in this case, they tilt against petitioners' theory. The plain language of the termination provision itself indicates that Congress assumed that the owner of the pre-existing work possessed the right to sue for infringement even after incorporation of the pre-existing work in the derivative work.

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

[24] Congress would not have stated explicitly in § 304(c)(6)(A) that, at the end of the renewal term, the owner of the rights in the pre-existing work may not terminate use rights in existing derivative works unless Congress had assumed that the owner continued to hold the right to sue for infringement even after incorporation of the pre-existing work into the derivative work.

[25] Accordingly, we conclude that neither the 1909 Act nor the 1976 Act provides support for the theory set forth in *Rohauer*....

[26] Finally, petitioners urge us to consider the policies underlying the Copyright Act. They argue that the rule announced by the Court of Appeals will undermine one of the policies of the Act—the dissemination of creative works—by leading to many fewer works reaching the public. *Amicus* Columbia Pictures asserts that “[s]ome owners of underlying work renewal copyrights may refuse to negotiate, preferring instead to retire their copyrighted works, and all derivative works based thereon, from public use. Others may make demands—like respondent’s demand for 50% of petitioners’ future gross proceeds in excess of advertising expenses ...—which are so exorbitant that a negotiated economic accommodation will be impossible.” These arguments are better addressed by Congress than the courts.

[27] In any event, the complaint that respondent’s monetary request in this case is so high as to preclude agreement fails to acknowledge that an initially high asking price does not preclude bargaining. Presumably, respondent is asking for a share in the proceeds because he wants to profit from the distribution of the work, not because he seeks suppression of it....

NOTES

1. If an author can validly assign their renewal rights in advance, even if only as an expectancy, does the renewal term fulfill its purpose? Can you think of how, in the context of *Abend*, B.G. De Sylva Productions could have ensured its motion picture rights into the renewal term for Cornell Woolrich’s story even if Woolrich died before the renewal term?

2. Recall that the 1909 and 1976 Acts both required that application for renewal of copyright be “made to the Copyright Office and duly registered within one year prior to the expiration of the original term of copyright.” 17 U.S.C. § 304(a) (1976). Recall also that, for all works published from 1964 through 1977, the Copyright Renewal Act of 1992 removed the requirement that a renewal term of copyright protection was contingent on registration before the renewal period. Pub. L. 102–307, 106 Stat. 264 (codified at 17 U.S.C. § 304(a)(3)(B)). Nonetheless, the new law instituted incentives to register copyright before the renewal period, including one that aligns with the rule articulated in *Abend*. Specifically, 17 U.S.C. § 304(a)(4)(A) provides that if this registration is not made before the renewal period, the *Abend* rule will be reversed:

a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

D. Terminations of Transfer

The 1909 Act made the renewal term revert back to the original author to give him or her a second chance to recapture the copyright and reprice it. The 1976 Act is similarly motivated to protect authors, who often possess less bargaining power than the distributors with whom they transact. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 124 (1976). However, because there is no renewal period under the 1976 Act, the author must do something to accomplish this recapture of copyright. In that respect, the 1976 Act enables authors to terminate transfers and exclusive and non-exclusive licenses of their copyright.

The termination provisions for works whose copyright is transferred after the effective date of the 1976 Act are set out in 17 U.S.C. § 203:

(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest....

Section 203(a)(2) goes on to spell out how the termination right can be exercised when the author has died.

Note also that, as specified, transfers of rights in a work made for hire cannot be terminated. Nor can transfers made by will. Nor can transferors subsequent to the author exercise termination rights.

Section 203(a)(3) spells out the precise five-year window in which an author is entitled to exercise termination:

Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

To terminate a transfer or license, there must be advance notice of the termination, which must meet the conditions specified in § 203(a)(4):

The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

The 1976 Act also provides for termination of some transfers and licenses made under the 1909 Act. That said, these terminations are more limited, corresponding to termination's purpose in this context. The 1976 Act's provision of an additional term of 19 years for works protected under the 1909 Act raised questions as to who should have the benefit of this additional term: the author (or the author's heirs), or the holders of rights in the renewal term. As set out in the legislative history, Congress was convinced that "the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, at 140 (1976).

Section 304(c) was enacted to provide this form of termination right, and it mostly mirrors the provisions of § 203. The important differences are definitional. First, it permits termination of "the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will," of "any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire." 17 U.S.C. § 304(c). Second, it specifies that termination of the grant can happen within a five-year window following what would have been the end of the second copyright term under the 1909 Act: "Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later." *Id.* § 304(c)(3).

When the 1998 copyright term extension of 20 years was enacted into law, Congress similarly provided termination rights for this new term, but only for pre-1978 transfers or licenses that were not already terminated under § 304(c). Section 304(d) sets out this termination provision. It looks like §§ 203 and 304(c) but for its definitional differences. First, it permits termination of "the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, otherwise than by will," of "any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right." *Id.* § 304(d). Second, it specifies that termination of the grant can happen within a five-year window following what would have been the end of the second copyright term under the 1976 Act: "Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured." *Id.* § 304(d)(2).

Importantly, to make it harder—if not impossible—to contract away any of these three termination rights, the 1976 Act seeks to forbid the possibility of advance agreements by an author not to exercise their termination rights:

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Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

Id. §§ 203(a)(5), 304(c)(5), 304(d)(1). This provision was a reaction to how readily one could sign away one's renewal rights in advance under judicial interpretations of the 1909 Act (as *Abend* indicates). Although the language seems both broad and clear-cut ("notwithstanding any agreement to the contrary"), some courts understand this provision formalistically. Pertinently, some courts disallow termination when the author or the author's heirs have renegotiated an agreement in advance of termination, which is understood to revoke the first agreement and start the countdown to the termination window all over again. *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005). The Ninth Circuit reasoned in such a case that upholding the renegotiated agreement as against termination advanced the goals of termination rights because "Congress ... anticipated that parties may contract, as an alternative to statutory termination, to revoke a prior grant by replacing it with a new one." *Milne*, 430 F.3d at 1046. The court continued: "Congress sought to foster this purpose by permitting an author's heirs to use the increased bargaining power conferred by the imminent threat of statutory termination to enter into new, more advantageous grants." Others have criticized this reasoning on the ground that the renegotiated agreement is a forbidden "agreement to the contrary." *E.g.*, Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329 (2010); Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799 (2010).

NOTES

1. Consider the policy implications of providing authors with termination rights. The termination right is intended to allow the author to recapture some of the money from successful works to which the author was not originally entitled. Is this fair to the publishers that take the risk of distributing material? Will authors that are unsuccessful ever exercise their termination rights? If not, termination rights can act as a regressive tax in the following sense: Because publishers know authors can terminate transfers down the road, they are willing to pay all authors less for initial rights because the right is not as valuable. Then, the only authors who will want to terminate transfers later on are those authors whose works become successful enough to make it worthwhile. Those authors will then make a lot of money from termination by regaining their rights. For analysis along these lines, see Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147 (2015); Michael Karas & Roland Kirstein, *Efficient Contracting under the U.S. Copyright Termination Law*, 54 INT'L REV. L. & ECON. 39 (2018); Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49 (2013). Do you think it is plausible that publishers pay less money for initial rights than they would absent a termination right?

2. Related to termination rights are artist **resale royalty rights**, which grant artists a percentage of the proceeds on the resale of their works. Like termination, it allows artists to benefit down the line should their works become more valuable. Unlike termination, it provides this benefit by allowing artists to share in the appreciated value of their work but without any renegotiation. A California law passed in 1976 guarantees artists five percent of the profits in a later sale of their artwork. Cal. Civ. Code § 986(a). In so doing, California followed France and a number of other nations, in which such profit-sharing with artists is legally required. A federal court has held that the California law is almost entirely preempted by the 1976 Act. *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018). (We study preemption in Chapter X.) There have been proposals, thus far unsuccessful, to enact resale royalty rights into federal law. *E.g.*, The American Royalties Too Act of 2014, S. 2045, 113th Cong. (2014); H.R. 4103, 113th Cong. (2014). Commentary on whether resale royalty rights are helpful to artists at recapturing some of the increased value of their works or serve as a regressive tax tend to mirror the policy debates over termination rights. *E.g.*, Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237 (2017); Kal Raustiala & Chris Sprigman, *Artist Resale Royalties: Do They Help or Hurt?*,

FREAKONOMICS, Dec. 22, 2011, <http://freakonomics.com/2011/12/22/artist-resale-royalties-do-they-help-or-hurt>; Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1 (2014).

3. The sound recording industry has feared successful musicians exercising their termination rights, particularly starting in 2013 (35 years after the 1976 Act went into effect). Record labels have sought to stave off artists' ability to exercise these rights by explicitly stating in their contracts with artists that recordings are works made for hire. If that were to be the case, then the termination provisions would not apply and artists would have no termination rights to exercise. However, as seen from our study of works made for hire in Chapter III, sound recordings are not on the statutory list of commissioned works that qualify as works made for hire. 17 U.S.C. § 101. Unless these recordings qualify as a contribution to a collective work or as a compilation (and the required written agreement specifying work-made-for-hire status is executed), these sound recordings can qualify as works made for hire only if the recording artists were employees of their associated record labels (or possibly if the recording artist is an employee of a so-called "loan-out corporation" that artists sometimes use (generally for tax reasons) to contract with record labels) at the time they made their recordings. For a sampling of a majority of the commentary that concludes that it will be hard to establish that these sound recordings are works made for hire and therefore for record labels to disqualify artists from exercising termination rights, see Daniel Gould, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91 (2007); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002).
