Copyright’s Paradox: The Public Interest and Private Monopoly

NICHOLAS RUIZ*

INTRODUCTION

“[T]here is no new thing under the sun.” Appropriation has been an integral part of human development since the birth of mankind. The Romans imitated the Greeks, Shakespeare build upon preexisting works, and the greatest Renaissance composers copied the melodies of lesser-known composers. Borrowing from existing creations “is at the heart of what we know as Progress.” Even common American principles were built upon foundations of the past. When crafting the Constitution, the Founding Fathers adopted numerous concepts from the Magna Carta, a British document signed by King James in 1215. The ideas of a limited democracy, trial by a jury of one’s peers, the model for Congress, and the copyright system all came from the 13th century document.

Many scholars recognize that there cannot be any more completely new ideas and that all artists are simply “dwarfs standing on the shoulders of giants.” Unsurprisingly, a portion of all copyright activity is derivative. For example, most of our favorite bedtime stories and childhood cartoons were derived from works that had fallen into the public domain. Almost the entire Disney empire, which we have all grown to love, was premised on expired copyrighted works. Although many people know Disney debuted Mickey Mouse in the cartoon Steamboat Willie, most do not know that Steamboat Willie was actually a parody of Steamboat Bill, Jr., a silent film that had fallen into the public domain.

Borrowing from other works is commonplace in the artistic world, as

* J.D. Candidate, University of San Francisco School of Law, 2014. Ruiz is a recipient of the Intellectual Property Certificate and the CALI Award for Copyright Law and Criminal Procedure.
1. Ecclesiastes 1:9 (King James) (“The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.”).
2. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHTS § 12:1 (2014).
3. Id.
5. Id.
it facilitates a variety of expressive creations.\textsuperscript{9} Many modern artistic endeavors, such as the creation of jazz and rap music, fan fiction, comics, parodies, and fashion design, rely on borrowing. Appropriation increases the flow of new creations by allowing others to build off existing works instead of requiring artists to develop wholly new works.

Copyright law's initial goal was to assist the progression of the arts and sciences by encouraging the dissemination of information.\textsuperscript{10} The reason copyright grants authors a limited monopoly in their creations is to incentivize creators to share their works with society.\textsuperscript{11} Yet, over the last several decades, Congress has expanded the scope of copyright protection in a way that has decreased the availability of information.\textsuperscript{12} More specifically, the derivative work right has become so broad as to prohibit secondary artists from borrowing from existing material to create new works, thus hindering creativity and preventing authors from sharing new works with the public.

Given the significance of borrowing in expressive activities and fields of art, the reach of the current copyright regime is too wide. By extending copyright terms and broadening the scope of exclusive rights far beyond that imagined by the Founding Fathers, the current system fails to adhere to the constitutional clause granting Congress the power to protect copyrighted works to "promote science and the useful arts."\textsuperscript{13}

The current copyright system differs from that mandated by the Constitution in two ways. First, the broad scope of the derivative work right undermines copyright's idea/expression dichotomy and creates uncertainty in secondary artists as to when appropriation will be considered infringing. Second, the statutory extensions of copyright terms do not align with the Constitution and stagnate the public domain. The extensions have thwarted the free flow of ideas and dissemination of information. This Comment proposes a remedy to this problem by examining the nation's history, copyright systems abroad, and other applicable areas of law.

Part I of this Comment describes the constitutional basis for copyright law and the advent of the derivative work right. Part I also discusses the effect of the derivative work right on the progression of American culture and the constitutional issues surrounding the right's expansive scope of protection. Part II contains a historical account of Congress's extension of copyright terms, highlighting constitutional concerns about such extensions. Part II also addresses concerns about the shrinking number of works in the public domain. Part III examines foreign systems for possible remedies to the problems presented. Finally, this Comment proposes amendments to the current copyright system that would redefine derivative

\textsuperscript{10} Id. at 247.
\textsuperscript{12} U.S. CONST. art. I, § 8, cl. 8.
works and mandate a compulsory licensing scheme.

I. BROADENING THE SCOPE OF COPYRIGHT AND THE ADVENT OF THE DERIVATIVE WORK RIGHT

Copyright protection is based on the "Progress Clause," a constitutional mandate granting Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their" works. The Constitution grants a limited monopoly to copyright owners to incentivize creative activity.

The initial goal of copyright law was not to merely reward the author, but also to secure for the public the benefits derived from artistic works. Copyright law facilitates the flow of artistic works to the public in two ways: (1) it incentives the actual creation or production of a work, and (2) it mandates that a work fall into the public domain upon expiration of the work’s term of copyright. Congress has repeatedly amended copyright law to balance the interests of authors’ control over their creations with the public’s interest in the "free flow of ideas."

Congress has steadily expanded the scope of copyright protection throughout American history. The first federal copyright statute, the Act of 1790, limited protection to books, maps, and charts and restricted the duration of copyright to fourteen years, with the possibility of a fourteen-year extension. Additionally, the Act only gave copyright holders the right to prevent literal reproductions of their published works. For example, in the 1853 case of Stowe v. Thomas, a Pennsylvania court held that an unauthorized German translation of Uncle Tom’s Cabin did not infringe the original author’s copyright. The court reasoned that the translation required originality and talent and enhanced the value of the underlying work. The court stated that when an author sells his book, "the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of . . . ideas intended to be conveyed."

Congress expanded the scope of copyright in 1870 by enacting the first statute codifying a right to control dramatizations or translations of the original. Thus, under the 1870 Act, the author of Uncle Tom’s Cabin

14. Id.
16. E.g., Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").
19. Eldred, 537 U.S. at 192.
20. 23 F. Cas. 201 (1853).
21. Id. at 206–07.
22. Id. at 206.
23. Id. at 206–07.
would have had a claim for infringement for the unauthorized German translation of her work. The 1909 Copyright Act further expanded copyright by giving original authors the right to "make any version" of the copyrighted work.

Today, the 1976 Copyright Act protects any "original" work of authorship, so long as the work contains a minimal spark of creativity and is "fixed in any tangible medium." The originality requirement is very minimal, such that any work exhibiting more creativity than a traditional phonebook directory would meet the requirement. The 1976 Act also grants authors the right to authorize or prohibit any derivative works based upon the original. In doing so, Congress broadly defined derivative works to include a "translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, transformed, or adapted."

By the end of the 20th century, an unauthorized derivative of a copyrighted work was considered a "per se infringement of a protected expression." For example, making a sequel to a movie using a similar plots and similar characters could be considered infringing even if the secondary work were to add new dimensions of creativity to the original. Even the appropriation of a minimal amount of expression from a copyrighted work could be considered infringing. In Roth Greeting Cards v. United Card Company, the defendant's greeting card was found to infringe the plaintiff's copyrighted card. The court noted that the defendant had not actually copied the plaintiff's protected artwork or text, but still determined that the defendant was liable for reproducing a work that matched the "total concept and feel" of the original card.

The definition of a derivative work is extremely broad and could include a work incorporating even a portion of an underlying copyrighted work. This expansive scope encompasses the exclusive right of the author to prevent others from expressing his copyrighted work in other forms. Thus, copyright owners retain the power to hinder the free flow of ideas and dissemination of information, especially when subsequent authors have only a few ways of expressing the idea embodied in the copyrighted work. This aspect of copyright law raises constitutional concerns because the

used by Congress in the Copyright Act of 1790 and 1870, referred exclusively to writers.

26. This Comment intends the term "authors" to encompass a spectrum of creators and does not exclusively refer to writers.
34. 429 F.2d 1106 (9th Cir. 1970).
35. Id. at 1111.
36. Id. at 1110.
First Amendment prohibits certain restrictions on speech when there are no alternative channels to express the message.37

A. LIMITATIONS OF COPYRIGHT AND THE EXPANSIVE DERIVATIVE RIGHT: BUILT-IN FIRST AMENDMENT SAFEGUARDS

Copyright law and the First Amendment often intersect due to their shared objective of fostering a thriving cultural society.38 The First Amendment facilitates the progression of culture by permitting the free flow of speech, information, and expression into the public’s marketplace of ideas;39 and copyright law promotes the progress of culture by providing incentives aimed to increase the quantity and quality of artistic works.40 But tension exists in the application of the First Amendment to copyright infringement cases.

On its face, copyright law is incompatible with the First Amendment. The First Amendment provides that “Congress shall make no law... abridging the freedom of speech,”41 yet the Progress Clause grants Congress the power to give authors exclusive rights to control expression. Despite the conflict, courts are reluctant to acknowledge the First Amendment as an affirmative defense in copyright infringement suits.42 In Harper & Row Publishers, Inc. v. Nation Enterprises,43 the Supreme Court stated that the 1976 Copyright Act accommodated First Amendment concerns with the idea-expression dichotomy and fair use doctrine.44 Despite the Court’s trust in these two doctrines, concerns about chilled speech still exist. Lower courts have inconsistently applied the fair use defense in numerous copyright infringement cases and have thus chilled free speech.45

Moreover, the broad definition of a derivative work conflicts with First Amendment principles. Specifically, the derivative work right places copyright law in conflict with the First Amendment by undermining the idea-expression dichotomy and creating doubt in the minds of secondary users over how much they can borrow from an original work. The blurry line between fair and unfair uses causes a loss of potentially valuable works

39. See U.S. Const. amend. I.
41. Id.
44. See id. at 556–60.
45. There are court decisions that emphasize certain factors of fair use over others, inconsistently define “transformative use,” and are reversed on appeal for inconsistent application of the fair use factors. See, e.g., Harper, 471 U.S. at 569 (reversing the lower court’s ruling on the question of fair use); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276–77 (11th Cir. 2001) (reversing the district court’s holding that the secondary use was not protected by fair use).
due to the subsequent author's fear of infringement liability. The First Amendment must be given more consideration in infringement suits or the public will continue to miss out on important works of expression.

1. Problems with the Idea-Expression Dichotomy as a First Amendment Safeguard

Known as the idea-expression dichotomy, copyright protection extends only to the particular expression used by the author and not to the underlying idea or facts of the work. For example, the idea of a superhero dressed up in a cape, fighting crime and seeking vengeance for his parent's murder, is unlikely copyrightable. However, the framing, lighting, timing, and other artistic choices that go into creating the scenes of the original Batman are protectable expressions. This explains the existence of numerous cape-clothed superheroes capable of incredible feats of strength. Further, regardless of the labor or cost involved in discovering information, any facts or ideas underlying the copyrighted work remain free for public use. Therefore, secondary users presumably may use their own words to express the original ideas of others. This presumption, however, does not always hold true.

The idea-expression dichotomy offers no clear guidance as to what is an idea as opposed to an expression. This uncertainty may deter a reasonably prudent person from using ideas underlying a copyrighted work even though the use may be permissible. This result chills speech, as speakers will tend to evade even fair use of ideas, fearing that courts could find their use infringing. Additionally, the presumption that people freely express ideas without using protected expression fails to recognize the scope of copyright's exclusivity. By awarding authors derivative work rights, copyright not only protects reproductions of their expressions, but also prevents others from expressing the same idea in similar ways. Consequently, a secondary speaker may be found liable for infringing an original expression, even if he uses a different method to convey the idea. Furthermore, although a message can be conveyed through alternative vehicles, it may not carry the same effectiveness. Certain messages are not as persuasive as the original when altered or paraphrased. This could also chill speech since an artist may not be able to express freely his message (i.e., paraphrasing the material would not convey the speaker's message) when no reasonable

46. Golan v. Gonzales, 501 F.3d 1179, 1184 (10th Cir. 2007) (holding that the idea-expression dichotomy is not a sufficient safeguard of the public's First Amendment concerns).
52. See Eldred, 537 U.S. at 221.
manner to obtain permission from the owner exists.

The Supreme Court’s holding in *Eldred v. Ashcroft* has further aggravated free speech concerns. In *Eldred*, the Court affirmed that there is no First Amendment right to imitate copyrighted works.54 In response, lower courts often accommodate intersecting issues of free speech and copyright infringement with the fair use doctrine, which permits certain unauthorized uses of protected expressions.

2. The Blurry Line of the Fair Use Doctrine

The fair use defense excuses minimal takings of works where the taking is beneficial to society and would not cause significant economic harm to the owner.55 It recognizes certain forms of expression, like parody, criticism, and debate, necessitate the reproduction of an author’s original words, images, or sounds.56 The ultimate test for fair use is whether copyright’s goal of promoting the “Progress of Science and useful Arts” is better served by allowing the use than by preventing it.57

Congress codified the flexible fair use doctrine in § 107 of the 1976 Copyright Act.58 Section 107 serves as the primary mechanism for limiting copyright’s expansive definition of the derivative work right. The four-factor fair use test helps judges determine whether the use of protected material in a particular case is fair. The factors are nonexclusive and leave ample room for judicial discretion. The Supreme Court explained that this flexibility is essential to “avoid rigid applications” that on occasion would stifle the creativity that the law is meant to foster.59

Although this elasticity is useful when balancing concerns of public access with the private interests of the author, the case-by-case analysis also leads to inconsistent applications.60 Exploitation by copyright owners and uncertainty by some courts begs the question of whether the fair use doctrine can adequately limit copyright monopolies.

Courts continuously emphasize that the fair use doctrine encompasses all necessary safeguards for First Amendment concerns.61 However, there are situations where the doctrine has been stretched too far to excuse copyright infringement in the interest of the First Amendment.62 While

54. *See Eldred*, 537 U.S. at 221 (“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.”).
57. *Campbell*, 510 U.S. at 575.
61. *Sarl Louis Ferraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 482 (2d Cir. 2007) (“[A]bsent extraordinary circumstances, the fair use doctrine encompasses all claims of first amendment in the copyright field.” (internal quotation marks omitted)).
these cases weigh in favor of the public interest, they also undercut the predictability of the fair use defense. Conversely, some courts have rejected the fair use defense altogether, thus undermining First Amendment values. This unpredictability creates uncertainty for secondary users as to what qualifies as a fair use. As with the issues raised with the idea/expression dichotomy, this uncertainty deters creativity.

B. TRANSFORMING DERIVATIVE USE VS. TRANSFORMATIVE FAIR USE

Defendants in copyright infringement suits rely on case law as the basis for raising the fair use doctrine. However, the requisite level of change needed for a secondary work to meet the fair use standard is unclear. The 1976 Act suggests transformations are derivative works and thus are not fair uses. Yet courts and commentators occasionally embrace the term “transformative” as constituting a degree of change sufficient for fair use.

The transformative factor in a court’s fair use analysis is typically accredited to an article by Judge Pierre Leval that defines “transforming” and “transformative.” According to Judge Leval, a work that simply repackages the original is not transformative, and thus a transforming derivative, as it “merely ‘supersede[s] the objects’ of the original . . . . If, on the other hand, the secondary work adds value to the original,” thereby changing the underlying work into a new creation with “new aesthetics, new insights and understandings,” the work is transformative and the product of the exact type of action that fair use is meant to protect. Therefore, a transformative secondary use, as opposed to a transforming one, should be allowed under the fair use doctrine.

In determining what qualifies as transformative, Judge Leval created a standard that differentiated between productive and non-productive uses. Subject to the other factors of the fair use doctrine, the use is fair and thus permissible if the work advances knowledge and facilitates creation. This focus on productivity was reiterated by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, where the Court questioned whether an alleged transformation added “something new, . . . altering the first with new

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63. Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1220 (11th Cir. 1999); Meeropol v. Nizer, 560 F.2d 1061, 1068–71 (2d Cir. 1977).


65. 17 U.S.C. § 101 (2012) (defining a derivative work as a “translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, transformed, or adapted”).

66. Leval, *supra* note 7, at 1116 (suggesting that absence of transformation should end the fair use inquiry).

67. *id.* at 1111 (quoting Folsom v. Marsh 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

68. *id.*

expression, meaning or message,” thereby progressing culture. The principle objective in applying the fair use defense is to evaluate the requisite changes to the underlying material. The Court must ask whether the altered work serves the broader public purpose of copyright (i.e., providing public access to creative works), in addition to whether there has been a “transformation per se.” However, subsequent courts have adopted a narrower version of Judge Leval’s transformative analysis due to the Supreme Court’s decision in Campbell. Currently, courts tend to focus on the defendant’s use of the original, rather than the subsequent work’s effect on society.

Although the Supreme Court has only applied the transformative standard in cases where there was a minimal taking of an underlying work, the transformative analysis could also extend to cases involving derivative works. Since early Roman times, it has been well-recognized that there are no wholly new ideas. As Justice Hugh Laddie stated: “The whole human development is derivative. We stand on the shoulders of the scientists, artists and craftsman who preceded us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress.” The Renaissance and Industrial Revolution may have never transpired had the broad scope of the derivative work right been in effect. Legal scholars that proclaim copyright was founded as a natural right maintain an unnatural perception of history. Parts of all intellectual activity are derivative, as every idea reflects a considerable part of what has come before. Therefore, it is critical to distinguish between derivative uses that merely supersede the original and those that sufficiently alter it.

Copyright law should continue to prohibit transforming derivative works that do not add value to society, while simultaneously encouraging transformative works that serve a public benefit. Whatever “wrong” stems from reproducing and selling another’s work, changing an original work into something new is not the same. The fair use doctrine will greatly hinder the development of new transformative works if the fair use exception continues to allow for an expansive derivative work right.

Unfortunately, a broad derivative work right emerged within the

72. Id.
73. Friedman, supra note 33, at 184.
74. Laddie, supra note 6.
75. Id. at 259.
76. Id.
77. 4 PATRY, supra note 2.
78. Leval, supra note 7, at 1109.
Second Circuit, the court widely recognized as the nation’s most influential copyright court. In a series of cases involving derivative works, district courts bound by the Second Circuit’s authority took a narrow reading of the fair use exception, while broadly defining the scope of the derivative work right. Other courts have followed suit, resulting in broader protection for copyright holders. Congress has also further strengthened this protection by regularly extending the length of copyright protection.

II. EXPANDING THE DURATIONS OF COPYRIGHT TERMS

As the scope of copyright protection broadened, Congress gradually expanded the duration of copyright protection. Under the 1909 Act, published works received two terms of twenty-eight years so long as they were properly renewed. The 1909 Act also required a work to meet certain formalities to qualify for federal copyright protection. For instance, if a work was published without proper notice (the author’s name, the copyright symbol, and the date of publication), the work automatically fell into the public domain. A work that was not properly renewed after its first term also passed into the public domain. An author’s choice not to renew a work typically indicated that the work either had minimal societal value or that the author no longer intended to exploit it. The formalities dictated by the 1909 Act allowed more works to enter the public domain for others to freely build upon.

The 1976 Act, however, removed many repercussions for authors who failed to meet the formalities, meaning fewer works fell into the public domain. The 1976 Act granted copyright protection for the author’s life plus fifty years, regardless of whether the work was ever published. And by 1989, U.S. copyright law had abandoned all of the required formalities.

81. Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994) (holding that an unauthorized copying of scientific journal articles, solely for use in research, was not a fair use); Castle Rock Entm’t, Inc., v. Carol Publ’g Grp., Inc., 150 F.3d. 132 (2d Cir. 1998) (awarding damages for copyright infringement and permanently enjoining defendants from publishing a book based on a copyrighted television program).
83. The 1831 Act extended the initial term from fourteen to twenty-eight years, followed by a possible renewal period of fourteen years if proper formalities were met and the author was alive in the last year of the first term, offering a maximum duration of protection of forty-two years. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436. The 1909 Act extended the renewal term of fourteen years to twenty-eight years, setting the maximum duration of protection to fifty-six years. Act of Mar. 4, 1909, ch. 320, 60th Cong., 2d Sess., 35 Stat. 1075.
85. Id.
86. Id.
87. Golan v. Gonzales, 501 F.3d 1179, 1189 (10th Cir. 2007).
88. Id. at 1181.
in order to comply with the Berne Convention.\textsuperscript{89}

The removal of the formalities and the two-term renewal regime now keeps many works out of the public domain and, consequently, out of the reach of secondary users. By eliminating the renewal requirement, copyright law took away the sole method that assured unexploited works would enter the public domain.\textsuperscript{90} Reflecting on the Progress Clause, the constitutionally mandated balance between facilitating the free flow of ideas and awarding limited monopoly privileges now appears tipped in a manner that ultimately hinders creation.

Expanding the duration of future copyrights, as well as the term of existing copyrights, places a challenging obstacle in front of secondary users. Within the last fifty years, Congress has extended the terms of copyrighted works eleven times.\textsuperscript{91} The Copyright Act of 1976 gave works in their second term of copyright an additional nineteen years of protection; the Sonny Bono Copyright Term Extension Act ("CTEA" or "Sonny Bono Act") of 1998 extended this by twenty more years.\textsuperscript{92} The CTEA prolonged the duration of future copyrights to the life of the author plus seventy years.\textsuperscript{93} Consequently, the first copyrighted work to fall into the public domain on account of an expired term will be twenty years following the passage of CTEA.

The expansion of copyright has drastically reduced the amount of material available in the public domain. The steady movement towards stronger protection has surpassed the amount of protection the Framers intended\textsuperscript{94} and presents two major concerns. First, the expansion of copyright terms runs counter to the constitutional mandate that exclusive rights be granted for a limited time.\textsuperscript{95} Second, prolonged copyright terms cause a stagnant public domain, hindering the free flow of ideas and the dissemination of information.

A. AN UNCONSTITUTIONAL INTERPRETATION OF THE PROGRESS CLAUSE

Although the Progress Clause states that copyright protection is to last for only a \textit{limited} time, the numerous copyright term extensions suggest the duration of protection is nearing closer to \textit{unlimited}. "[I]f every time a copyright is about to expire, Congress has the power to extend the term, then Congress can achieve what the Constitution plainly forbids—perpetual terms."\textsuperscript{96} Congress’ ability to extend existing copyright terms must be curbed; otherwise, the constitutional mandate of a limited term is

\textsuperscript{89} Id. at 1189.
\textsuperscript{90} LESSIG, supra note 8, at 135.
\textsuperscript{91} Id. at 134 (citing Act of Feb. 3, 1831, ch. 16, 4 Stat. 436).
\textsuperscript{93} Golan v. Gonzales, 501 F.3d 1179, 1181 (10th Cir. 2007).
\textsuperscript{94} LESSIG, supra note 8, at 131.
\textsuperscript{95} U.S. CONST. art. 1, § 8, cl. 8.
\textsuperscript{96} LESSIG, supra note 8, at 215–16.
meaningless. At the time the Constitution was written, a limited time meant "a time that is restrained and circumscribed... not [left] at large." The breadth and duration of the current copyright term hardly resembles the limited time originally envisioned by the Framers.

If we believe the primary goal of copyright is to facilitate a thriving national culture, then the reason for granting a limited property right is to incentivize creators to share their works with society. And indeed, Congress promotes this goal by granting creators a limited monopoly in exchange for public access to the product of their genius upon expiration of the monopoly.

Some scholars argue that without extensive copyright protection, authors would not create. But history suggests otherwise. For example, television and radio flourished without extensive copyright protection. Thousands of books comprising works from the public domain were, and continue to be, written, printed, and distributed without copyright protection. This is not to say that copyright law should be completely obviated; there still needs to be some level of incentive to encourage creation. However, the current lengthy copyright terms are unnecessary.

Justification for the extension of terms under the CTEA, which gave pre-existing copyrighted works an additional twenty years of protection, is scarce. In Eldred v. Ashcroft, arguing on behalf of plaintiff Eric Eldred, Lawrence Lessig challenged the extension of terms for pre-existing published works. He argued that the limited time granted upon securing a copyright is a "constitutional boundary, a line beyond the power of Congress to extend." But the Court did not agree and found the CTEA constitutional. The majority reasoned that although the CTEA extended existing copyrights to works given a specified term under the 1976 Act, the terms were "still limited, not perpetual, and therefore fit within Congress' discretion." The Court stated that nothing in the text of the Constitution, or its history, indicates that "a term of years for a copyright is not a 'limited Time' if it may later be extended for another 'limited Time'."

In Eldred, the Court also noted that the CTEA reflected a sensible
judgment of Congress.\textsuperscript{110} Congress's primary rationale for the CTEA was to align U.S. copyright terms with those in the European Union ("EU"). By extending the term, the EU agreed to grant American authors the same protection as European authors.\textsuperscript{111} Further, the Court found that the extension would give foreign authors a stronger incentive to disseminate their works in the United States. Finally, the Court reasoned that the CTEA was a proper response to technological advancements and "rationally credited projections" that showed a longer term would encourage more creativity.\textsuperscript{112}

Despite the Court's reasoning, it is unlikely that a longer copyright term incentivizes more creation or maximizes the free flow of ideas. Rather, the increased protection restricts the amount of material available to secondary users. While technological advancement—notably, the Internet—has greatly increased the ability to disseminate information, current copyright law inhibits authors from exploring untapped or unexploited opportunities for creation.

In \textit{Free Culture}, Lessig argues that Congress passed the CTEA for reasons different than those offered by the Supreme Court.\textsuperscript{113} Lessig believes a more likely explanation for the continual term extensions is monetary gain. Extending existing copyright terms is a lucrative endeavor for Congress because copyright holders are willing to pay high prices to receive longer protection. Lessig argues that large "entities were using their power—expressed through the power of lobbyists' money—to get another twenty-year" extension for their lucrative monopoly.\textsuperscript{114} Although these are strong accusations, they nevertheless provide an ulterior explanation for Congress's extension of copyright terms.

In his dissenting opinion in \textit{Eldred}, Justice Stevens stated that the Progress Clause was not only a grant of power, but also a limitation, which means "Congress may not overreach the restraints imposed by the stated constitutional purpose" (i.e., to encourage innovation).\textsuperscript{115} Justice Stevens argued that when Congress extends limited terms for reasons beyond this purpose, the extension is unconstitutional.

Justice Stevens noted that the justification for granting limited monopolies in both patent and copyright law is the "full and immediate access by the public when the limited time expires."\textsuperscript{116} Justice Stevens argued that public access to inventions at the "earliest possible date" was the overriding purpose of the constitutional provisions,\textsuperscript{117} and that implicit

\begin{thebibliography}{99}
\item[110.] \textit{Id.} at 188.
\item[111.] \textit{Id.}
\item[112.] \textit{Id.}
\item[113.] Lessig, supra note 8, at 216.
\item[114.] \textit{Id.} at 220.
\item[115.] \textit{Eldred}, 537 U.S. at 223.
\item[116.] \textit{Id.} at 224.
\end{thebibliography}
in the patent clause (although absent from the copyright clause) is the qualification that "neither a state nor Congress may extend the life of a patent beyond the expiration date." Justice Stevens explained:

Neither the purpose of encouraging new inventions nor the overriding interest in advancing progress by adding knowledge to the public domain is served by retroactively increasing the inventor's compensation for a completed invention and frustrating the legitimate expectations of members of the public who want to make use of it in a free market. Because those twin purposes provide the only avenue for congressional action under the Copyright/Patent Clause of the Constitution, any other action is manifestly unconstitutional.

The primary goal of the patent system is to "bring new designs and technologies into the public domain through disclosure." Like the copyright system, patent law represents a carefully designed bargain that promotes public disclosure in exchange for a limited monopoly. To retroactively alter the bargain by extending the predetermined term of protection is unfair to those expecting the work to enter the public domain. The fairness concerns that have inspired the constitutional shields against "ex post facto laws, and laws impairing the obligation of contracts" should bar Congress from enacting a retroactive modification for both patent and copyright terms.

B. THE CONSEQUENCE OF A STAGNANT PUBLIC DOMAIN: A DETERRENT TO PROGRESS

The purpose of the public domain is to allow the public access to cultural wealth that has accumulated over time. Free public access facilitates the dissemination of information and encourages a thriving national society. But the lengthening of the copyright term has caused the public domain to shrink.

Early American copyright jurisprudence supported a rich and vibrant "free culture" by giving secondary users the freedom to transform preexisting works. But due to Congress' continued practice of expanding existing terms, current copyright law has limited the archive of inventive building blocks and rendered the public domain stagnant.

The progression of culture relies on public access to works that have come before. Society is harmed when hardly any copyrights expired within the last fifty years. Copyrighted works that were expected to enter the public domain but were extended by the CTEA include such well-known works as...
films as Disney's *Steamboat Willie*, *Star Wars*, and the compilation of poems by Robert Frost. The removal of these works from the public domain acts as a large uncompensated transfer of wealth, taking capital from ordinary individuals and placing it in the wallets of large media corporations.

The real harm, however, does not come from the continued protection of famous works that maintain commercial and cultural value. Rather, CTEA's extension harms the public by protecting works that no longer produce a benefit because they are not well-known or commercially exploited. Due to the low standards required to qualify for copyright protection and the fact that works are protected from the moment of creation, a small fraction of copyrighted works actually have long-term commercial value in their protected form. Thus, for works that either have no present commercial value or an extremely short commercial life, the extension of terms is just another barrier for secondary users.

Copyright law's movement away from formalities and the two-term regime exacerbates the problem of the shrinking public domain in two ways. First, under the previous two-term system, when a work was no longer exploited, authors were less likely to renew the work for a second term. This allowed the work to fall into the public domain, and thus become available for secondary users, at an earlier date. Second, authors of works with low commercial values may be less inclined to follow proper formalities. Under the previous copyright system, these works would fall into the public domain. Today, copyright protection is automatic, which means that unexploited works remain unavailable for secondary users. In addition, absent registration and notice requirements, tracking the owners of copyrighted works can be very difficult. Therefore, a secondary user seeking to create an authorized derivative work may be unable to contact the rights holder to obtain permission.

III. NARROWING THE SCOPE OF THE DERIVATIVE WORK RIGHT

Appropriation is integral to the development of a flourishing national culture; thus, major reformation to the copyright regime is critical to enable the progress of the arts. Congress must clarify the blurry line between an infringing (transforming) derivative use and a non-infringing (transformative) fair use to dispel secondary users' fear of litigation and
encourage creative activities.

This Comment challenges the bloated version of the copyright system. As discussed above, two trends in copyright law are responsible for the inadequacies of the current system: extending the term of copyright protection and increasing the scope of the derivative work right. But simply shortening the duration of copyright protection and bringing it closer to its original length is not the proper solution. The remainder of this Comment focuses on narrowing the scope of the derivative work right while preserving the other rights granted by copyright law.

A. LOOKING ABROAD FOR SUGGESTIONS: COMPARATIVE ANALYSIS OF COPYRIGHT

In countries party to the Berne Convention, the duration of copyright is shorter than that in the United States, generally the life of the author plus fifty years. Most of these counties also have a more limited derivative work right compared to the United States. If the U.S. derivative work right was narrower, it would be more in line with the rights delineated in the Berne Convention: “Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.” The Berne Convention, unlike U.S. copyright law, does not extend the derivative work right to transformations.

1. Examples of Limited Derivative Work Rights

In Poland, copyright protection for derivative works only extends to “translations, alterations, or adaptations of another work.” Transformations thus do not receive protection. Further, Poland does not require a secondary author to obtain consent to prepare a derivative unless the secondary work is in the form of “computer programs, databases, or film adaptations of literary works.” Instead, Poland grants a moral right that requires secondary users to identify the creator and title of any underlying work on which the derivative is based. And if the derivative work is merely inspired by a preexisting work, the secondary author has no obligation to give recognition to the original author.

As further examples of countries with limited derivative work rights, India and China do not specifically grant copyright owners protection in

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139. Id.
140. Janusz Barta & Ryszard Markiewicz, Poland, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2[3] (Paul Edward Geller & Lionel Bently eds. 2013). No consent is necessary to “prepare” the derivative work in Poland, but consent of the owner is required prior to “exploitation” of any work based on a prior work. Id.
141. Id.
142. Id. § 7.
143. Id.
derivative markets. Instead, any "translations, adaptations, arrangements of music, and other alterations of prior... artistic works" qualify as entirely original works. Thus, in both countries, an author that creates a derivative work enjoys a separate copyright.

2. The United Kingdom's Derivate Work Right
The scope of the derivative work right in the United States differs greatly from that in the United Kingdom ("UK"). Where the United States does not limit the type of subject matter that qualifies as a derivative work, the UK defines derivatives unique to each copyrightable category. For instance, for literary works "other than computer programs and databases," only translations qualify as derivatives. And derivatives of dramatic works are limited to "conversions into a non-dramatic form."

While U.S. copyright law defines derivative works broadly, the law in the UK restricts the types of adaptations that apply to specific categories of works. Thus, a literary work that is "transformed" into a dramatic work would not be protected as a derivative in the UK. Further, the categorical limits applied in the UK likely make determinations of infringing derivative works more consistent. The UK's approach thus better clarifies the blurry line between fair use and infringing derivative use for secondary users.

3. Compulsory Licensing
Under the current U.S. copyright system, a secondary user wishing to incorporate a portion of a copyrighted work faces two significant obstacles: (1) costs associated with licensing fees or potential litigation over infringement, and (2) the difficulty of obtaining permission from the original owner. Many countries alleviate the problem of acquiring authorization through a compulsory licensing scheme. For example, in Taiwan, an artist that creates a musical work is subject to a compulsory license. After paying any necessary fees for the compulsory license, a secondary user in Taiwan can produce new sound recordings using the underlying original. Poland has a similar compulsory licensing system.

Compulsory licensing is not entirely foreign to U.S. copyright law. Congress has previously created compulsory licensing systems for recorded
music, radio stations, and cable broadcast networks. Compulsory licenses are similar to a mandatory sale of property, as they statutorily force copyright owners to grant a license at an established rate.

Incorporating a compulsory licensing system into the derivative work right would greatly promote creativity by removing the hurdles secondary users currently face. Compulsory licensing would remove the problems associated with acquiring permission and reduce transactional costs related to standard licensing negotiations. While copyright owners may protest such an addition, a form of profit allocation would alleviate most issues. As explained in the proposal below, under a profit allocation scheme, the original owner would receive a percentage of any profit generated from derivative markets. Further, works created under the licensing scheme would not act as blocking copyrights to the original owner. Therefore, works produced under a compulsory license would not preclude the original owner from creating derivatives based on the initial work nor derivatives based on secondary works created under the compulsory license. Rather, the compulsory license would simply allow a secondary user to create a derivative work based on the underlying copyrighted work without the consent of the owner.

B. PROPOSAL: NARROW THE SCOPE OF THE DERIVATIVE WORK RIGHT

The following proposal to narrow the scope of the derivative work right amends current copyright law in three ways: (1) it alters copyright duration and formalities, (2) it redefines the scope of the derivative work right, and (3) it creates a compulsory licensing system. The proposal is based on the copyright law history, scholarly recommendations, other areas of law, and copyright systems abroad.

1. Duration and Formalities

The first step to narrowing the derivative work right is to reinstate many of the elements of the 1909 Copyright Act. Thus, my proposal would require an author to comply with the formalities of proper notice and registration before receiving a copyright. This would allow secondary users to locate original authors more easily, expedite the process of licensing rights for secondary use, and place works that do not meet the formalities under the presented proposal, subsequent works made under a compulsory license would not be able to block original authors from exploiting their work or creating new derivative works.

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154. See discussion infra Part IV.B.

155. “Derivative market” refers to the consumer and artistic market for works that are not original, but rather are derived from an underlying copyrighted work. For example, a derivative market for the Batman story would include consumers who would purchase, or artists that would produce, Batman sequels, Batman paintings, and Batman figurines based on descriptions from the original story.

156. An example of a blocking copyright is a parody created under a license from an original copyright owner. If this parody incorporated a large portion of the original, and were to also be granted copyright protection, then the secondary user would be able to block the original owner from exploiting the original work by withholding consent to use the parody. Under the presented proposal, subsequent works made under a compulsory license would not be able to block original authors from exploiting their work or creating new derivative works.
into the public domain.

Second, an author would obtain an exclusive right to all derivative works for a fourteen-year term, with the possibility of a fourteen-year extension upon proper renewal. When filing for renewal, owners would be required to pay a nominal fee. The fee would be a price calculated to incentivize creations of secondary works while discouraging original authors from renewing if they had no plans to exploit derivative markets. Further, to be granted a renewal, the author would have had to exploit the derivative market within the first fourteen years of the work's creation. Failure to do so would cause the owner to lose the exclusive right to create derivatives. But my proposal would not strip the freedom of the original owner to make subsequent derivative works. Rather, after the terms for the derivative work right had expired, or where the original creator had failed to exploit the derivative market within fourteen years, the owner would only lose the exclusive monopoly over the derivative market.

Upon expiration of the maximum twenty-eight-year term, or the owner's failure to properly renew, the right of secondary users to make derivative works would be subject to a compulsory licensing scheme, enabling secondary users to make "Secondary Derivative Works." Secondary Derivative Works would encompass derivative works made by secondary users under this scheme. Works created under a "voluntary" licensing agreement would not be treated as Secondary Derivative Works.

2. Redefining the Scope

My proposal would also reduce the scope of the derivative work right to match that set forth in the Berne Convention. Authors would have the "exclusive right of authorizing adaptions, arrangements and other alterations of their works."\(^7\) Transformations, however, would not be considered derivatives, and authors could not prevent secondary users from transforming their works.

Further, a work would only be considered a Secondary Derivative Work, and thus be subject to the compulsory licensing scheme, if it were transformative as opposed to transforming.\(^8\) A secondary use licensed under a compulsory license would only be granted protection if the work added value to the original by changing it into a new creation with new aesthetics, insights, and understandings. A work that merely repackaged or republished the original would not likely suffice.\(^9\) To make the transforming versus transformative determination, courts would consider whether the new use was productive to society and not merely the original work with a trivial modification.\(^10\) When a secondary work adds new value to an original, it is precisely the type of enriching activity copyright is

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158. See supra Part I.B (discussing the transformative analysis used by the Second Circuit and Supreme Court in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994)).
159. See Campbell, 510 U.S. at 576.
160. See id. at 569.
meant to protect.

3. Compulsory License and Profit Allocation

My proposal would also subject original authors to a compulsory licensing system upon expiration of their fourteen-year\textsuperscript{161} derivative work right. After the termination of the derivative work right term, original creators would no longer have exclusive control over derivative markets for the original work. However, original owners would be compensated with a percentage of all profits accumulated by derivative works created by the original author and through profit allocation from works created by secondary users under a compulsory license. The percentage would be computed before a license was granted—it might be negotiated, based on a standard set by the courts, or based on the labor placed into the original work or the estimated commercial value of future derivatives.

A secondary user’s application for a compulsory license would need to specify the exact type of derivative the user planned to create, including an explanation of how the new use would be productive to society. With this information, the copyright owner could better estimate the potential profits from the licensed work, and the parties could reach a fair deal when negotiating the percentage of profit allocation.

Finally, a Secondary Derivative Work would be protected by copyright law without prejudice to the original owner. In other words, a Secondary Derivative Work would never act as a copyright that blocks the original author.

CONCLUSION

Reproducing and selling another’s work is wrong. Nevertheless, a “wrong” that changes an original work into something new is different—it adds value to our culture. Although arguments for stronger copyright protection persist, transformative works by secondary authors should be permitted. Thus, copyright law should no longer fully protect the derivative markets for an original author. My proposal properly limits the broad scope of the derivative work right, balancing the interests of original authors with the interests of those that wish to borrow from copyrighted work.

Under my proposed system, owners would be encouraged to make derivative works within the first fourteen years of creation. The risk of losing the exclusive right by not exploiting the work would incentivize authors to create derivative creations at an earlier date. Further, a narrower definition of the derivative work right and the addition of compulsory-licensed Secondary Derivative Works would allow more users to make new transformative works. Redefining the scope of the derivative work right would clarify what secondary use of an original work would be considered fair, increase the number of original creative artists, and enhance creative activities in general.

\textsuperscript{161} Or twenty-eight years, depending on whether the author properly renewed the copyright.
Finally, the formalities and compulsory licensing scheme of my proposed system would allow more works to automatically enter into the public domain, thus diversifying the material available for secondary users. And my proposed profit allocation would compensate the original owner with continuing royalties from Secondary Derivative Works.

A more limited copyright protection would allow creators, composers, and artists to borrow from prior works without being subjected to infringement liability for creating unauthorized derivatives. Alleviating licensing fees, litigation costs, and initial labor costs related to accessing original works would lower the cost of creating new transformative works of authorship and incentivize their creation, thus fulfilling the primary purpose of copyright law.