

More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age



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ABSTRACT

The digital age has forever changed the role of copyright in promoting the progress of science and the arts. The era of instant authorship has provided copyright to countless authors who are not motivated by copyright incentives. It has also made it impracticable for copyright to return to a system requiring author adherence to formalities, such as notice and registration. Though many intellectual property scholars today argue for “reformatizing” copyright, they fail to consider fully the consequences of shifting from the current opt-out copyright system to an opt-in regime. This Comment fills that gap by exploring how an opt-in regime would work in a world with countless authors. In particular, it details the inability of many authors to know at the time of creating an original work whether that work will be commercially successful, such that, if copyright did not automatically vest, it would be worth the time and cost to obtain protection. This Comment ultimately argues that an opt-in copyright system characterized by formalities would not scale in the era of instant authorship and that returning to such a regime would disincentivize authors who are motivated by the present copyright scheme. This Comment then concludes with a discussion of why an opt-out system that automatically grants rights to authors is supported by the different theories of the U.S. Constitution’s Copyright Clause.

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INTRODUCTION

For 220 years, copyright entitlements given to authors of original works in the United States have swelled.¹ The Copyright Act of 1790 granted to authors only the exclusive right to copy their “maps, charts, and books.”² There was no exclusive right to public performance or derivative works and certainly no protection for software code or sound recordings—after all, such expression did not yet exist. And, for much of U.S. history, copyright only vested in a work if its author satisfied a number of formalities, primarily notice, deposit, registration, and renewal. Over time, however, formalities that once kept many works out of the copyright system have been sidelined while the duration of copyright protection has increased about fourfold.³

1. See Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1676 (2009) (“It is often said that death and taxes are the only guarantees in life. After even a cursory examination of the history of copyright law, one might add that the expansion of copyright law is guaranteed as well.”). See generally Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW (Fiona Macmillan ed., 2007) (arguing that content industries effectively lobby the U.S. Congress with interests not necessarily shared by the public).
2. Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124 (amended 1802) (“[F]or the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”).
3. With the passage of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, formalities stopped being a condition for copyright protection. See *infra* note 53. The Act also changed the length of the copyright term from twenty-eight years with an additional twenty-eight-year period upon renewal to one giving most works rights for a fixed duration of the life of the author plus fifty years. Copyright Act of 1976 §§ 302–304, 90 Stat. at 2572–76 (codified as amended at 17 U.S.C. § 302–304 (2006)). Congress further extended that term by twenty years with the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (amending 17 U.S.C. § 302). The ever-growing length of copyright is something that many copyright scholars agree is a problem. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 11 (2008), available at <http://thepublicdomain.org/thepublicdomain1.pdf> (“For most works, the owners expect to make all the money they are going to recoup from the work with five or ten years of exclusive rights. The rest of the copyright term is of little use to them except as a kind of lottery ticket in case the work proves to be a one-in-a-million perennial favorite.”); NEIL NETANEL, *COPYRIGHT'S PARADOX* 205 (2008) (taking issue with “today's absurdly lengthy copyright term”); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 119 (2009) [hereinafter PATRY, *COPYRIGHT WARS*] (attacking the rationale of repeatedly extending the copyright term); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 489 (2003) (“For now, it is enough to observe that a system of indefinite renewals would—depending on the fee, on whether group renewals were permitted, and on the formalities involved in renewal—somewhat mitigate the problem of incentives to invest in public-domain works.”); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1513 (2009) (arguing that increased human lifespans and the limited long-term return on most copyrights means

The demise of formalities has been described as a shift from an opt-in copyright system—one into which authors entered actively—to an opt-out regime that grants rights automatically, regardless of whether the author wants them or not.⁴ In recent years, there has been a trend among many copyright scholars to blame the end of formalities for some of copyright's more pressing problems,⁵ such as the prevalence of orphan works—those copyright-protected creative works whose owners cannot feasibly be located.⁶ Meanwhile, content-user

that “the finite duration proviso is no longer a meaningful limitation on the dominion of copyright owners, and in the future it may become virtually irrelevant—if it has not become so already”).

Justice Breyer also took issue with the extension of the copyright term in *Eldred v. Ashcroft*:

How will extension help today's Noah Webster create new works 50 years after his death? . . . Regardless, even if this cited testimony were meant more specifically to tell Congress that somehow, somewhere, some potential author might be moved by the thought of great-grandchildren receiving copyright royalties a century hence, so might some potential author also be moved by the thought of royalties being paid for two centuries, five centuries, 1,000 years, “til the End of Time.” And from a rational economic perspective the time difference among these periods *makes no real difference*.

537 U.S. 186, 255 (2003) (Breyer, J., dissenting). Leading economists, such as Kenneth J. Arrow and Milton Friedman, have also demonstrated that extending copyright does not fulfill copyright's purpose of incentivizing authors to create. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 8, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

4. See *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007) (“Renewal served as a filter that passed certain works—mostly those without commercial value—into the public domain. Along with formalities such as registration and notice (which have also been effectively eliminated), renewal requirements created an ‘opt-in’ system of copyright in which protections were only available to those who affirmatively acted to secure them. The majority of creative works were thus never copyrighted and only a small percentage were protected for the maximum term.”); see also Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 124 (2002) (“[C]opyright law has flipped over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 155 (“The 1976 Act converted copyright from a system in which authors had to opt in to possess rights in their work to one in which rights vested automatically upon creation of those works regardless of the author's intent or conduct.”).
5. See generally James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004). See also BOYLE, *supra* note 3, at 184; LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 287–91 (2004); Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 549 (2001); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 3 UTAH L. REV. 551 (2007); Stef van Gompel, *Formalities in the Digital Era: An Obstacle or Opportunity?*, in *GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE* 395–423 (Lionel Bently et al. eds., 2010); Kevin A. Goldman, Comment, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705, 720 (2006).
6. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006). Though it may be impossible, or at least infeasible, to locate the owner and obtain a license to use the work, using the work without permission would still constitute copyright infringement. Without a successful

practices, like peer-to-peer sharing, have forced authors to meet the significant costs of monitoring for and enforcing against infringements, lest the infringing users claim an implicit license.⁷ This latter point was highlighted in *Authors Guild v. Google, Inc.*,⁸ in which Google was sued for scanning millions of complete books into its searchable database, Google Books. Google argued that its scanning was noninfringing unless copyright owners actively opted out of Google Books, which conceptually would be similar to opting in to the full enjoyment of copyright entitlements.⁹ In March 2011, Judge Denny Chin, then a U.S. district court judge and now a judge on the U.S. Court of Appeals for the Second Circuit, rejected a settlement agreement that would have sanctioned an opt-in copyright system for books.¹⁰ Importantly, however, the dispute is ongoing, and the move certainly will not be the last to put copyright owners in a position in which they must opt in to enjoy the incentives Congress intended for them.¹¹ In light of the

defense, such as fair use, the infringing user would be liable to the copyright owner, should they later be identified. Many who support returning formalities to copyright warn that orphan works are constricting the commons and making it harder for authors to build upon others' creative expression. These works are discussed *infra* Part I.

7. While an exclusive license requires a transfer of copyright as governed by section 204(a) of the Copyright Act, owners can grant nonexclusive licenses orally or imply it by conduct. However, for an implied license, circuit courts in the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits have adopted slight variations of the Seventh Circuit's test in *L.A.E., Inc. v. Sharver*, 74 F.3d 768, 776 (7th Cir. 1996), which held that an implied license is only created when "(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work." See, e.g., *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26 (1st Cir. 2003); *Graham v. James*, 144 F.3d 229 (2d Cir. 1998); *Lowe v. Loud Records*, 126 F. App'x 545 (3d Cir. 2005); *Nelson-Salabes, Inc. v. Morningside Dev., L.L.C.*, 284 F.3d 505 (4th Cir. 2002); *Lulirama Ltd., Inc. v. Access Broad. Servs., Inc.*, 128 F.3d 872 (5th Cir. 1997); *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998); *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748 (9th Cir. 2008); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284 (11th Cir. 2011); *Atkins v. Fischer*, 331 F.3d 988 (D.C. Cir. 2003). Thus, such a defense from infringing users likely would not be meritorious. That does not mean, however, that it would not be costly and time consuming for copyright owners to monitor for infringing uses and enforce their copyright in the face of such uses.
8. 770 F. Supp. 2d 666 (S.D.N.Y. 2011).
9. See Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Settlement Approval, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-JES), 2008 WL 4888425; see also Legal Analysis, GOOGLE BOOKS, <http://www.google.com/googlebooks/legal.html> (last visited Mar. 21, 2012).
10. *Authors Guild*, 770 F. Supp. 2d at 680–81 (noting that "the notion that a court-approved settlement agreement can release the copyright interests of individual rights owners who have not voluntarily consented to transfer is a troubling one").
11. The leading theory behind the U.S. Constitution's Copyright Clause, U.S. CONST. art. I, § 8, cl. 8, is that it aims to build a robust culture by offering authors incentives to create, which in turn benefits the public. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By

push from scholars to return copyright to an opt-in regime and the troublesome content-user practices that have led to increased costs for copyright owners,¹² this Comment weighs the pros and cons of opt-in and opt-out regimes and concludes that the opt-out regime is the preferable approach for the digital age.¹³ Many scholars who favor an opt-in regime have identified symptoms of a sick copyright system—among other problems, an ever-expanding copyright regime is restricting access to expressive works whose authors were unmotivated by commercial exploitation and might not even be locatable for licensing purposes—and they have argued that formalities would ensure that copyrights would only be granted to those seeking such protection. But those scholars do not consider fully the negative effects that switching back to an opt-in regime would have—in particular, such a move would discourage original expression via digital technologies, which is now flourishing. This Comment seeks to fill that gap in scholarship. It concludes that an opt-out copyright system, though certainly not perfect, is the preferable approach because it better serves copyright's incentivizing purpose and is simply much more practical in the era of instant authorship.

Part I focuses on the movement toward “reformatizing” copyright and discusses the decline of formalities in the United States and why some scholars think formalities should make a comeback. Part II discusses why it would be problematic for formalities to be a condition precedent to protection.

establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”); *infra* notes 165–170 and accompanying text. Theories behind copyright are discussed further in Part IV.

12. Though many discuss the costs of monitoring and enforcing copyright, there appears to be little empirical evidence. This may be in part because the costs differ widely for different authors and across media. An example, however, demonstrates why monitoring and enforcing can be cost-prohibitive for content owners, particularly independent authors. Consider an independent photographer who uploads hundreds of photos to his online portfolio each week. Once online, those photographs are easy to reproduce without permission and tracking them down would pose significant hurdles, even if they are watermarked, because online images are only searchable based on captions. And the photographer is not going to know where to look because infringing uses of his photograph could appear just about anywhere on the internet: private social networking pages, comment boards, blogs, and even sites selling a related service, such as a large, framed version of the photograph. Even on the chance that the photographer located an infringing use, he might not find it worth his time to stop the infringing use (unless an email requesting the photograph be removed would suffice) because litigation is time consuming, and, in the absence of registration, he would not be able to seek statutory damages. For further discussion, see *infra* Part II.C.1.
13. The phrases “digital age” and “era of instant authorship,” used throughout this Comment, are not interchangeable. The digital age began with the explosion of digital technology that lowered barriers to authorship over time. The era of instant authorship is a more recent period within the digital age. Both the digital age and the era of instant authorship are integral to the consequences of reinstating formalities.

While Reformalists¹⁴ argue that the digital age has made formalities all the more necessary, this Comment counters that digital technologies have actually made formalities infeasible for authors and supports that contention with an analysis of the problems of scale. In particular, Part II details the inability of many authors to know at the time they create an original work whether that work will be commercially successful, such that, if copyright did not automatically vest, it would be worth the time and cost of obtaining protection. Part III explains how an opt-out regime benefits the commons without being a “trap for the unwary”¹⁵—that is, without denying copyright protection to those who lack the wherewithal to apply for it formally—and proposes a path for Congress regarding the Copyright Act’s termination provision.¹⁶ Finally, Part IV surveys theories of copyright, applying them to both the opt-in and the opt-out copyright regimes. It argues that both natural rights and economic theories support bolstering the current opt-out copyright regime with easier provisions for opting out; it also notes that utilitarians¹⁷ should not support a return to conditional copyright due to the likely consequences of an opt-in regime in the era of instant authorship.

I. THE MOVEMENT TO “REFORMALIZE” COPYRIGHT

Historically, formalities were required for copyright protection. Even a minor imperfection in one formality could forfeit the author’s copyright, thereby injecting the work into the public domain.¹⁸ From the passage of the first U.S. copyright law in 1790, copyright protection for works originating in the United States required four formalities: notice, deposit, registration, and renewal.¹⁹

14. For the purposes of this Comment, “Reformalist” is a label that includes all advocates of returning to a copyright regime in which formalities serve as a condition to protection. Though Reformalists differ in their methods of implementation, they all agree that formalities would improve the health of the copyright system.

15. See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.01 (2011).

16. 17 U.S.C. §§ 203, 304 (2006). Both sections grant authors the inalienable right to reclaim the licenses they have granted away after a given number of years (generally, thirty-five).

17. See *infra* note 176.

18. *E.g.*, *Wheaton v. Peters*, 33 U.S. 591, 592 (1834) (“No one can deny, that where the legislature are about to vest an exclusive right in an author or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. This principle is familiar as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference should be made, as respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author, rather than of the inventor.”).

19. See ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 405–10 (rev. 4th ed. 2007) (charting the evolution of copyright formalities in the United States).

Also, for a time, foreign works needed to be manufactured locally.²⁰ These formalities cost authors time and money and, in turn, kept an untold number of creative works out of the copyright system. General publication and distribution were expensive and the average American could do neither without commercial backing; individuals could rarely expect to make that money back by selling their works later. Thus, for many authors, the benefit of copyright protection was not worth the cost. To some extent, copyright was a luxury for works that anticipated or already had received commercial backing. Those were the works into which more money was invested, from which more profits were expected, and for which more temptation to pirate existed.

But, of course, the times they are a-changin'.²¹ As a result of the proliferation of digital technologies and the rise of the internet, the costs of authorship are now more often associated with creation than with publication and distribution. This can be true whether a book, for instance, is self-published or released to *Harry Potter*-esque anticipation.²² Once digitized, a work's publication, reproduction, and distribution costs approach zero; unlike the work's ancestors, the copies are nonrivalrous²³ and nonexcludable.²⁴ Because the digital age has turned vast numbers of people into an author of something creative, many more individuals are exposed to piracy. The internet is replete with tools that reduce the effort of publishing to the click of a button. This has led to geometric growth in the number of works under copyright's protective umbrella.²⁵ And, as one advocate for formalities has acknowledged, "in some respects our new interconnectedness makes copyright more important than ever, because there are more

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20. See Act of March 3, 1891, ch. 565, 26 Stat. 1106 (requiring that any foreign work seeking U.S. copyright protection be reproduced within the United States); see also Charles Rembar, *Xenophilia in Congress: Ad Interim Copyright and the Manufacturing Clause*, 69 COLUM. L. REV. 770, 785 n.49 (1969) ("The International Copyright Act of 1891, which extended copyright protection to works of foreign citizens under certain conditions, also introduced the manufacturing requirement to our copyright law."). Congress exempted authors of English-language works when it adopted the Universal Copyright Convention in 1954. *Id.* at 784. Congress did not entirely eliminate this formality until July 1, 1986, when it allowed the manufacturing clause to expire. See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1297 (1994).
 21. With apologies to Bob Dylan. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).
 22. See Niva Elkin-Koren, *The Changing Nature of Books and the Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1712 (2011).
 23. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 120 (4th ed. 2004). Digital copies of a creative work are nonrivalrous because, unlike a printed book, for example, the owner of a digital copy of a book can share that copy simultaneously with many people.
 24. See *id.* Digital copies of a creative work are generally nonexcludable because, once published, it is almost impossible for the copyright owner to prevent a copy from being shared.
 25. Exact numbers are elusive because, after all, registration is not required.

authors who can take advantage of its incentivizing effects and earn a living from sharing their creativity with the rest of us.”²⁶

However, the expansion of copyright has not been without backlash.²⁷ As James Gibson puts it: The United States is suffering from a bad case of “copyrightitis.”²⁸ Similarly, Christopher Sprigman sees the digital age as the dawning of a new era in creativity but claims that copyright is bottling up expression and innovation in the interest of protecting commercially dead works:

The growth of the Internet, and, more broadly, of digital technologies, has opened up new possibilities for public access to and use of creative works that did not exist when Congress was removing formalities from copyright law. Before the digital age, the cost of copying and distribution had more effect on the ability of most people to access, use, and transform creative works than did the copyright laws. But now digital distribution is cheap and digital copying is essentially free. Today copyright law has emerged as the principal barrier to the creative reuse of a large amount of material that under the former conditional copyright regime would not have been subject to copyright in the first place. The majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted. For works that are not producing revenues, continued copyright protection serves no economic interest of the author. But in an unconditional copyright system, commercially “dead” works are nonetheless locked up.²⁹

Both Gibson and Sprigman see a simple, if not rudimentary, solution: formalities.³⁰

Not all Reformalists advocate the same changes. They fall along a spectrum. However, despite nuances in their approaches to restoring formalities, Reformalists generally seem to have overlooked how formalities might contravene copyright’s goal of promoting creative content. The about-face has not been lost on some

26. Gibson, *supra* note 5, at 169.

27. See *supra* note 5; see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) (arguing that copyright protection should not be granted to digital works).

28. Gibson, *supra* note 5, at 212–31. Gibson notes that the FAQ section of the Copyright Office’s website includes answers to more than one hundred questions—“but tells us nothing about how to voluntarily forgo copyright protection.” *Id.* at 169–70.

29. Sprigman, *supra* note 5, at 489–90.

30. See Gibson, *supra* note 5; Sprigman, *supra* note 5. They are not alone. See, e.g., BOYLE, *supra* note 3, at 184; LESSIG *supra* note 5, at 287–91.

copyright experts, such as Jane Ginsburg: “In other words, the draconian features of U.S. formalities, once seen as deplorable, now in some respects are celebrated.”³¹

Before addressing the good and bad aspects of basing copyright protection on an author’s adherence to formalities, it is important to consider the origins of the U.S. copyright system.³² U.S. copyright law traces its roots to 1710 and Britain’s passage of the Statute of Anne.³³ Less than a century later, the framers of the U.S. Constitution saw copyright as an important vehicle for building culture.³⁴ They empowered Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ Exactly what the framers meant by the Constitution’s Copyright Clause³⁶ is a source of great debate³⁷ and is discussed further in Part IV. It is generally accepted, though, that copyright in the United States is a means to an end: Congress’s way of encouraging new expressive content by affording authors temporary monopolies over the use of their works.³⁸

Copyright is a bundle of rights that protects the creative expression of an idea, but not the idea itself.³⁹ Section 106 of the 1976 Copyright Act gives copyright owners the exclusive rights to reproduce,⁴⁰ distribute,⁴¹ and publicly perform⁴² their copyrighted works and to make derivative works based on their copyrighted works.⁴³ Authors of visual works also receive rights to attribution and integrity.⁴⁴

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31. Jane C. Ginsburg, *The U.S. Experience With Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 314 (2010).
 32. For a discussion of the public policy justifications underlying copyright, see *infra* Part IV.
 33. 8 Ann., c. 19 (1710), available at http://avalon.law.yale.edu/18th_century/anne_1710.asp. See generally Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 Hous. L. Rev. 965 (2010).
 34. See generally EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* (2002) (outlining the origin of the Copyright Clause).
 35. U.S. CONST. art. I, § 8, cl. 8.
 36. The Copyright Clause is also often called the Intellectual Property Clause or the Patent Clause.
 37. Copyright scholars generally fall into one of three schools of thought: natural rights theory, economic theory, or consequentialism (the most common branch of which, and the one discussed herein, is utilitarianism). For further discussion, see *infra* Part IV.
 38. See *infra* note 179; see also *infra* note 176.
 39. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); see also Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993).
 40. 17 U.S.C. § 106(1) (2006).
 41. *Id.* § 106(3).
 42. *Id.* § 106(4)–(6).
 43. *Id.* § 106(2).
 44. *Id.* § 106A. Incorporated via the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, section 106A protects an artist’s reputation by ensuring attribution and allowing the author

For original works of authorship that demonstrate at least a modicum of creativity, rights vest automatically upon fixation.⁴⁵ This is a key component of the current opt-out regime. By default, the author owns the copyright,⁴⁶ and for a long time—either for the life of the author plus seventy years or, for works made for hire, the shorter of ninety-five years from the date of publication or 120 years from creation.⁴⁷ Copyright’s divisible bundle of rights enables owners to transfer a nearly infinite number of exclusive and nonexclusive uses.⁴⁸ Anyone who uses a copyrighted work without permission is an infringer.⁴⁹ Ignorance as to the existence of the copyright is no defense.⁵⁰ Notably, it is irrelevant to infringement that the expressive work is not marked, has not been registered, or was not deposited with the Copyright Office.

to prevent the distortion, mutilation, or modification of his visual work, even after the work has been sold. *See Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003).

45. 17 U.S.C. § 102(a); *see Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 362–63 (1991).
46. 17 U.S.C. § 201(a).
47. *Id.* § 302.
48. *Id.* § 201(d). For example, a movie studio that owns all the rights to a feature film could sell to different parties an exclusive right to reproduce and distribute the film, an exclusive right to make a derivative work based on the film, and multiple nonexclusive licenses to limited or unlimited broadcasts of the film during different or overlapping fixed time periods and across various media.
49. *Id.* § 501(a). Infringers are liable either for actual damages and profits or, if the work was registered at the time of infringement, statutory damages ranging from \$750 to \$30,000 per act of infringement (and up to \$150,000 per infringement if the copyright owner proves the infringement was willful), “as the court considers just.” *Id.* § 504. Trial courts have broad discretion in setting the statutory damages for copyright infringement, *see Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077 (D. Md. 1995), and “must award an amount that will put the defendant on notice that it costs more to violate the copyright law than to obey it.” *Stevens v. Aeonian Press, Inc.*, No. 00 Civ. 6330(JSM), 2002 WL 31387224, at *1 (S.D.N.Y. Oct. 23, 2002) (quoting *Dream Dealers Music v. Parker*, 924 F. Supp. 1146, 1153 (S.D. Ala. 1996)).
50. Fair use can be a defense to infringement. *See* 17 U.S.C. § 107. But, fair use is a risky and costly defense to litigate. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); *see also* Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 870 (2010) (“The problem with relying on fair use . . . stems from the after-the-fact determination of fair use, the uncertain application of it to many particular situations, plus the costs of defense if sued even where the defense would be upheld.”). Recent research, however, has demonstrated that adjudication of fair use defenses is more predictable and measurable than widely believed. *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (mapping the chronological development of the fair use doctrine and finding that the question of transformative use has come to dominate use analysis); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. (forthcoming 2012) (confirming “the centrality of transformative use,” noting that when copying is only partial it weighs in favor of a fair use defense, and finding that having a commercial use does not weigh against the defendant); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

However, it has not always been this way. From the passage of the Copyright Act of 1790 until enactment of the 1976 Act that now governs most creative works, U.S. copyright law did not admit original works of authorship that failed to follow formalities.⁵¹ Before enactment of the 1976 Act, an author seeking copyright protection was required to provide notice, register his work with the Copyright Office by a set deadline, deposit a copy of the work with the Library of Congress, and renew his copyright at the end of the first of two possible terms.⁵²

Today, formalities are voluntary. Instead of acting as a condition to copyright protection, formalities merely offer more protection, such as statutory damages.⁵³ The shift away from formalities,⁵⁴ coupled with the explosion of instant authorship and the expansion in scope and duration of copyright, has led to a rise in orphan works. The number of orphan works is elusive. Even the Copyright Office's 2006 report on orphan works gives no guess as to how many works of authorship under copyright's umbrella lack an identifiable active rights holder.⁵⁵ Katharina de la Durantaye sheds a bit more light on the extent of the orphan works problem by compiling data from recent studies:

A study by the Carnegie Mellon University Libraries showed that 22% of the publishers for the works in its collection could not be found. Thirty-six percent of the publishers that were found and contacted did not respond to multiple letters of inquiry, most of which regarded out-of-print books. According to the British Library, orphan works constitute 40% of the copyrighted works in its collection.

Another U.K. study, conducted by the Collections Trust and the Strategic Content Alliance and mainly based on museums, galleries and archives concluded that on average, 5–10% of a museum's or

51. See MERGES, *supra* note 19. In fact, the 1976 Act as originally passed also required notice, deposit, and registration, but failure to adhere did not bring forfeiture. Formalities as a condition to copyright were completely abolished in the United States with the passage of the Berne Convention Implementation Act of 1988 (BCIA), Pub. L. No. 100-568, 102 Stat. 2853. See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 3:2 (3d ed. 2008). Formalities still matter for U.S. works published before March 1, 1989—the day the BCIA went into effect. Going forward, formalities also could be applied to new works originating in the United States, which would give rise to a two-tier copyright system in which works from Berne signatories face a lower standard for receiving copyright protection than U.S.-born works.

52. See MERGES, *supra* note 19.

53. See 17 U.S.C. § 504; see also *supra* note 49.

54. The dramatic shift away from formalities in the 1976 Act, discussed in detail in Part II, has been attributed to Congress's having a "weather eye" on the Berne Convention. DAVID NIMMER, SACRED TEXT, TECHNOLOGY AND THE DMCA 66 (2003).

55. U.S. COPYRIGHT OFFICE, *supra* note 6.

gallery's collection and 11–20% of an archive's collection consisted of orphan works. In total, the study found, the responding organizations might well own more than 50 million orphan works. Twenty-six percent of the participants reported that legal difficulties surrounding orphan works were frequent, with 5% reporting that “virtually every significant activity they undertake was affected by these difficulties.”⁵⁶

Though scope is difficult to pinpoint, de la Durantaye's synthesis of available research demonstrates that orphan works make up much more than a small corner of the creative works market. Indeed, they compose a substantial proportion of various library, museum, gallery, and archive collections. And the further back in time a work originated, the more likely it is to have been orphaned. About 75 percent of silent films from the 1920s, for instance, are estimated to be orphan works.⁵⁷ But even with contemporary works, digital technology has made it easy for pieces of a work to break off and become untraceable.⁵⁸ Although Congress has talked about limiting the occurrence of orphan works,⁵⁹ the unindexed catalog of orphan works, as it stands today, has “created a rights-clearance nightmare for any conscientious person who wants to build upon pre-existing works or make them available to others.”⁶⁰

Though many intellectual property scholars argue that copyright law needs reform,⁶¹ there is wide disagreement over exactly what should be done to solve

56. Katharina de la Durantaye, *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 229, 236–37 (2011) (footnotes omitted).

57. *Letter from Larry Urbanski, Chairman, Am. Film Heritage Ass'n, to Senator Strom Thurmond Opposing S. 505, OPPOSING COPYRIGHT EXTENSION* (Mar. 31, 1997), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/letters/AFH.html>. Urbanski's letter continues: Those Orphan films now owned by defunct companies and under copyright are ready for preservation by commercial archives. Commercial archives preserve orphan works at no cost to the public, in exchange for the right to market the works through public domain. Those non-studio Orphan films presently preserved by commercial archives will be abandoned because public domain allowed the economic incentive to preserve them.

Id.

58. *The “Orphan Works” Problem and Proposed Legislation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat031308.html>.

59. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

60. Samuelson, *supra* note 5, at 563.

61. *See, e.g.*, Samuelson, *supra* note 5, at 551 (“For one thing, the current U.S. copyright law is much too long, now weighing in at approximately two hundred pages. The statute is also far too complex, incomprehensible to a significant degree, and imbalanced in important ways. Moreover, it lacks normative heft—that is, the normative rationales for granting authors some protections for their

its problems, which extend beyond the proliferation of orphan works. Calls for copyright reform run the gamut⁶² and have been a consistent feature of the law.⁶³ Today, many scholars argue that returning to a copyright system that requires formalities as a condition to protection—an opt-in regime—could slow the shrinking of the commons and could prevent copyright law from locking up the use of original works whose creators were not motivated by copyright's incentives.⁶⁴ Formalities, they argue, additionally could increase the public domain by injecting into it creative works that did not affirmatively declare the author's desire for copyright protection and could reduce transaction costs “by creating information about ownership and the term of protection, which [historically]

works and for limiting the scope of those protections is difficult to extract from the turgid prose of its many exceptionally detailed provisions.”); Sprigman, *supra* note 5; *supra* note 3 (discussing copyright duration); *infra* note 62.

62. See, e.g., Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010) (proposing that copyright be reformed to give more rights to creators, less control to intermediaries like publishing houses, and greater freedom to consumers); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 458 (2009) (arguing that copyright's creativity requirement is too low and should be “akin to that of patent law”); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537 (arguing that copyright should be brought in line with social norms); see also John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, <http://www.wired.com/wired/archive/2.03/economy.ideas.html> (arguing that everything we know about intellectual property law is wrong, that it “cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum” and that radical reconstruction is needed).
63. See Abe A. Goldman, *The History of U.S.A. Copyright Law Revision From 1901 to 1954*, in 2 STUDIES ON COPYRIGHT 1101 (Fred B. Rothman & co. 1963) (1955). Shortly after passage of the 1909 Act, which was the first major overhaul of U.S. copyright law, politicians and the registrar of the Copyright Office were pushing for changes. See Ginsburg, *supra* note 31; Thorvald Solberg, *Copyright Law Reform*, 35 YALE L.J. 48 (1925).

64. James Boyle, for example, makes this argument:

The best solution would be a return of the formality requirement—a requirement that one at least write the words “James Boyle copyright 2008,” for example, in order to get more than 100 years of legal protection backed by “strict liability” and federal criminal law. Those who did not wish to have the legal monopoly could omit the phrase and the work would pass into the public domain, with a period of time during which the author could claim copyright retrospectively if the phrase was omitted by accident. The default position would become freedom and the dead weight losses caused by giving legal monopolies to those who had not asked for them, and did not want them, would disappear.

BOYLE, *supra* note 3, at 184; see also Sprigman, *supra* note 5, at 487 (“Copyright formalities . . . helped to maintain copyright's traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw.”).

simplified the process of identifying licensors and also clarified the length of the term of exclusive ownership that would be the subject of a license.”⁶⁵

However, formalities have only recently received the esteem that comes with nostalgia.⁶⁶ The digital age has not fixed the shortcomings of a formalities regime. Further, proponents of an opt-in copyright system have not considered fully how formalities might stunt the explosion of the new expression that has been fueled by the tools of digital technology. As discussed in Part II below, an opt-in regime would, for certain types of content, directly contravene copyright’s purpose of incentivizing authors to create original works as a means of promoting cultural progress.

II. THE TROUBLE WITH AN OPT-IN REGIME IN THE DIGITAL AGE

The United States traditionally required four formalities as a condition to copyright protection: notice, registration, deposit, and renewal. The same formalities were common up until the late nineteenth century throughout Europe, too,⁶⁷ but began losing significance after the adoption of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1886, which created more uniform copyright laws across signatory nations.⁶⁸ Originating under the influence of strong European beliefs about an author’s natural rights,⁶⁹ the Berne Convention was revised in 1908 to prohibit signatories from requiring formalities of foreign works that originated in other signatory nations.⁷⁰ This revision marked the beginning of the end for formalities, culminating with

65. Sprigman, *supra* note 5, at 502; *see also* van Gompel, *supra* note 5, at 401–03 (arguing that the reformation of copyright would primarily ease the clearance of rights and would increase the flow of free information).

66. *See* 2 NIMMER & NIMMER, *supra* note 15, at § 7.01; *see also* Irwin Karp, *A Future Without Formalities*, 13 CARDOZO ARTS & ENT. L.J. 521 (1995); Arthur Levine, *The End of Formalities: No More Second-Class Copyright Owners*, 13 CARDOZO ARTS & ENT. L.J. 553 (1995).

67. *See* Stef van Gompel, *Les Formalités Sont Mortes, Vive Les Formalités! Copyright Formalities and the Reasons for Their Decline in Nineteenth Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 159 (Ronan Deazley et al. eds., 2010), available at <http://ssrn.com/abstract=1670676>.

68. The original signatories were Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia, and the United Kingdom.

69. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 133 n.3 (1st Cir. 2006); *see also* Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 185, 195 (2010) (stating that Berne negotiators may have been concerned about the “perceived burden of complying with formalities,” particularly on unwary authors).

70. Berne Convention for the Protection of Literary and Artistic Works, art. 5, para. 2, Sept. 9, 1886, 828 U.N.T.S. 221 (“The enjoyment and the exercise of these rights shall not be subject to any formality . . .”).

their push into near irrelevance in U.S. law in 1989.⁷¹ At the time, the demise of formalities was celebrated.⁷² Today, the benefits of formalities are intertwined with the negative consequences; unfortunately, an opt-in copyright system would have to accept the bad with the good.

A. The Good: Formalities

First, formalities put the public on notice about the works in which an author is claiming exclusive rights, thereby reducing ambiguity about legal liability that arises from unlicensed uses of that work.⁷³ Second, formalities, particularly notice and registration, help interested users locate copyright owners, a process that eases the licensing of rights.⁷⁴ No longer required, registration has dropped off dramatically.⁷⁵ In turn, it has become more difficult to identify the owners of potentially

71. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.). The Berne Convention, however, only limits treatment of foreign works from other Berne signatory nations. The United States remains free to impose formalities on works originating in the United States or in countries that have not signed on to Berne. See *id.*

72. See LESSIG, *supra* note 5, at 288 (“In a world before digital technologies, formalities imposed a burden on copyright holders without much benefit. Thus, it was progress when the law relaxed the formal requirements that a copyright owner must bear to protect and secure his work. Those formalities were getting in the way.”); Levine, *supra* note 66, at 556 (“History has shown that formalities in copyright law, viewed with the benefit of hindsight, are just plain wrong.”).

73. According to the House Report for the 1976 Act, the notice requirement serves four principal functions: “(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. 94-1476, at 143 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5759.

74. This, in turn, lowers transaction costs. For users, the transaction costs primarily associated with obtaining a copyright license include searching for the owner and negotiating a price. Those costs have “increased exponentially in recent years.” Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 381 (2005) [hereinafter Elkin-Koren, *Limits of Private Ordering*] (attributing this rise to the expansion of copyright and the removal of formalities); cf. Genevieve P. Rosloff, “Some Rights Reserved”: *Finding the Space Between All Rights Reserved and the Public Domain*, 33 *COLUM. J.L. & ARTS* 37, 45–51 (2009) (arguing that the repeal of formalities has complicated copyright licensing and contributed to increasing licensing costs).

75. After growing sharply since World War I, annual copyright registrations dropped after 1991 and then leveled off roughly 20 percent below their high-water mark of about 600,000. “Some portion of these missing registrations is comprised of authors who, because they see no realistic prospect of commercial return from their works and do not foresee infringement litigation, are not moved by the law’s current inducements to register.” Sprigman, *supra* note 5, at 496 (referencing statistics presented in WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 210–53 (2003)).

millions of copyrighted works, swelling the ranks of orphan works.⁷⁶ Third, formalities keep many works out of the copyright system when an author is not motivated by copyright protection, thereby limiting restrictions on expression and growing the public domain.⁷⁷ Finally, formalities serve an evidentiary purpose by providing prima facie evidence of copyright ownership.⁷⁸

B. The Bad: Formalities

There is a reason that Melville Nimmer, the preeminent copyright scholar of the twentieth century, referred to the decision by some courts to construe formality requirements leniently, even under the 1909 Act, as “a more enlightened approach.”⁷⁹ As Nimmer testified to Congress when it considered overhauling copyright in the 1960s: “My own feeling is that there should not be [sic] forfeiture in any event . . . simply because of a failure to comply with a formality which can be a trap for the unwary”⁸⁰ The sentiment that the failure to satisfy the required formalities caused unjust forfeitures led to inconsistent judicial treatment. Some courts demanded strict adherence: A minor imperfection, like the copyright notice appearing on the wrong page or a misspelling of the author’s name, resulted in forfeiture.⁸¹

76. See *supra* note 6.

77. This process of growing the public domain is indirect. When copyrightable works are published without formalities in a system that requires formalities, they pass straight through to the public domain because of the author’s inaction.

78. 17 U.S.C. § 410 (2006); see also Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 739–42 (2003) (“For authors, there are two primary benefits to registration. First, an author who registers his work within five years of its first publication enjoys certain evidentiary presumptions as to the validity of his copyright and the accuracy of the information supplied on his application. This makes it easier for the author to win any later infringement action. Second, registration qualifies an author to pursue additional remedies with respect to infringements that take place after registration.”).

79. 2 NIMMER & NIMMER, *supra* note 15, at § 7.01.

80. David Nimmer, *Codifying Copyright Comprehensively*, 51 UCLA L. REV. 1233, 1252–53 n.131 (2004); see also H.R. REP. NO. 94-1476, at 143 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5759 (“One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.”). However, the notice requirement was not relaxed until the enactment of the BCIA, which made compliance with sections 401 and 402 voluntary and went into effect in March 1989. 17 U.S.C. §§ 401–402.

81. See Ginsburg, *supra* note 31, at 330 (citing *J.A. Richards, Inc. v. N.Y. Post*, 23 F. Supp. 619, 620 (S.D.N.Y. 1938); *Sanga Music, Inc. v. EMI Blackwood Music, Inc.*, 55 F.3d 756, 760 (2d Cir. 1995)) (“Although a notice accompanying the masthead of a periodical (typically on the editorial page of a newspaper) was commonly regarded as satisfactory, it was, for example, held that it was improper to place the copyright notice on the back cover of a twenty-eight-page pamphlet; such a defect was regarded as fatal, and the work was thrust into the public domain. Similarly, courts could be

Other courts were not so punctilious.⁸² The adjudication of the right to exploit Martin Luther King, Jr.'s "I Have a Dream" speech may be the high-water mark of courts straining to find that copyright protection had not been forfeited despite a complete disregard for formalities.⁸³ Courts sharing this perspective have preferred to reward authors for what they do, rather than to punish them for what they neglected to do. Like the U.S. Court of Appeals for the Eleventh Circuit in the "I Have a Dream" case, some courts have seemed concerned about unfair forfeitures even when it is clear that copyright incentives did not motivate the author.⁸⁴

strict about the placement of the notice on a journal or other collective work, holding that such notice would not protect included works that were authored by others and that did not carry a separate copyright notice. Inaccuracies in the year placed in the notice could also be fatal to the copyright.”).

82. See, e.g., *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

83. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999). On Aug. 28, 1963, King gave his famous "I Have a Dream" speech to 200,000 people gathered in front of the Lincoln Memorial in Washington and to millions of people who listened to the live radio and television broadcasts. The Southern Christian Leadership Conference (SCLC), which King founded, had pushed for broad media coverage of the speech, and the effort paid off. *Id.* at 1213. King wrote his speech and made copies available to the public in the SCLC's press tent at the March on Washington. The SCLC also published the speech in a widely circulated newsletter. *Id.* at 1213 n.1. Neither publication contained notice of copyright, and neither publication had been registered with the U.S. Copyright Office, as was required for copyright protection under the 1909 Act that governed works created at the time. However, about one month later, on Sept. 30, 1963, King successfully sought copyright protection. *Id.* at 1213. When King's estate sued CBS for using extensive CBS-filmed footage of the speech in a 1994 historical documentary about the twentieth century, the district court judge sided with CBS; the judge said King's speech was in the public domain and, therefore, CBS neither needed permission nor needed to pay to use it. *Id.* at 1213–14. But the court of appeals reversed in a strained manipulation of the facts and the circumstances under which the 1909 Act requires notice. Focusing on the distinction between a "general publication" and a "limited publication," the court found that the speech—despite being heard by millions, reprinted in thousands of newspapers and the SCLC newsletter, broadcast throughout homes, and disseminated to the public in transcript form—had not, as a matter of law, been a general publication. Accordingly, because only general publications were subject to the Act's notice requirement, King had not forfeited his "I Have a Dream" speech to the public domain. *Id.* at 1214–17. Of note, the 1976 Act abolished the general/limited distinction, opting instead for copyright to vest upon fixation, regardless of whether the author satisfied formalities.

84. See, e.g., *Goodis*, 425 F.2d at 401 (holding that, though the magazine serialization of a novel did not identify the author's name in the copyright notice, "copyright notice in the magazine's name is sufficient to obtain a valid copyright on behalf of the beneficial owner, the author or proprietor"); see also Vincent A. Doyle et al., *Notice of Copyright*, 1 STUDIES ON COPYRIGHT, supra note 63, at 237–38 (discussing "an increasingly liberal attitude toward the copyright notice," and citing more than a dozen cases that had not required strict compliance); Ginsburg, supra note 31, at 323 n.53 ("Courts' efforts to avoid forfeitures may also explain the somewhat tortured U.S. case law relating to sound recordings.").

C. And the Ugly Problems of Scale

Formalities in the digital age raise additional concerns that have been overlooked in recent scholarship. Publishing, copying, and distributing creative expression is much cheaper—in some instances, costs approach zero—and is done *much* more frequently than before. Those circumstances make copyright protection all the more important. To see why, consider the following hypothetical from James Gibson, who has argued for the return of formalities and who believes that automatic copyright protection suppresses others' use of that expression. In arguing that authors should have the chance to affirmatively decline being brought into the copyright system, Gibson puts forth an increasingly common scenario:

For example, suppose that a regular Joe takes a break from his two jobs and four children to write a movie review and send it to an electronic mailing list of film aficionados. The listserv technology that this community uses automatically makes hundreds of copies of his review—one copy appears in the e-mail inbox of every member of the list, others reside (at least for a time) on intermediate servers that facilitate the transmission of internet communications, another appears in an archive that the list moderator maintains, and so forth. Now, one might reasonably argue that Joe authorized these copies by sending his review in the first place, and that copyright law accordingly works fine here. But what is the legal consequence when a listserv member decides to print out his review, or forward it to a friend, or place it on his or her own website?

The right answer, in all likelihood, is “Who cares?” Not Joe, certainly.⁸⁵

Why must that be true? Gibson's claim is based on a common assumption: that Joe *certainly* does not care.⁸⁶ But Joe might care, especially if a member of that listserv

85. Gibson, *supra* note 5, at 216.

86. See, e.g., John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT L.J. 203, 204–05 (2008) (“Due to the same technological changes that are threatening the music business, amateur production of information and innovation is on the rise. . . . Because these creators produce content for the love it and are prepared to work for free—or even to lose money to feed their desire to create—their existence threatens the economic assumptions of commercial providers of content. As a result, the rise of amateurism calls into question some fundamental assumptions we have about the public policy of innovation, the way that innovation occurs within society, and the incentives necessary to produce valuable innovations in our society.”). Though it is accurate to state that many online authors are creating content without immediate compensation, or even at a personal cost, it does not follow that these ostensible amateurs are unmotivated by the prospect of reaping financial rewards. Take, for instance, Christian Lander. As an unknown in 2008, he started a blog called *Stuff White People Like*. STUFF WHITE PEOPLE LIKE, <http://www.stuffwhitepeoplelike.com> (last visited Mar. 21, 2012). It was at least a \$300,000 idea. The blog took off.

republishes Joe's reviews on his own popular, maybe even profitable, movie review website. Further, Gibson presumes that authors creating content online are just Regular Joes.

In fact, the internet is filled not only with frequent authors automatically being given copyrights they neither want nor need but also with frequent authors whose creative expression is motivated by exactly the financial incentives copyright aims to provide. Award-winning authors and influential journalists write prolifically on blogs;⁸⁷ professional photographers share photos on Flickr and upload entire galleries to online studios;⁸⁸ and comedians use Twitter to try out new material or to develop the foundation for a book or even a television show.⁸⁹ This plethora of content from established authors and artists is among the major contributions that have given the internet its rich texture. And, it is in large part made

It received favorable reviews in the *Los Angeles Times* and *The New Republic* within its first three months, and Lander quickly landed a healthy book-publishing deal with Random House. See Gregory Rodriguez, *White Like Us*, L.A. TIMES, Feb. 25, 2008, <http://www.latimes.com/news/opinion/la-oe-rodriguez25feb25,0,1952462.column>; Allen Salkin, *Why Blog? Reason No. 92: Book Deal*, N.Y. TIMES, Mar. 30, 2008, <http://www.nytimes.com/2008/03/30/fashion/30web.html> (reporting that Lander received a \$300,000 advance); Adam Sternbergh, *Why People Like Stuff White People Like*, NEW REPUBLIC (Mar. 17, 2008, 12:00 AM), <http://www.tnr.com/article/books-and-arts/why-white-people-stuff-white-people>. Copyright incentives motivated Lander, even though it was impossible for him to know when he started his blog that it would be successful commercially, and other so-called amateurs have replicated the *Stuff White People Like* model. Some, like Jon Acuff's STUFF CHRISTIANS LIKE, <http://www.jonacuff.com/stuffchristianslike> (last visited Mar. 21, 2012), have been economically successful, whereas others, like STUFF JOURNALISTS LIKE, <http://www.stuffjournalistslike.com> (last visited Mar. 21, 2012), have not.

87. For instance, Steven Levitt and Stephen Dubner, the authors of *Freakonomics*, took the concept underlying their book and started a blog, FREAKONOMICS: THE HIDDEN SIDE OF EVERYTHING, <http://www.freakonomics.com/blog> (last visited Mar. 21, 2012). After a few years of independent popularity, the *New York Times* paid for the right to host the blog on its website. See Press Release, The N.Y. Times Co., NYTimes.com to Be Exclusive Host of Freakonomics Blog (Apr. 8, 2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=105317&p=irol-pressArticle&ID=1038175>. In 2011, the *Freakonomics* blog returned to independence to serve as the online anchor for the *Freakonomics* mini-empire, which includes more books, a radio show, lectures, and a movie. See Jeff Bercovici, *Freakonomics Leaving NY Times to Start Own Venture*, FORBES.COM (Jan. 14, 2011, 11:17 AM), <http://blogs.forbes.com/jeffbercovici/2011/01/14/freakonomics-leaving-ny-times-to-start-own-venture>.
88. To be sure, Flickr users upload and share their photos under the "some rights reserved" licenses offered by Creative Commons. See also *infra* note 137. Part III, *infra*, further discusses Creative Commons.
89. Whitney Cummings, for example, sold two network sitcoms that she created last fall after building her fan following on Twitter, largely with jokes about being a single woman. See, e.g., @WhitneyCummings, TWITTER (June 9, 2011), <http://twitter.com/#!/WhitneyCummings/status/82641146962116608>; see also Hugh Hart, *Shit My Dad Says: Twitter Got Me a Sitcom Deal*, WIRED UNDERWIRE (Nov. 10, 2009, 4:33 PM), <http://www.wired.com/underwire/2009/11/shit-my-dad-says> (reporting that four months after starting the Twitter account @shitmydadsays, Justin Halpern had signed a book deal with Harper Collins and a TV sitcom deal with CBS).

possible by the fact that authors know they can share their works with the public without forfeiting them to the public domain.

The primary problem with formalities, despite the good that they do, is that they can be prohibitively expensive in the digital age, particularly for frequent authors. In other words, they do not scale.⁹⁰ Problems of scale are not uncommon in copyright. As a copyright owner's catalog of works grows or the universe of potential users of that catalog expands, it becomes increasingly difficult for the copyright owner to enjoy the full force of his or her copyright in any given work. This Comment proceeds by discussing three different stages in the life of a copyright at which problems of scale arise. Each is demonstrative of the problems of scale that arise in an opt-in copyright regime, in which authors and copyright owners are forced to jump through procedural hoops before being admitted to the system to enjoy the full extent of their copyright.

1. Too Many Works to Keep Up With Formalities

The technological tools that many claim have created a need for formalities are the same tools that make formalities impracticable for the majority of original works of authorship being fixed online today. Online authors may publish copyright-protected content several times each day, quickly making adherence to formalities impracticable and infeasible. Registration costs \$35 per work if done through the Copyright Office's website.⁹¹ For a blogger publishing, say, three times each day on weekdays, four weeks of work would cost about \$2100 to get into the copyright system⁹²—without accounting for what three years ago was an eighteen-month backlog at the Copyright Office.⁹³ In many cases, authors would not be

90. When legal scholars talk about "scale" in applying new legal rules in the abstract, they are referring to "a progression of degrees." BLACK'S LAW DICTIONARY 1461 (9th ed. 2009). When a legal rule does not scale, it means that the rule only works as intended when applied in a confined universe.

91. *eCO Online System*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/eco> (last visited Mar. 21, 2012).

92. This is a conservative estimate of publishing frequency. Blogger rates of publication vary greatly, from Malcolm Gladwell publishing only seven times in a twelve-month period to Dave Barry publishing sixteen times in a single day. See GLADWELL.COM BLOG, <http://gladwell.typepad.com/gladwellcom> (last visited Mar. 21, 2012); OFFICIAL DAVE BARRY BLOG, http://blogs.herald.com/dave_barrys_blog/2011/04/19 (last visited Mar. 21, 2012). Of course, these two authors also differ greatly in the type of content they publish: Gladwell's posts are, at times, somewhat lengthy pieces in the style of his articles for *The New Yorker*, whereas Barry's posts are typically no more than fifty words, a little humor, and a hyperlink.

93. See Lyndsey Layton, © 2009? *Wishful Thinking, Perhaps, as Backlog Mounts*, WASH. POST, May 19, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051803171_pf.html ("Of the 10,000 applications that pour into the Copyright Office each week, the

able to distinguish which of their works, at the time of creation, might be commercially successful and which might not. Consequently, they likely would find it impossible to pick the works for which it would be worth satisfying formality requirements and would choose not to do so for either type of work. This rationale parallels an underlying assumption in class action lawsuits that if the default rule was changed to require potential class members to proactively join, “many class members will not take the trouble to ‘opt in’ in consumer class actions for small amounts.”⁹⁴ Similar ambivalence toward opting in can be seen in organ donation, which is chronically undersupplied despite 80 percent of Americans supporting the concept.⁹⁵ “What explains this paradox? It is easier to do nothing than it is to act.”⁹⁶

It is, of course, possible to create a cheap and easy system for marking and registering a work. For instance, blogs could embed a code at the top of each post that would be akin to the © symbol on the inside of a book cover, and the Copyright Office, or a third party, could provide for “click here” registration. While such a requirement might scale up to the current level of what is being created online, technology and media for creative expression are changing rapidly, and it is not clear that even cheap-and-easy online notice and registration could scale to the next level. More importantly, the premise for reintegrating formalities is that it would weed out of the copyright system expressive works that were not motivated by copyright incentives. For formalities to have their desired effect, they need to require some effort from the author. But if they are even slightly burdensome to meet, they will likely prevent some authors from entering the copyright system and, in turn, discourage the creation of expressive works that the Constitution gave Congress the power to promote.

staff can process about 7,000, adding 3,000 untouched applications to a growing pile that currently totals about 523,000. Workers are now handling paper applications received in late 2007.”). At the time, copyright officials expected the backlog to get worse, and that was under the current regime in which only a small proportion of original works, like books and films, bother to register. *Id.*

94. Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 227–28 (2004). Based on this assumption, business groups have long supported changing the default away from opt-out. If potential class members had to opt in, leading fewer members to join the class, damages would be much smaller. *Id.*

95. See Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 114 (2004) (noting that, though 80 percent of Americans support organ donation, only about 25 percent “go through the trouble to opt in”).

96. *Id.* at 113. Calandrillo recommends changing organ donation from an opt-in regime to an opt-out system based on presumed consent. *Id.* at 124–25. He was not the first to recommend such a shift from opt-in to opt-out in organ donations. See, e.g., Kelly Ann Keller, Comment, *The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended “Opt-Out” Solution to Organ Scarcity*, 32 STETSON L. REV. 855 (2003).

Photographers, for instance, often shoot hundreds of photographs in a single session. Registering each photograph would be difficult and expensive, and at the time a photographer would need to decide which images to obtain copyrights in, the photographer likely would not know which images might prove commercially successful. Because it would be cost-prohibitive to invest in registering all of those photographs and because he would not know which would be commercially successful at the time a decision would need to be made, he likely would elect to obtain copyright only in a few photographs or none at all, leaving the majority of his work out of the copyright system. If one of those uncopyrighted photographs turned out to be successful, the photographer would see little benefit.

Without the exclusive right to exploit the works that could be commercially successful, it is likely that some authors—and not simply photographers—would find fewer incentives to create at all. Though the internet has provided opportunities for many who are not motivated by copyright and economic incentives, it also has provided a medium for more people to make a living off of their creative expressions.⁹⁷ Thus, one likely consequence of formalities in the digital age is that they would discourage some authors from creating at all. Another consequence is that other would-be authors might find it more advantageous to poach new contributions from the growing public domain than to create something original or even derivative. From an economic perspective, the would-be author would have greater incentive to surf the web looking for potentially successful, unprotected works to copy than he would have to invest time and effort in creating his own original content.⁹⁸

97. For some, that living is supplemental income; for others, it is full time, and even can be lucrative. See Mark Penn, *America's Newest Profession: Bloggers for Hire*, WALL ST. J. ONLINE (Apr. 21, 2009), <http://online.wsj.com/article/SB124026415808636575.html> ("In America today, there are almost as many people making their living as bloggers as there are lawyers. Already more Americans are making their primary income from posting their opinions than Americans working as computer programmers or firefighters."). Penn reported in 2009 that 452,000 Americans blogged as their primary source of income. *Id.* Blogging can also serve as a platform for those with greater ambitions of authorship. See *supra* notes 86–87, 92.

98. Such activities, however, could be subject to state law claims such as misappropriation. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (crafting the tort doctrine of unfair competition into a new common law doctrine of misappropriation, applicable when, in dealing with otherwise uncopyrightable works, an individual reaps where they have not sown); RALPH S. BROWN & ROBERT C. DENICOLA, *CASES ON COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP* 653–55 (10th ed. 2009) (discussing the challenges the misappropriation doctrine has faced since *International News Service* and the inconsistency with which it has been applied).

2. Notice and Takedown Trouble

Signs of copyright's problems of scale could be spotted a decade ago with the implementation of the Digital Millennium Copyright Act (DMCA) of 1998, which signaled copyright's shift from an ex ante notice regime to an ex post notice regime for some Digital Era uses of protected content.⁹⁹ Section 512 of the DMCA includes a "safe harbor" provision that insulates from liability online service providers that transmit, route, or temporarily store infringing content uploaded or actively transmitted by the users.¹⁰⁰ Congress's intent in passing the DMCA was to prevent copyright from slowing technological developments, which would be a potential consequence of holding tech creators and manufacturers liable for the infringing actions of third parties.¹⁰¹ Under the DMCA, copyright holders cannot sue online service providers to enforce their copyright before notifying the service provider of the allegedly infringing content and requesting that it be taken down.¹⁰² Thus, in a manner similar to registering a work with

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99. See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 626 (2008) ("[U]nder an ex post notice regime, the owner must provide notice to the trespasser *after* the trespass for the trespass to become illegal. In other words, the trespasser is in the clear, unless and until she receives appropriate notice from the owner of the property.").
100. 17 U.S.C. § 512 (2006). Section 512(k) defines an online service provider as "an entity offering the transmission, routing, or providing the connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." *Id.* § 512(k). In other words, those agencies providing internet access, email, chat rooms, web page hosting, and so forth could be considered online service providers.
101. Peer-to-peer technology (P2P), for example, has been widely used for infringement on a massive scale—it is both common for P2P to facilitate infringement and for users to infringe hundreds or thousands of copyrighted works. Think Napster, the file-sharing site used largely to illegally download protected music. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 100–01 (2002/03) ("Tens of millions of Internet users actively downloaded music over Napster's peer-to-peer network during its relatively short lifespan, resulting in the unauthorized distribution of potentially billions of copies of sound recordings."); see also Matthew Green, Note, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799 (2002). Nonetheless, P2P file sharing can also be used to distribute noninfringing content, such as academic and scientific research, public domain content, and copyrighted works that copyright owners consent to sharing. Thus, courts have added additional hurdles to holding technology manufacturers liable. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
102. Once notified, online service providers must act "expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement . . ." 17 U.S.C. § 512(b)(2)(E).

the Copyright Office before statutory damages will accrue, the copyright owner must opt in before enjoying the full extent of copyright protection.

Section 512 has been central to many high-profile, DMCA-related cases. It continues to be at the heart of the ongoing *Viacom International, Inc. v. YouTube, Inc.* litigation.¹⁰³ Viacom claimed that YouTube had “actual knowledge” that users unlawfully had taken tens of thousands of copyrighted videos from Viacom’s collection and uploaded them to YouTube; despite this, Viacom further alleged, YouTube “failed to do anything about it” until the old media conglomerate made infringement-specific demands of the new media giant.¹⁰⁴ YouTube responded to Viacom’s takedown notices, but, as Douglas Lichtman has said, that default forces copyright holders to play Whac-A-Mole—searching for and knocking down infringing content like springing moles in the popular arcade game—while permitting YouTube to get rich selling ads on the same infringing content.¹⁰⁵

Notice and takedown is tedious, time consuming, and costly for content owners. However, while the process is streamlined with a major player like YouTube and a limited universe within which to search for infringing material,¹⁰⁶ YouTube is not the only player in the online digital video market. And the more players that enter this market, the more impracticable it becomes for copyright owners to monitor infringement, and the less likely it becomes that they can comply with notice and takedown requirements.¹⁰⁷

103. *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010). Viacom sued YouTube for direct and vicarious infringement. The critical question in the case was whether YouTube had actual or apparent knowledge of the infringing activity. *Id.* at 519. In other words, was YouTube constructively aware of the infringing activity, based on the fact that it was common knowledge that YouTube contained *lots* of infringing content? The court held that the facts and circumstances did not rise to the level of apparent knowledge, and thus YouTube was not liable under section 512. *Id.* at 529. However, the appellate court vacated the order granting summary judgment because “a reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website” and because “that the District Court erred by interpreting the ‘right and ability to control’ provision to require ‘item-specific’ knowledge.” *Viacom Int'l, Inc. v. YouTube, Inc.*, Nos. 10-3270-cv, 10-3342-cv, 2012 WL 1130851, at *1 (2d Cir. Apr. 5, 2012). The appellate court further remanded for consideration of whether YouTube exhibited “willful blindness”—“a ‘deliberate effort to avoid guilty knowledge’”—demonstrating actual or apparent knowledge and thereby voiding YouTube’s safe harbor protection. *Id.* at *10–11 (citation omitted).

104. *Viacom*, 718 F. Supp. 2d at 518–19.

105. Douglas Lichtman, Professor of Law, UCLA School of Law, Lecture to Copyright Class at UCLA School of Law (Oct. 28, 2010). Similarly, in *A&M Records, Inc. v. Napster, Inc.*, Napster was not contributorily liable for its users’ infringement until the record labels notified Napster about specific songs that its users illegally distributed and downloaded. 239 F.3d at 1027.

106. Digital Rights Management can also be of some help, often with the online service provider’s assistance.

107. To be sure, even with copyright protection, many copyright holders do not enjoy the full force of their rights because enforcement is too costly, particularly when popular works are infringed by small actors on the internet. However, even if it is unclear that the author will see enough economic

3. The Googlization of Authors' Rights?

A similar problem of scale could be seen in Google Book Search. In 2004, Google announced plans to digitize an unprecedented collection of books and other writings through an agreement with major public libraries.¹⁰⁸ Since then, Google has scanned twelve million books.¹⁰⁹ The grand vision was to create a massive, searchable database of the world's books.¹¹⁰ And the benefits would be many, as Judge Chin noted in his recent opinion:

Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart buried in library stacks—will be preserved and given new life.¹¹¹

Google's scanning, though, was not limited to books in the public domain. The company made entire digital copies of millions of books still under copyright.¹¹² However, it did so with three important caveats: Google only made snippets, not entire books, available to users; it agreed to exclude certain books like thesauruses and short poems, though did not make public the list of excluded works;¹¹³ and it provided a mechanism by which copyright owners could opt out of the book scanning.¹¹⁴

incentives to enforce his or her copyright, it should not change the threshold calculus for whether an author obtains copyright.

108. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011).

109. *Id.*

110. *Id.*; see also Jeffrey Toobin, *Google's Moon Shot*, NEW YORKER, Feb. 5, 2007, at 30 (outlining the Book Search project and the likely legal challenges Google could anticipate).

111. *Authors Guild*, 770 F. Supp. 2d at 670.

112. *Id.*

113. Douglas Lichtman, *Copyright as Innovation Policy: Google Book Search From a Law and Economics Perspective*, 9 INNOVATION POLY & ECON. 55, 58 (2008) (arguing that copyright law should not give Google a free pass simply because it "promises this amazing resource through which all of us would be able to search the world's books in much the same way that Google today allows us to search the Web").

114. As mentioned above, in the context of Google Book Search, opting out is conceptually similar to opting in to copyright protection as discussed throughout this Comment.

While Google's efforts received much positive praise in the media,¹¹⁵ in part because digitizing orphan works would provide the public access to out-of-print and uncommercializable books,¹¹⁶ there was heavy pushback over the infringing nature of Google's book scanning and the power it would give Google over the market for orphan works.¹¹⁷ Representing thousands of authors, The Authors Guild joined many publishers to bring a class action lawsuit against Google in 2005. Google defended its project on the basis of fair use, and the parties settled in November 2008.¹¹⁸ The amended settlement agreement "blessed Google's scanning efforts and also potentially allowed for ads to be shown on the book pages online," with Google agreeing to pay \$125 million to establish a registry that would divvy out payments to authors and publishers when their work was viewed online.¹¹⁹ The amended settlement agreement also included a provision that enabled authors and publishers to proactively opt out of Google's scanning.

As mentioned above in the discussion of *Viacom*, putting the burden on copyright owners to notify a user when they disapprove of an infringing use might work well with a sole infringer. Likewise, if Google were the only user digitizing books, then authors could easily learn about the project and quickly communicate their desires to be excluded. But Google is not the only company interested in

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115. See Cory Doctorow, *Why Publishing Should Send Fruit-Baskets to Google*, BOINGBOING (Feb. 14, 2006, 5:03 AM), http://www.boingboing.net/2006/02/14/why_publishing_shoul.html ("In all cases, Google provides information for buying any book that matches a search-query, provided that the book is in-print. Sadly, most books aren't in print, and for an author, there is no greater professional loss than that arising from not having your works available for sale at all—this loss far outstrips any conceivable loss from kids with photocopiers, Russian hackers who post ebooks on their websites, or fumble-fingered marketing or PR. So what's not to like?"); *Let Google Copy!*, WIRED, Sept. 22, 2005, <http://www.wired.com/politics/law/news/2005/09/68939> ("There are fundamental differences between copying analog works into a digital format for the purposes of piracy, and copying the same works to create a service that conforms to copyright laws in making that data available to the public. What happens on the backend should be of little or no interest to copyright holders, so long as rights are respected on the front end, where control over a work really counts.").
 116. See Miguel Helft, *Google's Plan for Out-of-Print Books Is Challenged*, N.Y. TIMES, Apr. 3, 2009, <http://www.nytimes.com/2009/04/04/technology/internet/04books.html>; cf. *Found One! We Re-unite an Author With an "Orphaned Work"*, AUTHORS GUILD (Sept. 14, 2011), <http://www.authorsguild.org/advocacy/articles/found-one--we-re-unite-an.html>.
 117. See Helft, *supra* note 116; Elinor Mills, *Google's Battle Over Library Books*, CNET NEWS (Oct. 24, 2005, 4:00 AM), http://news.cnet.com/Googles-battle-over-library-books/2100-1025_3-5907506.html.
 118. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 671 (S.D.N.Y. 2011).
 119. Amir Efrati & Jeffrey A. Trachtenberg, *Judge Rejects Google Books Settlement*, WALL. ST. J., Mar. 23, 2011, at B1. For a more thorough discussion of the terms of the settlement, see *Authors Guild*, 770 F. Supp. 2d at 671-72. See also Fred von Lohmann, *Google Book Search Settlement: A Reader's Guide*, ELECTRONIC FRONTIER FOUND. (Oct. 31, 2008), <https://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide>.

building a searchable online database of books.¹²⁰ And the calculus inverts when there are potentially countless similar programs that require copyright owners to opt in proactively before an infringing use will create liability and owners can enforce their copyrights. In analyzing Google's fair use argument, Lichtman writes:

In a world with a large and ever-changing list of opt-out projects, authors would be forced to invest substantial sums finding each project and notifying each about their desire to participate. The problem would be even worse if some of those opt-out programs were designed strategically to make things difficult on authors, for instance, imposing high standards of proof before acknowledging that an opt-out really came from the correct copyright holder. (Infringers have an incentive to do just that because in an opt-out system, infringers benefit if authors find it too expensive to actually engage in the mechanism of opting out.)

Overall, then, the problem with an opt-out program is that it does not scale.¹²¹

Judge Chin, it seems, would agree.

Sixteen months after he preliminarily approved the amended settlement agreement,¹²² Judge Chin rejected the settlement. The reasons were myriad and included the opt-out provision. While recognizing the public benefit that would be derived from creating a central registry for orphan works, Judge Chin said that Google had overreached what the law permits.¹²³ He noted that U.S. copyright law ensures that "a copyright owner may sit back, do nothing and enjoy his property rights untrammelled by others exploiting his works without permission."¹²⁴ Under the settlement, however, copyright owners who did nothing would forfeit their rights. Chin recommended that the parties revise the settlement so that Google would need to receive permission from authors and publishers before scanning their books, just as copyright law requires.¹²⁵ In other words, rather than force

120. See, e.g., Katie Hafner, *In Challenge to Google, Yahoo Will Scan Books*, N.Y. TIMES, Oct. 3, 2005, <http://www.nytimes.com/2005/10/03/business/03yahoo.html> (reporting that Yahoo, nonprofits, and some universities had formed the Open Content Alliance, which would build an online book library using only books in the public domain or for which the copyright owner gave consent).

121. Lichtman, *supra* note 113, at 72.

122. Order Granting Preliminary Approval of Amended Settlement Agreement, *Authors Guild*, 770 F. Supp. 2d 666, 2009 WL 5576331.

123. For one thing, Judge Chin said that solving the orphan works problem was a task best left to Congress. *Authors Guild*, 770 F. Supp. 2d at 677.

124. *Id.* at 681 (quoting a statement that counsel for Amazon, David Nimmer, made at a fairness hearing) (internal quotation marks omitted).

125. *Id.* at 686. This is true even though opt-in might not work for Google's business model. See *Online Seminar: Unraveling the Rejection: The Google Book Settlement*, COPYRIGHT CLEARANCE CTR.

authors who do not want to be included in the project to opt out, authors who wanted to be included could opt in to Google Book Search—effectively opting out of their rights to keep Google from copying their protected works.

III. WHY IT IS BETTER TO LET AUTHORS OPT OUT OF AUTOMATIC COPYRIGHT—AND WHAT CONGRESS CAN DO ABOUT TERMINATION

There has been another movement afoot in copyright. This effort is not looking to reformatize the law; instead, it is working to educate authors about how to tailor the law ad hoc so that they only retain the copyrights they actually want to exploit. Full enjoyment of copyright's bundle of rights, after all, is the default for authors, but the law allows authors to assign those rights to others. Technically, an assignment is a transfer of exclusive rights, and the public domain can be a recipient. As Robert Merges has noted, many authors in the past decade, including copyright reformer Lawrence Lessig, have used this mechanism to publicly disclaim their property rights and donate works to the public domain.¹²⁶ An opt-out copyright regime, as discussed immediately below, is preferable to an opt-in regime in the digital age because it allows for the building of the commons without being a trap for the unwary.

A. “Copyleft” and Free Use

It is not surprising that, in the digital age, a movement of authors refusing to accept their full bundle of copyrights, thereby donating some or all of a work to the public domain, would begin as the free software movement. Copyleft, as the movement is known, got its start in 1984 when Richard Stallman quit his job in the Artificial Intelligence Lab at the Massachusetts Institute of Technology and started writing GNU code.¹²⁷ The moniker “copyleft” refers to inverting copyright law and using the law to ensure that a software program remains “free” and that

(Mar. 30, 2011), <http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/Google-10-Unraveling-Rejection-transcript.pdf> (featuring Lois Wasoff).

126. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 196–97 (2004); see also *id.* at 197 (“Their motives no doubt vary. Some, like Lessig, are forming a counterthrust to overprotection. Others are simply trying to reduce the hassles that come with claiming property rights. And many of course are trying to ‘seed’ the market for their works by giving away ‘free samples’ to generate interest. For the public, motive is irrelevant. These are additions to the public domain, freely given and freely available, and therefore a good thing.”).

127. See Richard Stallman, *The GNU Project*, GNU OPERATING SYS., <http://www.gnu.org/gnu/the-gnuproject.html> (last visited Mar. 21, 2012). GNU stands for GNU's Not Unix! *Id.*

all future modified and extended versions are also free.¹²⁸ Stallman described its ethos: “Free software’ is a matter of liberty, not price. To understand the concept, you should think of ‘free’ as in ‘free speech,’ not as in ‘free beer.’”¹²⁹

GNU’s General Public License (GNU GPL) creates four basic freedoms in using licensed programs: freedom to run the program for any purpose; freedom to modify it; freedom to distribute copies, for free or for a fee; and freedom to distribute modified versions “so that the community can benefit from your improvements.”¹³⁰ But, unlike when a work is injected into the public domain, slapping a GNU GPL license on a work burdens its downstream users with keeping the copyrighted code open.¹³¹ This is the genius of the GPL, as James Gibson explains:

Suppose a programmer adds his or her own code to the GNU/Linux operating system and then releases the resulting product in object code format only. By distributing the modified program without making its source code available, the programmer has infringed the GNU/Linux copyright, because the license that accompanies the GNU/Linux software (the GNU GPL) grants permission to make and distribute modified versions only if those versions are distributed under the same terms as the original program, and those terms require accessible source code in downstream modifications. And if the programmer tries to escape infringement liability by arguing that the GNU GPL does not apply, then he or she has just abandoned the only argument that would have made the modification legal in the first place; without the GPL’s protection, the modification is unlicensed and infringing.¹³²

In other words, open-source licensing schemes promote the availability of source code by enlisting copyright’s protection over expression—they “draw their power from the same copyright rights that the movement seeks to dilute.”¹³³

128. See Richard Stallman, *The GNU Operating System and the Free Software Movement*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 53, 59 (Chris DiBona, Sam Ockman & Mark Stone eds., 1999) (“Copyleft uses copyright law, but flips it over to serve the opposite of its usual purpose: instead of a means of privatizing software, it becomes a means of keeping software free.”).

129. *The Free Software Definition*, GNU OPERATING SYS., <http://www.gnu.org/philosophy/free-sw.html> (last visited Mar. 21, 2012); see Lawrence Lessig, *Free, as in Beer*, WIRED, Sept. 2006, <http://www.wired.com/wired/archive/14.09/posts.html?pg=6> (attributing the quote to Stallman).

130. Stallman, *supra* note 128.

131. *What Is Copyleft?*, GNU OPERATING SYS., <http://www.gnu.org/copyleft> (last visited Feb. 21, 2012).

132. Gibson, *supra* note 5, at 201–02 (footnotes omitted).

133. *Id.* at 202.

The GNU GPL model has been incredibly successful at achieving its goals. Most notably, it led to the development of the Linux operating system, which many consider superior to Microsoft Windows, in large part because of its open-source nature.¹³⁴ The GNU GPL also enabled Wikipedia to grow via millions of users creating encyclopedia entries and licensing them to Wikipedia.¹³⁵ Now the go-to site for a quick description of just about any subject, Wikipedia has been revolutionary; like “Google,” “Wikipedia” has become a verb.¹³⁶ The site has created for encyclopedic information the massive, searchable database that Google hopes to build for books. Wikipedia, however, has done so with the full consent of authors.

B. Benefits to Authors and the Public Domain

Beyond Linux, Wikipedia, and other works distributed under the general public license, GNU also inspired Lessig to start the Creative Commons, which does for other creative works—videos, pictures, music, charts, books, poems, and the like—what the GNU GPL and Stallman did for software code.¹³⁷ A similar

134. See, e.g., *Linux vs. Windows*, COMPUTER HOPE, <http://www.computerhope.com/issues/ch000575.htm> (last visited Apr. 4, 2012); *Our Linux Top 10 Reasons*, REICHEL.NET, <http://www.reichel.net/opensource/linuxtop10.html> (last visited Apr. 4, 2012); David A. Wheeler, *Why Open Source Software/Free Software (OSS/FS, FLOSS, or FOSS)? Look at the Numbers!* (Apr. 16, 2007), DAVID A. WHEELER'S PERSONAL HOME PAGE, http://www.dwheeler.com/oss_fs_why.html.

135. David M. Berry & Marcus McCallion, *Copyleft and Copyright*, EYE, Spring 2005, available at <http://www.eyemagazine.com/opinion.php?id=117&oid=290>. Of course, copyleft has its consequences and critics:

Our experience with developing open-source software without copyleft offers no support for the pervasive fear of exploitation. To the contrary, we have gained more in terms of contributions and collaborations by replacing copyleft with voluntariness.

Based on our experience, we advise open-source developers to use the least amount of copyleft necessary.

Bjorn Reese & Daniel Stenberg, *Working Without Copyleft*, O'REILLY POLY DEVCENTER (Dec. 19, 2001), <http://www.oreillynet.com/pub/a/policy/2001/12/12/transition.html> (explaining why they left the copyleft movement and chose to release software without a GPL license).

136. *Wikipedia Next Google Verb*, BRANDHACKERS (May 23, 2005), <http://www.brandhackers.com/2005/05/wikipedia-next-google-verb.html>.

137. Much has been written about the Creative Commons. See BOYLE, *supra* note 3, at 179–204; Elkin-Koren, *Limits of Private Ordering*, *supra* note 74, at 378–79 (“Creative Commons’ ideology could be summarized as follows: (1) Creativity relies on access and use of preexisting works; (2) copyright law creates new barriers on access to works, becoming an obstacle for sharing and reusing creative works; (3) the high costs associated with the copyright regime limit the ability of individuals to access and reuse creative works; and (4) copyrights should be exercised in a way that promotes sharing and reusing.”); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 283–98 (2007) [hereinafter Loren, *Limited Abandonment*]; Sprigman, *supra* note 5, at 517–519. Creative

movement also is afoot in the patent field.¹³⁸ Why? Because opting out of the full bundle and only retaining limited intellectual property rights benefits both the public and the creators who give up those rights.

First, opting out has the immediate effect of growing the public domain by whatever portion of the copyright that was donated. Second, it encourages authors to think proactively about copyright, thereby helping to increase the likelihood that copyright's incentives motivated the author to retain the rights not donated.¹³⁹ Third, under an opt-out regime there is less ambiguity for users regarding the liability associated with using an expressive work. Either works will be clearly marked as reserving only some rights (or no rights) or they will be entitled to the full protection of copyright law. Unlike in an opt-in system, in which works are presumed to be unprotected unless they carry a marking of notice (and even then they may not have satisfied other formalities), there is much less guesswork for users in an opt-out system. The copyright status of works in an opt-in system is further clouded by the potential for notice or registration deficiencies to be perfected within a certain period of time.¹⁴⁰ During that period, it is possible for users to build upon a work that may later achieve protection, thereby cutting off the users' future abilities to profit from their uses of the original works.¹⁴¹ Opt-out regimes clear the air, leaving would-be users with two clear options: (1) find and use a work that has been donated to the public domain or has moved into it following expiration of the copyright, or (2) pay the owner for use of the copyrighted work.

Commons offers six different licenses that reserve some rights to the author, ranging from only attribution to everything but noncommercial reproduction and distribution. See *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited Mar. 21, 2012). Creative Commons also offers a license that marks a work as having "no rights reserved." See *About CCO—"No Rights Reserved,"* CREATIVE COMMONS, <http://creativecommons.org/about/cc0> (last visited Mar. 21, 2012).

138. See Gideon Parchomovsky & Michael Mattioli, *Partial Patents*, 111 COLUM. L. REV. 207 (2011); Andrew Boynton, Note, *Eco-Patent Commons: A Donation Approach Encouraging Innovation Within the Patent System*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 659, 679–82 (2011).
139. The downside is that many creators unmotivated by copyright will not bother to opt out, even if they ideologically support other creators building the public domain by limiting the copyrights they take. Cf. text accompanying notes 91–96, *supra*.
140. The duration of the period would depend on the specifics of a provision reinstating formalities in copyright law.
141. Joseph McNamara makes a similar point in advocating that Congress revise the Design Piracy Prohibition Act, which stalled in the 110th Congress, to shift protection for fashion designers from an opt-in system with formalities to one that provides automatic protection. Joseph E. McNamara, *Modifying the Design Piracy Prohibition Act to Offer "Opt-Out" Protection for Fashion Designs*, 56 J. COPYRIGHT SOC'Y U.S.A. 505, 531–32 (2009).

Opt-out regimes also have added value for authors. First, copyright protection remains automatic, which mitigates the disincentives that can arise with formalities.¹⁴² A second benefit is that opt-out regimes do not lead to unjust forfeitures. Authors can decide what rights they want to give up and what they want to keep. If they sit back and do nothing, they keep the full bundle of copyright rights. And, third, other authors' donative efforts provide partially public domain works upon which authors can build.¹⁴³ While still benefiting the public and growing the public domain, these benefits for the author avoid the disincentivizing consequences of an opt-in copyright regime that raises barriers to obtaining copyright protection.

C. Dealing With Termination

The Copyright Act's termination provision is the biggest threat to the success of an opt-out regime made leaner by individual authors privately restraining the copyrights that they receive. Sections 203 and 304 expressly state that except in the case of a work made for hire, any exclusive or nonexclusive transfer of copyright is subject to termination during a specified period of time.¹⁴⁴ The Act's legislative history shows that Congress was concerned about authors being forced into unremunerative transfers.¹⁴⁵ One need not search hard to see why.

142. For more discussion of this point, see *supra* Part II.

143. The GNU GPL, for example, "is designed to make an inducement from our existing software: 'If you will make your software free, you can use this code.' Of course, it won't win 'em all, but it wins some of the time." RICHARD M. STALLMAN, *Copyleft: Pragmatic Idealism*, in *FREE SOFTWARE, FREE SOCIETY: THE SELECTED ESSAYS OF RICHARD M. STALLMAN* 129, 130 (2d ed. 2010), available at <http://www.gnu.org/philosophy/pragmatic.html>.

144. 17 U.S.C. §§ 203, 304 (2006). For most transfers of copyright executed on or after January 1, 1978, termination "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." *Id.* § 203(a)(3). For a work that was in its first or renewal copyright term on January 1, 1978 and the copyright was transferred before January 1, 1978, then termination "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).

145. See H.R. REP. NO. 94-1476, at 124 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740 ("A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."); see also *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172-73 (1985) ("The extension of the duration of existing copyrights to 75 years, the provision of a longer term (the author's life plus 50 years) for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had

Most authors without a history of successful production lack leverage and may be forced into bad deals.¹⁴⁶

Take, for instance, a first-time novelist who accepts a relative pittance to have her novel published. She agrees to transfer all rights to the publishing house. She gets an advance of \$25,000, and about \$1 for each hardback and \$0.50 for each paperback sold after the advance is met. The novel toils as a hardback but then breaks through as a paperback after some favorable, albeit late, media attention. The novel becomes a *New York Times* Best Seller and a movie studio pays the publisher to turn it into a feature film. On the one hand, the author can rejoice in her reputational success; on the other hand, the publisher, rather than the author, makes money on the film. And what if, as often is the case, the author never sells another popular novel and after a few years cannot even convince publishers to read her book proposals?

Congress had this kind of situation in mind when it included the termination provision in the Copyright Act. Because Congress feared that authors might otherwise be forced to waive their termination rights, Congress specified in the Copyright Act that the “[t]ermination 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.”¹⁴⁷ That means “initial ownership cannot voluntarily be permanently and unconditionally divested.”¹⁴⁸

Generally speaking, termination may be executed during a five-year window beginning thirty-five years after the transfer of copyright.¹⁴⁹ Thus, because the free software movement started twenty-eight years ago, not enough time has passed for courts to have heard a case involving an author trying to reclaim rights from which he opted out. Further, software code has a relatively short shelf life and there is not yet a major motion picture based upon a comic character published with a Creative Commons license of “Some Rights Reserved.” But that day could very well come; if it did, it would threaten the sanctity of the semi-commons that the GNU GPL and the Creative Commons created.

been made before the author had a fair opportunity to appreciate the true value of his work product.”).

146. The provision also may have had something to do with valuation problems inherent in creative works at the time a deal is struck. See Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1345–46 (2010).

147. 17 U.S.C. § 203(a)(5).

148. Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 360 (2010).

149. See *supra* note 144.

That threat would devalue the semicommons.¹⁵⁰ To guard against this threat, Lydia Pallas Loren recommends that courts find a way around the termination provision.¹⁵¹ After addressing the possibility that termination of a Creative Commons license could not be executed because it would be impossible for an author to comply with termination procedural requirements,¹⁵² she argues, in the alternative, for a judicially crafted doctrine based on the theory of limited abandonment. A widely recognized judicial doctrine of copyright abandonment already exists. The rule, as articulated by Judge Learned Hand, is that in donating a copyrighted work to the public domain, the copyright owner “must ‘abandon’ it by some overt act which manifests his purpose to surrender his rights in the ‘work,’ and to allow the public to copy it.”¹⁵³ It remains unclear whether courts will accept the possibility of a copyright owner abandoning only a portion of the rights granted as opposed to all of the copyrights tied to the work in question.¹⁵⁴

Loren, however, argues that courts should recognize limited abandonment when: (1) an overt act demonstrates the copyright owner’s intent to abandon some part of the bundle of rights; (2) the copyright owner clearly articulates which rights were abandoned; and (3) the rights abandoned were offered to the public.¹⁵⁵ Loren then demonstrates how this test is satisfied when someone utilizes a Creative Commons license.¹⁵⁶

If the courts apply the doctrine of limited abandonment, when the documents say that the grant is “perpetual (for the duration of the applicable copyright),” that is precisely what those words will mean. The Creative Commons asserts that it is trying to provide the option for copyright owners to signal “some rights reserved” . . . thereby enabling others to access a growing pool of raw materials without legal friction.” If only

150. See Loren, *Limited Abandonment*, *supra* note 137, at 276–77.

151. *Id.* (“If a copyright owner has placed a work into the Creative Commons semicommons space, it should not be possible for the copyright owner to remove it, effectively snatching it back into the proprietary space. Such a retraction could have significant consequences for one who relies on the semicommons status of a work.”).

152. See *id.* at 319 (“Unlike typical contracts between two parties that are signed and dated, Creative Commons licenses do not contain an execution date (nor do they contain a signature). A copyright owner or a court will therefore be unable to determine when the termination window begins. Second, to effect a termination under section 203 of the Copyright Act, advance notice of termination must be given by sending a signed written notice to ‘the grantee or the grantee’s successor in title.’ A Creative Commons Licensor will often find it impossible to comply with this notice requirement. To whom will the notices need to be sent?” (footnotes omitted)).

153. *Nat’l Comics Publ’ns, Inc. v. Fawcett Publ’ns, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951).

154. See Loren, *Limited Abandonment*, *supra* note 137, at 320.

155. *Id.* at 323–24.

156. *Id.* at 325–27.

some rights are reserved, the remaining rights are best viewed as having been abandoned.¹⁵⁷

In other words, when an author proactively reserves only some rights, he has committed Judge Hand's overt act to surrender his other rights in the work, thereby allowing the public to copy it—albeit in partial fashion. It is possible that some courts will find this argument convincing if confronted with the problem. But, as Timothy Armstrong notes, it is far from clear that they will be persuaded.¹⁵⁸

The more surefire solution to the termination problem for works donated to the public domain would be for Congress to amend the Copyright Act's termination provision in a manner “expressly authorizing authors to make a nonwaivable, irrevocable dedication of their works, in whole or in part, to the use and benefit of the public—a possibility that the Patent Act expressly recognizes, but the Copyright Act presently does not.”¹⁵⁹ This would be in line with Congress's concern about preventing unremunerative transfers. Though it is often difficult for statutory reform to get on the congressional agenda, Congress has moved numerous times to amend copyright laws. Further, a narrowly targeted statutory revision may be workable.¹⁶⁰ Congress should act here in the interest of strengthening the opt-out system and protecting the public from losses associated with having a work removed from the public domain after coming to rely on its availability.¹⁶¹

157. *Id.* at 326–27 (citations omitted).

158. *See* Armstrong, *supra* note 148, at 362. His primary concern is whether “existing doctrine is sufficiently flexible to accommodate such a development.” *Id.* at 412.

159. *Id.* at 359–60.

160. *Id.* at 416–18.

161. To be sure, estoppel and laches also likely would be successful defenses to copyright infringement claims in such situations, even for claims of prospective infringement. *See* 4 NIMMER & NIMMER, *supra* note 15, at § 13.07; *see also* Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960) (articulating the elements of an estoppel defense in a copyright action); Haas v. Leo Feist, Inc., 234 F. 105, 108–09 (S.D.N.Y. 1916) (holding that, though the defendant had infringed the copyright in a song the plaintiff recorded, the plaintiff had slept on his rights and could not bring suit). In an oft-quoted portion of the *Haas* opinion, Judge Learned Hand explained the rationale behind applying the laches doctrine to copyright infringement actions:

It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.

Id. at 108. However, the success of such equitable defenses, and the prospective uses courts award those persons stating the defenses, would vary by case.

IV. THE COPYRIGHT CLAUSE FAVORS AN OPT-OUT REGIME

Copyright provides authors with a temporary monopoly over the exploitation of their creative works. The interest to be served is not the author's but the public's.¹⁶² In delivering what is now a well-known speech to the House of Commons in 1841, Lord Thomas Babington Macaulay declared:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.¹⁶³

At the time Congress added the Copyright Clause to the Constitution, a half-century earlier, Thomas Jefferson and others, including the ratifying conventions of Massachusetts, New Hampshire, New York, and North Carolina, expressed similar concern about extending such monopolies to authors. However, unlike Macaulay, they were not all convinced about the necessity of this “necessary evil.”¹⁶⁴ Copyright's supporters, such as James Madison, were also concerned about letting authors lock up the expression of an idea. Nevertheless, they considered copyright a necessity, and they prevailed.¹⁶⁵

The clear purpose of the Copyright Clause, according to intellectual property historian Edward Walterscheid, is to benefit society. Promoting the progress of science and the useful arts is the means to that end.¹⁶⁶ “While this means may also be viewed as an incentive or reward for the creations of genius, i.e., inventions or writings, the [Copyright] Clause does not in any way state that providing such

162. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (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.”); H.R. REP. NO. 100-609, at 17 (1988) (“Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors’ labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain.”).

163. THOMAS BABINGTON MACAULAY, *Copyright (February 5, 1841)*, in 8 THE WORKS OF LORD MACAULAY 195, 199 (Lady Trevelyan ed., 1875), available at <http://yarchive.net/macaulay/copyright.html>.

164. WALTERSCHEID, *supra* note 34, at 4–11.

165. See *id.* at 7.

166. See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1 (2003). As discussed in Part I, *supra*, copyright does not concern itself with all creations or all authors but rather with those expressive works that demonstrate at least a modicum of creativity. See *supra* note 45 and sources cited therein.

incentive or reward is the purpose of the grant of authority to Congress.¹⁶⁷ That is a slight but significant distinction. Indeed, the U.S. Supreme Court has repeatedly recognized that the framers intended copyright to promote free expression and build up culture by providing the “economic incentive to create and disseminate ideas.”¹⁶⁸ As the Court said in *Twentieth Century Music Corp. v. Aiken*¹⁶⁹: “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹⁷⁰ In other words, the copyright system is premised on providing authors with rewards that encourage more creation and inure more benefit to the public than the alternative. The creation of private wealth for the author is an ancillary benefit of a well-functioning copyright system.¹⁷¹

A. Understanding Incentives

The principals underlying the copyright system should influence whether copyright is an opt-in or opt-out regime—particularly for building a legal framework that provides incentives to create. The term “incentives” primarily refers to economic benefits.¹⁷² After all, money talks. But incentives are not limited

167. Walterscheid, *supra* note 166, at 40.

168. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (noting that copyright established “a marketable right to the use of one’s expression”); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 187 (1985) (“Achieving that fundamental objective of the copyright laws requires providing incentives both to the creation of works of art and to their dissemination.”); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970) (discussing copyright’s goals of both protecting access to ideas and providing authors with incentives to create new expressions of ideas).

169. 422 U.S. 151 (1975).

170. *Id.* at 156.

171. Patent law, which is the most clearly utilitarian of all intellectual property doctrines, makes an even stronger statement in this regard. *See* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003). Specifically, Congress may not provide patents that would lead to “the creation of private fortunes” but would otherwise be ineffective at, or unnecessary for, encouraging innovation. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917). The copyright system, which also has nonutilitarian justifications, *see infra* notes 174–176, does not have the stringent limitation of the patent system. This may be in part because of difficulty measuring the long-term cumulative benefit to the public of copyright provisions and in part because extending copyrights generally comes at a less significant cost to society than patent monopolies, which often claim major technological and medical advancements.

172. *See supra* note 11. It is, however, challenging to place a numeric value on a copyright in the abstract. *See* Matthew J. Baker & Brendan M. Cunningham, *Court Decisions and Equity Markets: Estimating the Value of Copyright Protection*, 49 J.L. & ECON. 567 (2006) (finding that copyright equity value increases with expanded protection but in an inconsistent and uneven manner).

to monetary rewards.¹⁷³ Though the Court has interpreted the Copyright Clause to authorize such incentives, there are numerous theories regarding how to tailor them. The three primary theories premise copyright on economics,¹⁷⁴ natural rights,¹⁷⁵ and utilitarianism.¹⁷⁶ No theory is in the majority,¹⁷⁷ and throughout the nineteenth century, the Court, treatise writers, and Congress made conflicting

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173. See *Harper & Row*, 471 U.S. at 590 n.13 (“[N]oneconomic incentives motivate much historical research and writing. For example, former public officials often have great incentive to ‘tell their side of the story.’ And much history is the product of academic scholarship. Perhaps most importantly, the urge to preserve the past is as old as humankind.”).
174. See *Mazer v. Stein*, 347 US 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights 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 in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”); see also Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 THEORETICAL INQUIRIES L. 309, 342 (2011) (“The economic analysis of copyright law assumes that content producers are selfish, rational actors who maximize profits. Corporations are profit-maximizers and therefore require economic incentives to invest in the production of new content. Content is expensive to produce and inexpensive to copy. The marginal cost of copying is often zero. Therefore, economic theory would predict that informational works will be under-produced in the absence of copyright. Only copyright, it is assumed, can secure a return on the investment in the creation of content and therefore secure sufficient incentives to create. The high investment in production costs (of a novel, a news report, a television series or a movie) is recouped by selling copies at a monopoly price or licensing exclusive broadcast rights. The business models of mass media and the content industry are therefore based on exclusivity.”). *But cf.* Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010) (presenting the “endowment effect,” whereby an author overvalues his copyrighted work and decides not to sell rather than lose ownership for less than he believes his work is worth, as a challenge to the classical economic theory).
175. Natural rights theory, or labor theory, holds that a creative work is a part of its author, and therefore the author has the moral right to control how the work is used, with or without copyright law. See Stephanie Gore, Comment, *“Eureka! But I Filed Too Late . . .”: The Harm/Benefit Dichotomy of a First-to-File Patent System*, 1993 U. CHI. L. SCH. ROUNDTABLE 293, 299 (“The root idea of Locke’s labor theory stems from the argument that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.”). Unlike much of the world’s copyright systems, particularly those of European countries, U.S. copyright has rejected moral rights for authorship, except with the Visual Artists Rights Act of 1990. See *supra* note 44.
176. Utilitarians view copyright as a means to an end—copyright provides the incentives that encourage individuals to create and thereby push the progress of culture—and therefore value incentives that lead to the creation of more and better original works of authorship. See COOTER & ULEN, *supra* note 23, at 115 (“The utilitarian approach makes a person’s claim to property tentative. It can be taken from him in principle if the beneficiaries of the expropriation gain more in utility than the owner loses.”); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 547 (2005) (“[There is] widespread agreement that the law orders property in response to societal needs, rather than in obeisance to a moral command or the natural order of the universe.”).
177. See PATRY, *COPYRIGHT WARS*, *supra* note 3, at 61; see also Ginsburg, *supra* note 31, at 319 (“Neither at the beginning of the eighteenth century, with the Statute of Anne, nor towards its end, with the U.S. Constitution’s Copyright Clause or the first U.S. copyright statute, did lawmakers set out to conceptualize copyright exclusively as a natural right, or only as a conditional State grant, or for that matter to adopt any overriding theory of copyright.”).

statements about whether copyright was based on natural rights or whether the rights came from a State-granted monopoly.¹⁷⁸ Among scholars, there is more support for a consequentialist view, particularly utilitarianism, than for any other theory of copyright.¹⁷⁹ Under that framework, copyright is a means to an end—laws of exclusivity are for the benefit of progressing the arts and sciences—and therefore the law should be crafted to maximize the public good.

The utilitarian argument for formalities, then, is premised on the well-reasoned belief that: (1) copyright has expanded to the point where it provides a bundle of exclusive rights that lock up creative expression for a very long time;¹⁸⁰ (2) many authors in the digital age create frequently, cheaply, and without thinking about copyright incentives; and (3) these authors would not bother with copyright formalities, thereby forfeiting their creative works to the public domain. Thus, the Reformalists argue, reintroducing formalities would increase contributions to culture. But, as articulated in Part II.C, that argument does not account for authors who are motivated by copyright but find formalities too cumbersome to satisfy and who, as a result, might lose the incentive to create at all.

Thus, an important question is *how* incentives work and whether authors would be less likely to create without the benefit of copyright.¹⁸¹ Congress has operated under the belief that more copyright protection means more incentives to create and, in turn, that more expressive works will be created for society's benefit. "The argument may be simply summarized: if a little copyright is good, more is better."¹⁸² This belief explains why Congress has repeatedly expanded

178. Ginsburg, *supra* note 31, at 319–21.

179. See Bell & Parchomovsky, *supra* note 176, at 542 (“[M]ost scholars today base their understandings of property on a model where property is justified by utilitarianism and defined by positive law rather than upon natural rights theories.”). It also should come as no surprise that academics, who often are more interested in sharing their research than getting rich from it, tend to be weaker supporters of copyright than, for example, musicians or filmmakers. Joseph Stiglitz, the Nobel Laureate in economics, articulated this ambivalence by telling the story of visiting a bookstore while in Taiwan and being conflicted about whether he wanted to find a pirated copy of his book there:

As I walked to the bookstore, I came to the conclusion that being ignored is far worse than having one's property stolen, and I resolved that I would actually be much happier if they had stolen my intellectual property than if they had ignored me.

When I got to the bookstore, they had in fact stolen it, and I was relieved.

Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1696 (2008).

180. Copyright duration is for the life of the author plus 70 years or, for works for hire, 95 years from publication or 120 years from creation, whichever is shorter. 17 U.S.C. § 302 (2006).

181. This assumes, as Reformalists do, that formalities in the digital age would lead to most expressive works passing straight through to the public domain. See Sprigman, *supra* note 5, at 502; see also *supra* note 73.

182. Shih Ray Ku et al., *supra* note 1, at 1671.

copyright over the past two centuries and why the Court in *Eldred v. Ashcroft*¹⁸³ recognized the most recent expansion—adding another twenty years to the copyright term—as a “rational exercise of the legislative authority conferred by the Copyright Clause.”¹⁸⁴

But is the premise that more copyright protections motivate a greater volume of creative works actually true? Despite the considerable ink spilled debating copyright, little attention and even less empirical research has been devoted to investigating how incentives spur creativity.¹⁸⁵ In 2009, a team from Case Western Reserve University published the first comprehensive study gauging the relationship between changes in copyright law and new copyright registrations, controlling for the removal of the registration requirement.¹⁸⁶ Their results did not support the general premise that more copyright leads to more creative works, but instead found variations across categories of creative works—“it is at best slightly better than a coin toss whether a legal change will have any effect upon a single category of creative works.”¹⁸⁷ They concluded that the best predictor of growth in copyright registrations was population growth.¹⁸⁸

183. 537 U.S. 186 (2003).

184. *Id.* at 204; *see also id.* at 188 (“Congress passed the [Copyright Term Extension Act] 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.” (citation omitted)).

185. There have been anecdotal examples of cultures thriving without copyright, but not cultures subject to the dynamism of the digital age. *See, e.g.*, Peter Tschmuck, *Creativity Without a Copyright: Music Production in Vienna in the Late Eighteenth Century*, in *COPYRIGHT IN THE CULTURAL INDUSTRIES* 210, 218 (Ruth Towse ed., 2002) (arguing that composers pushed for copyright protection not out of economic interest but because “[t]hey strongly believed in their moral right exclusively to decide about any alterations to their work”); Majid Yar, *The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom*, 10 *NEW MEDIA & SOC’Y* 605, 617–18 (2008), available at <http://nms.sagepub.com/cgi/content/abstract/10/4/605> (“[I]t is ‘cultures without copyright’ which in fact have generated some of the world’s greatest and most enduring cultural goods: *The Iliad* and *The Odyssey*, the epic of *Gilgamesh* and *Rubaiyat of Omar Khayyam*; the *Bible*, *Koran*, *Upanishad* and *Bagavadghita*; *Hamlet* and *The Canterbury Tales*; the *Mona Lisa* and the ceiling of the Sistine Chapel. All this goes to suggest that economic gain is not the only, or even the primary, basis upon which cultural production is stimulated; it can be suggested fairly that nothing stimulates production so well as an audience to see, hear, watch and appreciate artistic endeavours.”).

186. Such an empirical study is distinguished from the type of equity valuation studied in Baker & Cunningham, *supra* note 172, at 593 (“This paper has not determined whether equity value increases because changes in the law render existing materials more valuable or because of increased incentive to create new creative works.”).

187. Shih Ray Ku et al., *supra* note 1, at 1708–11.

188. *Id.*

While individual legal changes have historically been associated with changes in copyright registrations, it is extremely difficult to predict: (1) whether any given legal change will have such an effect; (2) what category or categories of works will be affected; and (3) when there is a relationship, whether that relationship will be positive or negative. In other words, when lawmakers consider whether to expand copyright law, the most they can expect in general is a 38 percent chance that the new law will increase the number of new registrations for some unknown category of work.¹⁸⁹

Those findings are not surprising. It makes sense that copyright incentives suffer from diminishing marginal returns after expanding beyond a certain point.¹⁹⁰ But many more questions remain unanswered, particularly whether modern-day creative works would thrive in the absence of copyright. Repeating a call that has been made before, better understanding of how copyright incentives work “requires an examination of empirical magnitudes that no one has fully undertaken.”¹⁹¹

B. Why Utilitarians Should Support an Opt-Out Regime

Assuming that the promise of at least *some* copyright protection motivates most authors, a utilitarian theory of copyright—which favors copyright laws that generate the most positive consequences for culture (that is, maximizing new works without unnecessarily locking up the expression of an idea)—supports maintaining an opt-out regime.¹⁹² Among other reasons, the digital age has facilitated an explosion of creative works. Though the overwhelming majority of these are commercially dead or orphans, there is no indication that most of these authors were not motivated by copyright at the time they created their works and have given up on the prospect of exploiting their works economically.¹⁹³ Additionally, Congress could restrain the reach of copyright in an opt-out system without obstructing protection in the first place. There are many ways to rein in copyright without using formalities: for instance, strengthening the fair use defense

189. *Id.* at 1712.

190. As Justice Breyer noted in his dissenting opinion in *Eldred v. Ashcroft*, “only about 2% of copyrights between 55 and 75 years old retain commercial value.” 537 U.S. 186, 248 (2003) (Breyer, J., dissenting).

191. Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh In on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 457 (2005).

192. Natural rights and economic theories of copyright, which both focus much more on authors, would be expected to support an opt-out regime.

193. Until empirical research shows otherwise, we should not assume that unknown bloggers or sci-fi writers are not incentivized by copyright to create. Doing so could result in removing incentives that are currently motivating those authors to create.

or expanding to other categories the compulsory licensing system that already exists for music. One manner of reform—shortening the copyright term—is discussed briefly below in Part IV.C.

Of course, an opt-out copyright system is not without its own shortcomings. Primarily, opting out may unnecessarily “fence off” expression as a function of momentum.¹⁹⁴ An opt-out regime is underinclusive in that not all authors who want to donate their work to the public domain will utilize the law to do so and overinclusive in that it still provides copyright for authors who are unmotivated by copyright incentives.¹⁹⁵ Like authors in an opt-in copyright system, authors in an opt-out system are more likely to do nothing than they are to take proactive measures to better define their copyright.

However, there are two factors that mitigate this concern. First, opting out is a lot cheaper than opting in, as it does not require a registration fee. Opting out requires only time and knowhow; there is no financial hindrance. Second, protecting commercially weak content in an opt-out regime does not necessarily reduce creative output or even the richness of the public domain, whereas complicating the process of obtaining copyright with an opt-in system could lead to fewer expressive works being created. R. Polk Wagner made this point in an essay challenging the “control-critics,”¹⁹⁶ arguing that copyright and patent law actually grow the public domain because incentivized creations stimulate others to create:

[I]nformation is stimulative in nature. Information begets more information. We respond to stimuli, whether our motive is political, artistic, or fiscal. This is most obviously seen in creative fields. . . . In this sense, the existence of intellectual property rights will itself stimulate . . . information emanating from an earlier creation, in addition to the more traditional incentive-effects on future creations.¹⁹⁷

Information is inspiration. For example, Quentin Tarantino’s *Kill Bill Vol. 1* and *Kill Bill Vol. 2* are, to an extent, homages to Sergio Leone’s spaghetti Western

194. Blame Newton’s first law of motion. See also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 33–38 (2003) (arguing that intellectual property is now experiencing a “second enclosure movement,” similar to the first enclosure movement in England of fencing off common land and making it private).

195. This, in turn, “can result in underutilization that hampers the diffusion of the information good.” Jacco Hakfoort, *Copyright in the Digital Age: The Economic Rationale Re-Examined*, in COPYRIGHT IN THE CULTURAL INDUSTRIES, *supra* note 185, at 63, 64 (arguing that to the extent that the internet facilitates easier illicit copying, further extending copyright would not have a positive effect).

196. R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

197. *Id.* at 1007–08 (footnotes omitted).

masterpieces; Tarantino's *Pulp Fiction* was a creative spin on three of the oldest stories in pulp genre, told in his own nonlinear and violent way.¹⁹⁸ Woody Guthrie, whose music was at least in part inspired by author John Steinbeck, had a major influence on the likes of Bob Dylan, Bruce Springsteen, and Pete Seeger.¹⁹⁹ And Director Christopher Nolan saw in the *Star Wars* and *Lord of the Rings* series indications that a movie could be based on a far vaster reality than a film could detail; he also saw in *The Matrix* that audiences are willing to explore "a massively complex philosophical concept in some sense."²⁰⁰ These films served as the inspiration for Nolan's Academy Award-nominated *Inception*.²⁰¹ Similar creative inspiration happens on the fringes and among virtually anonymous authors, too. Creators might not be able to license another author's work, but in many cases they will not want to. Instead, another author's photo, blog post, or sketch video will inspire the creator to craft something entirely original—mitigating the costs of protecting commercially dead works.

Most important, though, is that the incentive purpose of copyright requires Congress to err on the side of copyright being overinclusive, except when the net result would be fewer contributions to the arts and culture. As this Comment argues, today an opt-out system generates more creative contributions to culture than an opt-in system would generate.

C. Reining in Opt-Out

How then to tailor an opt-out system so that it both addresses the Reformalists' concerns about locking up access to expression and continues to provide copyright protection that scales in the digital age? The correct course might be to pare copyright in a way that reduces author expectations about incentives without raising any hurdles to obtaining copyright protection. As Sara Sadler

198. See John Hiscock, *Tarantino: I'm an Amateur*, LONDON EVENING STANDARD (Oct. 2, 2003), <http://www.thisislondon.co.uk/film/article-7002088-tarantino-im-an-amateur.do> (stating that Leone has influenced Tarantino more than any other director and that his goal is to one day do "something as perfect as the closing sequence in *The Good, The Bad and The Ugly*"); AFI, *Quentin Tarantino: The Inspiration for Pulp Fiction*, YOUTUBE (June 10, 2009), <http://youtube/qlC1nVUFuck>.

199. For instance, Guthrie wrote a ballad called "Tom Joad," inspired by a character in Steinbeck's *The Grapes of Wrath*. WOODY GUTHRIE, *DUST BOWL BALLADS* (RCA Victor Records 1940). Springsteen, having read Steinbeck's book and listened to Guthrie's song, wrote "The Ghost of Tom Joad." BRUCE SPRINGSTEEN, *THE GHOST OF TOM JOAD* (Columbia Records 1995).

200. See Dave Itzkoff, *The Man Behind the Dreamscape*, N.Y. TIMES, June 30, 2010, <http://www.nytimes.com/2010/07/04/movies/04inception.html>.

201. *Id.*

has articulated,²⁰² author incentives respond to continually increasing expectations, which Congress supports through periodic expansion of copyright:

Over time, the increase of rights under copyright law creates expectations among creators, including expectations of increasingly broad rights in the future. Creators form incentives based on those expectations. When rights under copyright law fail to satisfy expectations, creators ask lawmakers to provide them with broader rights in the name of “incentive.” When lawmakers comply, the result creates higher expectations among creators, and so on. The existence of this cycle is the reason why arguments about incentives so often tend to the tautological.²⁰³

That need not be. Congress could rein in those expectations instead of enlarging them, which over time could break the cycle without reducing authors’ motivations to create.

The most expedient manner by which to do this likely would be to revise the duration of copyright.²⁰⁴ Intellectual property scholars widely disagree about what aspects of copyright need reform, but they broadly agree that a copyright term of life plus seventy years makes no sense.²⁰⁵ Not when copyright is intended to provide incentives for authors while only allocating monopoly over an expressive work for “limited Times.”²⁰⁶ Justice Breyer has pointed out that about 98 percent of copyrights are economically worthless after about a half century.²⁰⁷ Rare are hits like Mickey Mouse²⁰⁸ or “White Christmas”²⁰⁹ or *The Catcher in the*

202. See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433 (2007).

203. *Id.* at 435.

204. Though in-depth analysis of the copyright term is beyond the scope of this Comment, it is important to discuss it quickly as one manner in which an opt-out regime can be tightened.

205. See *supra* note 3.

206. U.S. CONST. art. I, § 8, cl. 8. What falls within that clause remains unclear. See Landes & Posner, *supra* note 3, at 472.

207. *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting).

208. The first Mickey Mouse cartoon was created in 1928 and was set to enter the public domain in 2003 before the Copyright Term Extension Act of 1998 extended Mickey’s copyrighted life another twenty years. See Joyce Slaton, *A Mickey Mouse Copyright Law?*, WIRED, Jan. 13, 1999, <http://www.wired.com/politics/law/news/1999/01/17327>; Claire Suddath, *A Brief History of Mickey Mouse*, TIME, Nov. 18, 2008, <http://www.time.com/time/arts/article/0,8599,1859935,00.html>.

209. “White Christmas,” written by Irving Berlin and most famously performed by Bing Crosby, is the best-selling record in history. See Roy J. Harris, Jr., *The Best-Selling Record of All*, WALL ST. J., Dec. 5, 2009, at W18 (reporting that more than 50 million copies of Crosby’s single have been sold, “with album and other sales taking the total above 100 million”).

*Rye*²¹⁰—copyrighted properties that remain commercially profitable decades after publication. And authors who published with the expectation of a term of copyright that lasts the life of the author plus fifty years or with the expectation of two terms of twenty-eight years can hardly claim to have been motivated by the prospect of their descendants being able to exploit their copyrighted works seventy years after their deaths. The current copyright term makes sense to only one subset of Americans: shareholders and directors of the content industries,²¹¹ specifically those who own film, music, and book catalogs. And, as was well publicized with the passage of the Copyright Term Extension Act of 1998, the content industries have a lot of lobbying power.²¹²

One practical way to get orphan works into the public domain by shortening the copyright term would be to follow what Richard Posner and William Landes suggested in a 2003 article: Make copyright renewable an indefinite number of times.²¹³ Shifting back to a renewal system would address many of the Reformalists' concerns without presenting as high of a risk of forfeiture for the unwary. Copyright would continue to vest automatically upon fixation, but, to be renewed, authors would have to confirm publicly that they still want copyright protection with the pro forma gesture of filing for renewal. If an author no longer cared about his rights, he would not bother to renew his copyright and his work would pass into the public domain.

In addition to redefining some of the incentives that authors include in their calculations for creating, an opt-out copyright system could streamline the method by which an author claims only a limited copyright. Streamlining that process would include educating the public about the ability to donate rights to the public domain and simplifying the steps for doing so.

210. First published in 1951, *The Catcher in the Rye* continues to sell about 250,000 copies each year. See Charles McGrath, *J.D. Salinger, Literary Recluse, Dies at 91*, N.Y. TIMES, Jan. 28, 2010, <http://www.nytimes.com/2010/01/29/books/29salinger.html>.

211. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 25 (2004) (stating that the expansion of intellectual property may be attributed to “political forces and ideological currents” that are “abetted by interest-group pressures that favor originators of intellectual property over copiers”); Elkin-Koren, *Limits of Private Ordering*, *supra* note 74, at 385 (“[T]he current copyright regime serves the needs of intermediaries . . .”).

212. See Eric E. Johnson, *When Do Works Enter the Public Domain?*, BLOG L. BLOG (Jan. 5, 2011, 11:36 PM), <http://bloglawblog.com/blog/?p=1128> (“Congress has been, for decades now, regularly extending copyright terms at the bidding of the entertainment industry. . . . Because of this most recent extension legislation, the public domain is stuck at 1922 and will be for quite a while.”); see also Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001) (referring to the Copyright Term Extension Act as the “Mickey Mouse Protection Act”).

213. Landes & Posner, *supra* note 3, at 517–18.

CONCLUSION

Copyright's flaws have been magnified by digital technologies in the era of instant authorship. The discussion above demonstrates that Congress has many means by which it can tweak copyright to address Reformalists' concerns without returning copyright to an opt-in system. A shift away from opt-out would be problematic in that it would lead to forfeitures on a massive scale—commercially dead works would not be the only ones to pass through to the public domain. All creative works not clearly motivated by copyright incentives and affirmed by the author's adherence to formalities would enter the public domain. While an opt-out copyright regime has shortcomings of its own—namely, an inability to determine whether authors have been motivated by copyright—it preserves the rights to creative work possessed by an author who is motivated by copyright. This includes any chance he would have to capitalize commercially on that work and prevents inadvertent forfeiture of those rights. An opt-in regime characterized by formalities, though better at keeping copyright protection from authors unmotivated by copyright incentives, unfortunately does not scale in the digital age. Adherence would be prohibitively expensive and unbearably time consuming. And because authors would be unable to determine which works might be commercially successful at the time of registration, many authors would choose not to register any; thus, they would not be able to reap the benefits of a work that later became commercially successful but had passed into the public domain. That, in turn, could disincentivize some authors from creating at all, thereby reducing expressive contributions that promote the progress of culture. Thus, in the interest of encouraging the creation of more original works of authorship—an interest the Constitution clearly recognizes—the copyright system should remain an opt-out regime free of formalities.