Whatever Happens to Works Deferred?: Reflections on the Ill-Given Deferments of the Copyright Term Extension Act

*J. Michael Keyes**

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I. INTRODUCTION

The U.S. Constitution bestows upon Congress the authority to promote the progress of the arts by securing to authors the exclusive rights to their creations "for limited times."[1] On October 27, 1998, limited times became less limited by virtue of the Sonny Bono Copy-

* Intellectual Property and Technology Associate, Preston Gates & Ellis LLP.

1. The text of the constitutional provision provides that, "[t]he Congress shall have Power . . . [t]o 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. *See* U.S. CONST. art I, § 8, cl. 8.

right Term Extension Act (CTEA).[2] This new piece of legislation, named after Congress' then-recently-deceased-singer-turned-politician colleague, amends various portions of the Copyright Act. The most significant and controversial amendment extends the term of copyright protection for subsisting and future works of authorship by twenty years.[3] Thus, the amendment grants a twenty-year public domain deferment to those copyright holders with existing copyrights in works of authorship so that those copyright holders can, theoretically, exploit those copyrights for an additional one-fifth of a century. The amendment also tacks on a twenty-year extension for those works that had not yet been created as of the date that the CTEA became law.[4]

Although there are scant judicial decisions addressing the constitutionality of the CTEA, it did manage to evade invalidation before the Federal Court of Appeals for the D.C. Circuit.[5] But the history of the CTEA is by no means finally penned. The U.S. Supreme Court agreed to review the D.C. Circuit's opinion, setting the judicial platform for what has been billed in some circles as "the most important copyright decision in more than 100 years."[6]

In contrast to the limited judicial writings on the CTEA, there is a healthy stock of insightful scholarly works on the CTEA festooning the legal journals throughout the country.[7] This article leaps into the scholarly fray and focuses on the domestic policy justifications and assumptions relied upon by Congress in enacting the CTEA.[8] In so doing, this article argues that the CTEA is premised upon a wayward

2. *See* The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in various sections throughout 17 U.S.C.).

3. *See id.*

4. *See id.*

5. *See* Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001) (holding that "the CTEA is a proper exercise of the Congress's power under the Copyright Clause"), *cert. granted*, ___ U.S. ___, 122 S. Ct. 1062 (2002).

6. Henry Weinstein, Ann O'Neill, & Meg James, *Studios May Have the Most to Lose*, L.A. TIMES, Feb. 21, 2002, at C1, *available at* http://www.latimes.com/business/la-000013191feb21.story?coll=la-headlines-business-manual (last visited July 15, 2002).

7. *See, e.g.*, *infra* notes 31, 46, 49, 78, 87, 99.

8. The legislative history indicates that one of the reasons why copyright extension was enacted was to help "harmonize" our copyright laws regarding copyright duration with those of the European Union. *See* S. REP. NO. 104-315, at 3 (1996) (noting that the "purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works."). This article does not focus on the merits of such an international endeavor to "harmonize" our laws with those of other countries.

copyright philosophy and unsupported congressional assumptions. The article also posits a modest alternative to the CTEA that would be more consonant with the philosophical tenets of copyright and more apt to achieve the goals Congress set out to accomplish. To those ends, part II of the article provides a fleeting foray into the history and mechanics of our copyright system. Part III discusses the pertinent portions of the CTEA and its legislative history. Part IV discusses why the CTEA represents misguided copyright policy and how its provisions are speculative, at best, in ensuring the public domain will be enriched and nurtured. Part V poses an alternative view of how the statute could have been recast to harmonize with the underlying aims of copyright protection and to better ensure that the stated congressional goals were obtained.

II. COPYRIGHT: THE GREAT COMPROMISE

The legal mechanism of copyright is several centuries old. Copyright, like many of the other legal doctrines of this country, owes its genesis to the country of England. In 1710, Parliament passed the first copyright statute, the Statute of Anne.[9] The statute granted authors the exclusive right to copy their works for a period of fourteen years.[10] A renewal period of fourteen years was also available to the author at the expiration of the original term.[11] At the end of the renewal term, the work became part of the public domain. Approximately eighty years after the Statute of Anne became law in England, the Copyright Act of 1790 adorned the legal landscape of the nascent United States of America.[12] This Americanized version of the Statute of Anne adopted many of its contours, including the fourteen-year initial period of protection.[13]

In both England and America, an inherent tension has always been woven into the tapestry of copyright protection—a tension that pits society's interests against the interests of the individual creators of works of authorship. This tension is an integral component of our

9. *See* Statute of Anne, 1710, 8 Ann., c. 93 (Eng.). The statute is named after Queen Anne, who reigned from 1702 to 1714. *See* Brian Forte, *The Statute of Queen Anne*, http://www.betweenborders.com/queenanne/index.html (last visited July 15, 2002). Queen Anne did not, however, have much involvement with the Act as her reign was plagued with both domestic problems and strife abroad. *See* http://encyclopedia.com/articles/28824Reign.html (last visited July 15, 2002).

10. 8 Ann., c. 93 (Eng.).

11. *See id.* The statute indicated that after the first set of fourteen years passed "the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years." *Id.*

12. *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125 (1790).

13. *See id.*

copyright regime given that society's interests and those of the individual do not necessarily coincide. On the one hand, society needs to have at its disposal works of authorship that can be freely utilized, scrutinized, manipulated, and transformed at will by anyone. Such intellectual and artistic freedom is a staple of our democratic society.[14] On the other hand, society might not have these works to use and manipulate if there is no incentive for the creation of these works in the first instance.[15] Thus, copyright seeks to balance the collective interests of society against the individual economic interests of the creators.[16]

Resolving the dissonance between these two interests has always been accomplished through a temporal displacement of society's rights—a legislative borrowing from Peter to pay Paul. That is, society's rights to use and consume works of authorship have been temporarily suspended and vested in the individual creator.[17] Of course, that temporary vesting is the copyright monopoly granted by the federal government to ensure that the creator receives a "fair return" for creating the work.[18] Once that temporary or limited time expires, the public at large becomes the proprietor of the creative work that was once held exclusively within the personal domain of the individual creator.[19]

Although the dissonance between the two interests is statutorily resolved by providing creators with a monopoly for a certain amount of time, there is no question which interest reigns supreme. The U.S.

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14. *See, e.g.*, Henry M. Gladney, *Digital Intellectual Property: Controversial and International Aspects*, 24 COLUM.-VLA. J.L. & ARTS 47, 68 (2000) (observing that it is "widely accepted" that "freedom in academic writings is fundamental to American democracy."); Mazer v. Stein, 347 U.S. 201, 219 (1954) (opining that "[t]he 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 . . . ."); Grant v. Raymond, 31 U.S. 218, 241 (1832) ("To promote the progress of useful arts, is in the interest and policy of every enlightened government.").

15. Lord Mansfield once explained that "[w]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements nor the progress of the arts to be retarded." Cary v. Longman, 102 Eng. Rep. 138, 140 n. (b), 1 East 358, 362 n. (b) (1801).

16. *See id.*

17. This temporary suspension of rights is subject to various statutorily created exceptions under 17 U.S.C. § 107 (the "fair use" defense), which provides a defense to what would otherwise be considered infringing activities. Uses of copyrighted material that could be considered "fair" under the statute include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107 (2000).

18. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (noting that "[t]he 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.").

19. *See id.*

Supreme Court has consistently determined that "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."[20] The Court has also characterized the copyright monopoly as a "special reward"[21] and one that is simply a "secondary consideration"[22] to the ultimate aim of enriching the public domain. One of the more respected justices to reach the lofty heights of the U.S. Supreme Court referred to the copyright monopoly as lasting for "a short interval."[23]

Even sectors of the federal legislative branch have expressly recognized the dominance of the public interests over the interests held by the individual copyright holder.

> In enacting a copyright law Congress *must* consider . . . two questions: first, how much will the legislation stimulate the producer and so benefit the public; second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.[24]

In short, the fundamental tenet of copyright policy—both historically and presently—is this: the copyright holder wins out in the short run with a monopoly that is designed to ensure a fair return for a limited duration, but the ultimate winner is society because it will be enriched and nourished with a vast array of artistic works once that limited durations runs.[25]

Building copyright policy upon this fundamental tenet is undoubtedly difficult and something that Congress has grappled with since 1790. Congress continues to muse over how exactly this cornerstone of copyright policy applies in a world becoming increasingly smaller (in the virtual sense) and technologically proficient.[26] Con-

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20. United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

21. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

22. *See Paramount Pictures*, 334 U.S. at 158.

23. "It is beneficial . . . to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject . . . ; [and beneficial] to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, 402-03 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1883).

24. H.R. REP. NO. 60-2222, at 7 (1909) (emphasis supplied).

25. *See supra* notes 18–23.

26. *See* S. REP. NO. 104-315, at 12 (1996) (discussing why technological developments should inure to the benefit of copyright holders).

gress' most recent musings resulted in the CTEA, which, as will be discussed, undermines the fundamental "fair return" tenet of copyright and is based on unsupported speculations.

III. THE CTEA AND ITS LEGISLATIVE MEMOIRS

The CTEA extends the terms of all copyrights for an additional twenty years. The statute provides as follows: (1) for works created in 1978 or thereafter, and to which an individual author owns the copyright, the Act extends the term to the life of the author plus seventy years;[27] (2) for works created in 1978 or thereafter that are anonymous, pseudonymous, or made for hire, the term is extended from seventy-five to ninety-five years from the year of publication or from 100 to 120 years from the year of creation, whichever occurs first;[28] and (3) for works created before 1978, for which the initial term of copyright was twenty-eight years, the renewal term is extended from forty-seven to sixty-seven years, creating a combined term of ninety-five years.[29] Congress is no neophyte to the discipline of copyright-duration extension. In fact, over the last forty years, Congress has extended the duration of copyright protection almost a dozen times.[30] "Nine of those extensions were of subsisting copyrights in anticipation of the major overhaul of the 1976 Copyright Act."[31]

The CTEA itself does not provide any clues as to the legislative intent behind the latest round of copyright extensions.[32] The legislative history of the CTEA, however, contains a healthy dose of indicia as to why Congress believed that copyright extension was necessary. According to Senate Report No. 104-315, the CTEA will aid in "stimulating the creation of new works and providing enhanced economic incentives to preserve existing works," and "such an extension will enhance the long-term volume, vitality, and accessibility of the

27. 17 U.S.C. § 302(a) (2000).

28. *Id.* § 302(c).

29. *Id.* § 304.

30. *See* Pub. L. No. 105-298, 112 Stat. 2827 (1998); Pub. L. No. 94-553, title I, § 101, 90 Stat. 2573 (1976); Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); and Pub. L. No. 87-668, 76 Stat. 555 (1962).

31. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001). *See also* Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).

32. *See supra* note 2.

public domain."[33] As this excerpt from the report indicates, there were two main reasons advanced for copyright protection extension: (1) it would preserve creative incentives, and (2) it would lead to the preservation of existing works.

With respect to the rationale of preserving creative incentives, the committee observed that "Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives."[34] Further, technological developments have extended the marketable lives of works of authorship:

> Technological developments clearly have extended the commercial life of copyrighted works. Examples include video cassettes, which have given new life to movies and television series, expanded cable television, satellite delivery, which promise[s] up to 500 channels thereby creating a demand for content, the advent of multimedia, which also is creating a demand for content, and the international networks, such as [the] Internet, *i.e.*, the global information highway.[35]

The question is, as the committee queried, who should benefit from these increased commercial uses?

The committee believed that "the basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons."[36] First, the promise of copyright extension for works will essentially provide the carrot of "additional income" for copyright holders, which will "increase existing incentives to create new and derivative works."[37] Second, "extended protection for existing works will provide added income with which to subsidize the creation of new works."[38] This was thought of as being "particularly important" in the context of corporate copyright ownership because those owners "rely on income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)."[39] Ultimately, though, the committee concluded that the beneficiary is the "public domain[,] which will be greatly enriched by the added influx of creative works over the long term."[40]

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33. S. REP. NO. 104-315, at 3 (1996).
34. *Id.* at 12.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. S. REP. NO. 104-315, at 12–13.
40. *Id.* at 13.

The committee further opined that the preservation of existing works provided an additional basis for extending copyright protection for an additional twenty years.[41] As stated by the committee, "copyrighted works have been fixed in perishable media, such as records, film, audiotape, paper, or canvas," and the copies of these works "usually suffer significant degradation of quality."[42] The advent of digital technologies would allow these works to be stored in digital format, and thus allow for ageless preservation of the works.[43] As far as the committee was concerned, however, no one would want to place these existing works into digital media without "some assurance of an adequate return on that investment."[44] Thus,

> [b]y extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (*e.g.*, motion pictures), the bill will create such an assurance by providing copyright owners at least 20 years to recoup their investment. More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.[45]

In arriving at the end result of copyright term extension, Congress—consistent with its copyright-enactment ethos—received the testimony, arguments, and proposals of several individuals from diverse legal and artistic disciplines.[46] Many of these individuals, most of whom were artists or descendents of artists, testified as to the need to extend copyright protection for works that have already been created.[47] For example, descendents of Arnold Schönberg, Jerome Kern, and Richard Rodgers[48] all arrived on Capitol Hill to present "massive inventories of existing copyrights that would imminently expire" if the copyright extension was not enacted.[49] None of these individuals, or

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41. *Id.*

42. *Id.*

43. *See id.*

44. *Id.* at 13.

45. S. REP. NO. 104-315 at 13.

46. Michael H. Davis, *Extending Copyright and the Constitution: Have I Stayed Too Long?*, 52 FLA. L. REV. 989, 996 (2000).

47. *Id.*

48. Arnold Schönberg is considered the founder of the twelve-tone musical compositional style of the twentieth century. *See* http://www.schoenberg.at (last visited July 15, 2002). Jerome Kern and Richard Rodgers were two of the musical titans of this century, authoring numerous musical compositions for the stage and concert halls. *See* MICHAEL KENNEDY, THE OXFORD DICTIONARY OF MUSIC (Oxford University Press, 2d ed. 1997).

49. *See* Davis, *supra* note 46, at 997. The most well-known (and arguably the most vociferous) proponent of copyright protection was Disney. *See* Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS &

others for that matter, contributed testimony regarding the need to extend copyright protection for future works. Rather, "[t]he sole interest of all those who testified in favor of extension at the various congressional hearings was in preserving existing terms which were about to lapse."[50] Jack Valenti, president of the Motion Picture Association of America, provided the only testimony regarding the need to extend copyright protection for existing works. He stated, in what has been dubbed the Little Orphan Annie[51] speech:

> Whatever work is not owned is a work that no one protects and preserve [*sic*]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life.[52]

The above excerpts from the legislative history are instructive, to be sure. Not only do these excerpts provide a glimpse into what the key committee of Congress was grappling with, but they also expose the policy pitfalls and speculative assumptions upon which the copyright extensions of the CTEA are based. Those pitfalls and assumptions are examined now.

IV. THE TROUBLING TRIUMVIRATE OF THE CTEA

The legislative history indicates that copyright extension would, theoretically, preserve "creative incentives" and "existing works."[53] Such preservations would, from Congress' perspective, ultimately enrich the public domain.[54] To these ends, Congress enacted the CTEA, which was calibrated to: (1) maximize the economic return to the copyright holder on the intellectual investment;[55] (2) strengthen incentives to create new and derivative works;[56] and (3) create incentives for copyright holders to preserve existing works.[57]

There are two problems underlying this congressional calibration. First, copyright law should not be based upon the social goal of

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ENT. L.J. 491, 523 (1999) (observing that "[t]he Walt Disney Company is among the biggest beneficiaries of this congressional largesse.").

50. *See* Davis, *supra* note 46, at 998.

51. *Id.* at 998 n.35.

52. *Id.*

53. S. REP. NO. 104-315, at 11–13.

54. *See id.* at 13.

55. *See id.* at 12.

56. *See id.* at 12–13.

57. *See id.* at 13.

maximizing the return to the copyright holder.[58] Indeed, copyright law is far less copyright-holder centric in that it seeks to reward the copyright holder with a fair return on the intellectual investment. Thus, the maximalist approach taken by Congress is not justified.

Second, Congress simply enacted the CTEA based upon a series of unsupported assumptions.[59] Congress assumed that it was necessary to strengthen existing incentives to create, even though nothing appeared defective with the incentives already provided under the Copyright Act of 1976. Likewise, Congress assumed it necessary to create incentives to encourage copyright holders to preserve their existing cache of works of authorship, even though this preservation may very well have happened without the largesse of the CTEA and will not necessarily happen because of it.

When enacting the CTEA under these assumptions, Congress overlooked the reality that creativity will actually be stifled. Numerous individuals and organizations will have to shelve their plans to use works of authorship—oeuvre that would have otherwise been escorted into the public domain by pre-CTEA copyright law. Coupling these congressional assumptions with the certain downturn in creativity that will be brought about by the CTEA leads to this inexorable conclusion: the CTEA represents misguided copyright policy.[60]

A. The Wayward Philosophy of Maximizing Returns to the Copyright Holder

The copyright duration policy underlying the CTEA is grounded on a misguided premise—namely, that copyright duration should be calibrated in such a manner as to allow the copyright holder to maximize the returns from a given work of authorship. Our copyright system is not based upon such a social policy. As Professor Ralph Brown observed years before the CTEA was on the congressional radar screen, the Constitution does not bestow upon Congress "the power to maximize the returns to authors and inventors."[61] Quite the contrary, the Constitution merely cloaks Congress with the authority "to promote the progress of science and useful arts."[62] Further; this authority cannot be exercised in disregard of temporal restrictions; rather, the authority to promote exists for limited times in that authors are only given this amount of time to be the sole exploit-

58. *See infra* Section IV A.

59. *See infra* Section IV B.

60. *See infra* Section IV C.

61. Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 592 (1985).

62. *See* U.S. CONST. art I, § 8, cl. 8.

ers of their respective works.[63] Thus, the congressional goal of maximizing the copyright holder's time for exploitation appears inconsistent with the constitutional imperative of extending protection for only limited times.

Additionally, the U.S. Supreme Court has suggested over the course of several copyright opinions that the fundamental tenet of copyright is narrower in scope than the maximalist approach taken by Congress in enacting the CTEA.[64] The essence of copyright is that it seeks to provide the copyright holder with a fair return on the intellectual investment.[65] The Court has similarly determined that "[t]he limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a *fair price* for the value of the works passing into public use."[66] Copyright is not designed to provide a special private benefit to the holder of the monopoly.[67] Instead, the copyright monopoly merely seeks to "induce release to the public of the products of [the creator's] genius."[68]

The principle emerging from the Court's copyright opinions is this: the copyright reward is intended to be sufficient, but not ample. The Court has determined that a sufficient reward ensures that the ultimate aim of promoting the public good will be protected and furthered.[69] Thus, if the reward of a fair return or fair price protects the public good, then, conversely, any reward that provides *more* than a fair return or fair price arguably compromises the sanctity of the public welfare.[70] This is the precise reason why the maximum return approach taken by Congress is faulty. The maximum return approach does not simply provide the author with a sufficient or fair amount of time to exploit the work. Instead, it provides the author with the greatest amount of time possible to take advantage of the monopoly. Such an approach, according to the Supreme Court, threatens to disrupt the public good that is at the heart of our copyright laws.[71]

Both the Constitution and the Supreme Court's jurisprudence indicate that the starting point for formulating copyright duration policy should focus on what element of time will allow an author to recoup a fair return. Congress did not commence its CTEA journey

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63. *See id.*

64. *See supra* notes 20–23.

65. *See, e.g., Twentieth Century Music Corp.*, 422 U.S. at 156.

66. Stewart v. Abend, 495 U.S. 207, 229 (1990) (emphasis added).

67. *Sony*, 464 U.S. at 429 ("[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.").

68. *Paramount*, 334 U.S. at 158.

69. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994).

70. *Cf. id.*

71. *See Fogerty*, 510 U.S. at 526.

from this fair return vantage point; rather, Congress focused its energies on the query of what amount of time would allow the copyright holder to maximize the harvest that was intellectually sown. This preoccupation with ensuring maximum results does not square with either the Constitution or the Court's explanations as to the underlying social goals and purposes behind our copyright laws.

In erroneously formulating a policy that seeks to maximize the return to the copyright holder, Congress inappropriately concluded that the marketable life of a work of authorship should be the touchstone for determining the length of copyright.[72] As opined by the Senate committee, technological developments have extended the commercial life of works of authorship and, therefore, copyright duration should be commensurate with this additional marketable life.[73]

For two independent reasons, it is not sound policy for Congress to equate copyright duration with the length of the marketable lives of works of authorship. First, such an equation is predicated upon the theory of maximizing the return to the copyright holder—a theory of questionable legitimacy given the constitutional text and the Court's ruminations as to the underlying social goals for copyright protection. Second, this equation does not compute because it is divorced from any practical assessment as to whether such a marketable life duration was necessary in order for a copyright holder to recoup a fair return on the initial intellectual investment. In other words, the marketable life formulation ignores the reality that technological developments have provided increased opportunities for exploitation.

Technological developments do not provide a basis for extending copyright duration precisely because they provide the copyright holder with an increased ability to recoup a fair return.[74] As technological

72. *See* S. REP. NO. 104-315, at 12.

73. *Id.*

74. Of course, technological advances have spawned a renaissance of copyright infringement, which arguably lessens the ability of the copyright holder to seek a "fair return." The threat of increased infringement, however, does not provide a sufficient justification for extending copyright duration because new technology has "made it easier for intellectual property rights owners to locate infringers." *See* IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 8.17[2], 8-220–8-221 (2001) (noting that Web-based searches can help track down illicit use of content and that "[t]echnologies such as digital watermarking may also may help copyright owners discern genuine from infringing digital works, and trace down the origin of unauthorized users.") Moreover, there are also legal mechanisms in place to help reduce the amount of copyright infringement that occurs as a result of new media. For example, provisions of the Digital Millennium Copyright Act (DMCA) are "intended to provide the protection necessary to encourage copyright owners to make their works available over the Internet." 144 CONG. REC. S12, 730-01 (daily ed. Oct. 20, 1998) (statement of Sen. Leahy); *see also* Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937 (1999). Thus, given the private and public steps that have been taken to in-

media are improved, expanded, and disseminated to the masses, the copyright holder's ability to exploit a given work of authorship expands.[75] Not only does the copyright holder enjoy the luxury of a multitude of media through which to exploit a work of authorship, but these media also have lower transaction costs than technological implements and methods of yesteryear.[76] For example, twenty years ago a copyright holder did not have nearly as many technological routes to pursue in seeking a fair return for creating a given copyrighted work. Today, the technological reality is strikingly different. Video and cassette tapes, digital technology, cable TV media, and the Internet have all created a vast expanse of potential opportunity for the copyright holder to seek a return on that intellectual investment, more so today than ever in the history of copyright.[77] For this reason, it simply does not make sound copyright policy to blindly extend copyright protection based upon the technological achievements that we have reached as a society. What makes better policy is to gauge copyright duration based upon an assessment of the exploitation opportunities available to the copyright holder.[78]

Copyright duration should be directly tied to the amount and significance of the opportunities that are at the disposal of the copyright holder.[79] As the opportunities for exploitation increase, the duration of copyright protection should be diminished. On the other hand, if opportunities for exploitation decrease, the duration of copyright should be lengthened. This is not to suggest that copyright protection should constantly be subject to some sliding congressional scale; rather, when Congress undertakes the task of assessing copyright duration, the focus of that assessment should be on the pragmatic real-world opportunities available for exploiting works of authorship.[80] With the CTEA, Congress did not engage in such an assessment, but instead simply reached the conclusion that copyright

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hibit copyright infringement as a result of new technologies, the copyright holder is still able to use these technological advances to recoup a greater fair return than ever before.

75. *See* S. REP. NO. 104-315, at 12.

76. *See* Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 640 (2001).

77. *See* S. REP. NO. 104-315, at 12. *See also* Silberberg, *supra* note 76 at 641.

78. This argument has a similar look and feel to the one posed by Professor Litman. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 180 (2001). There, Professor Litman posits that copyright infringement should be actionable only to the extent that the putative infringer's conduct disrupts "the copyright holder's opportunities for commercial exploitation." *Id.* Here, it is suggested that copyright duration should be based upon an assessment as to what opportunities are available to the copyright holder. These formulations are similar in that they both look to the real-world effect on the copyright holder's opportunities.

79. *See id.*

80. *See id.*

duration should be commensurate with marketable lives of works of authorship.[81]

In sum, one of the fundamental problems with the CTEA is that it is premised upon the notion that copyright protection should be commensurate with the marketable lives of works of authorship. Congress believed that because technological developments have increased the commercial longevity of works of authorship, copyright protection should likewise be extended.[82] Technological developments, in and of themselves, should not be used as a bellwether in formulating how long copyright protection lasts. Instead, those technological developments should be analyzed in terms of whether they provide a copyright holder with increased opportunity to exploit a work of authorship.

B. The Curious Congressional Assumptions of "Strengthening" and "Creating" Incentives

Congress' copyright extension policy is also predicated upon the assumptions that copyright extension will "strengthen" incentives to "create new and derivative works" and "create" incentives to "preserve existing works."[83] These assumptions are questionable because there is no indication that authors need more of an incentive or that existing works would not have been preserved without the benefit of copyright term extension. Thus, the conclusion that the public domain will be greatly enriched by copyright extension is called into doubt.

Congress engaged in bold speculation when it determined that incentives created under the 1976 Copyright Act needed to be strengthened. In order for additional copyright duration to make any sense on the basis of strengthening the incentive for authors to create new and derivative works, there must have been some aspect of the life-plus-fifty-years incentive that was wanting, lacking, or deficient in some respect. "Incentive" is synonymous with "motive," which is defined as "something (as a need or desire) that causes a person to act."[84] Thus, if authors have no need or desire for longer copyright protection, then copyright duration extension, while perhaps a windfall or a bonus, is not properly characterized as an incentive. Interestingly, no artists or authors testified to Congress that they would have greater in-

81. *See* S. REP. NO. 104-315.

82. *See id.* at 12–13.

83. *Id.* at 12.

84. MERRIAM-WEBSTER COLLEGIATE ONLINE DICTIONARY, *at* http://www.m-w.com/cgi-bin/dictionary (last visited July 15, 2002).

centive to create new and derivative works if Congress expanded copyright protection.[85] Rather, the sole concern of the artists (or their heirs) who testified appeared to be that the financial streams that would run dry if copyright protection were not extended for works already in existence.[86] Given the complete lack of indicia as to the authors' or artists' needs or desires for protracted copyright protection, it is arguably speculative that such an extension is necessary or that it will have any effect on strengthening incentives.

In fact, it seems unlikely that such a necessity to strengthen incentives could really exist. On a purely common sense level, could it truly be possible that an author or artist would be any more incentivized to create simply because the posthumous copyright protection was going to exist for nearly three-quarters of a century, as opposed to merely half a century?[87] The motivations that inspire works of a creative nature are innumerable. For example, fame, notoriety, wealth, love, hate, loneliness, joy, and sorrow are but a few examples in a vast sea of motives.[88] It seems quite likely that nowhere in that vast sea is the motive to create based on postmortem protection of an additional twenty years beyond the already extant fifty-years-after-death protection.[89] The congressional assertion to the contrary is dubious.

Congress also speculated that longer copyright protection for existing works will strengthen the incentive to create new works because

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85. *See* Davis, *supra* note 46 at 998.

86. *See id.*

87. Stephen R. Barnett & Dennis S. Karjala, *Copyrighted From Now Until Practically Forever*, WASH. POST, July 14, 1995, op-ed page ("What author is going to decide not to write another book because copyright royalties will flow only for 50 years, not for 70 years, after her death?"); *see also* Peter Jaszi, *Goodbye to All That—A Reluctant (And Perhaps Premature) Adieu to a Constitutionally Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L. 595, 597 (1996) (arguing that "[e]xtending the term of protection for works made after the effective date of the legislation might produce some theoretical, highly attenuated effect on the creative practices of individuals. I say might, because I cannot imagine the instance in which a writer, for example, would be swayed to undertake a project by the mere possibility of 20 [more] years of *posthumous* royalties available only in the highly unlikely event that the work retains popularity among generations of readers yet unborn . . . .") (emphasis added).

88. *See* Silberberg, *supra* note 76, at 626 (noting that creativity owes its genesis to an author's quest for "[f]ame, recognition of peers, and a desire to disseminate divergent views.").

89. Moreover, even if there was a "need or desire" for additional copyright duration, it is indeed questionable whether the twenty-year extension would fulfill those longings. To the extent there is an economic incentive to create additional works provided by the twenty-year extension, that incentive is negligible. As explained by Dr. Hal Varian, "extending current copyright terms by twenty years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works." Affidavit of Hal R. Varian at ¶ 3, Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), *available at* http://cyber.law.harvard.edu/eldredvreno/varian.pdf (last visited July 15, 2002). In short, it is not at all clear that an author would be any more incentivized to create a work simply because that work was going to receive greater *posthumous* copyright protection.

of the added income or subsidy that copyright owners will receive on original works.[90] This subsidy is important because the motion picture studios and publishers supposedly rely on it to "finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)."[91] Copyright extension may provide added income to the motion picture and publishing industries,[92] but this income will not necessarily induce the creation of new works. There is nothing in the CTEA itself that actually requires, compels, or even encourages this added income to be invested in such works of authorship.[93] Thus, it is at least possible that any additional income received from copyright extension could be applied to industry-related expenses, perks, or junkets that have nothing to do with the creation of new works of authorship.

Additionally, there is no indication from the legislative history that these entertainment industries would refuse or be financially unable to produce marginal or risky works without the income derived from copyright term extension.[94] This is not to say that the movie picture and publishing industries are greed-laden and ambivalent about whether the public domain is ever enriched by the creation of new works.[95] Rather, the point is that, in reality, the income received from those copyright extensions may have little or no impact on which marginal works are ultimately churned out by those industries. On one hand, such infusions of cash might lead to the creation of new works. On the other hand, the coffer enhancements from these infusions may be put to use far outside the realm of copyright subject-matter.

Finally, Congress assumed that without extending copyright protection there would be no incentive for the motion picture and publishing industries to preserve existing works.[96] Thus, to incentivize the film and publishing industries to transfer these "cultural treasures" into an "easily reproducible and indelible format"—that is, a digital format—the CTEA provides a blanket twenty-year copyright

90. *See* S. REP. NO. 104-315, at 12.

91. *Id.* at 12–13.

92. But even this congressional conclusion is debatable. *See* John McDonough, *Motion Picture Films and Copyright, at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/McDonough.html (last visited July 15, 2002) (arguing that "it can be easily shown that there are very few commercial motion pictures made before 1930 which are still bringing in the windfall of huge revenues which make these industries so profitable.").

93. *See* S. REP. NO. 104-315, at 12–13.

94. *See id.* at 12–13.

95. Although such a view might be held by many. *See, e.g.*, Garon, *supra* note 49, at 49.

96. *See* S. REP. NO. 104-315, at 13.

extension.[97] There are two problems with the assumption that the CTEA is the best vehicle to ensure the preservation of these existing works of authorship.

The first problem is that Congress simply assumed that without extended copyright protection there would be no carrot to encourage digitizing works of authorship. This congressional assumption may be grounded in the Little Orphan Annie soliloquy by Jack Valenti, wherein he testified before Congress that a work in the public domain is an orphan.[98] Regardless of whether this congressional assumption is based on Mr. Valenti's unorthodox view of the public domain, the assumption is certainly questionable because the actual lack of copyright protection may very well lead to a burgeoning array of creativity. This is especially true in today's technologically steeped world. Professor Lawrence Lessig recently struck upon this exact issue in his latest opus, *The Future of Ideas*.[99] Professor Lessig argues that just because a work tumbles into the public domain—what some might refer to as the grand orphanage of society—does not mean there is a de facto lack of incentive to use that work in an innovative and creative manner.[100] In fact, given the current technological tools at our disposal, the reality is quite to the contrary.

Professor Lessig recites poignant examples of how the lack of copyright protection actually induces individuals into creative and innovative action. Eric Eldred is one such consummate exemplar.[101] The trappings of the Internet and the innovative practices that could take place there entranced Mr. Eldred, a former naval computer programmer.[102] Almost by happenstance, he began publishing public domain novels in HTML format on the World Wide Web.[103] This hobby transformed itself into a passion and resulted in the founding of Eldritch Press, a free website devoted to publishing public domain works online. Mr. Eldred's creativity and innovative ways were sparked because of the lack of copyright protection.[104]

It appears likely that there are other Mr. Eldreds out there who, because of existing technology, would be willing to invest time, effort, and even financial resources to ensure that public domain works are

97. *Id.*
98. *See supra* note 46.
99. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 122 (2001).
100. *See id.*
101. *See id.*
102. *Id.*
103. *Id.*
104. *Id.* at 123.

transferred into an indelible format.[105] For instance, suppose that a Walt Disney film called "Mickey Mouse" was set to expire before the CTEA was enacted. Had that film's copyright term expired, there still would have been sufficient reasons for one to invest the time, effort, and money to ensure that the work—which would have been a treasure in the public domain chest—made its way into an indelible format. With the advent of Digital Video Disks (DVDs), a Mr. Eldred clone could have taken the Disney film, invested the necessary time and money, and produced a DVD version. This DVD version could couple the reproduced and digitized film with such elements as a History of Disney, or Walt Disney Biography, or any other multimedia enhancement that makes DVDs much more inherently valuable and attractive than their analog predecessors. Moreover, this DVD, embodying a compilation under copyright law, would be subject to copyright protection and receive the full federal armament under one of the other new appendages to the Copyright Act, the Digital Millennium Copyright Act (DMCA).[106]

The foregoing examples illustrate that technological advents can have a tremendously positive effect on innovation. When works of authorship are emancipated from the shackles of our copyright laws, that emancipation may lead to a renaissance of creativity and innovation—creativity and innovation that would not otherwise have transpired if the works were still subject to copyright protection.

The second problem is that it is nothing less than a major assumption on the part of Congress to think that the carrot of extended

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105. Indeed, "projects to digitize and give away millions of out-of-copyright books, movies, and music are now under way, funded by foundations, the government, and indeed corporations." Brief of Amici Curiae of The Internet Archive On Behalf of Petitioners, No. 01-618, *available at* http://www.arl.org/info/frn/copy/ia_brief.html#foots, (last visited July 15, 2002); *see also* LITMAN, *supra* note 78, at 173 (observing that history has shown that a "variety of new media flourished and became remunerative when people invested in producing and distributing them first, and sorted out how they were going to protect their intellectual property rights only after they had found their markets.").

106. The Copyright Act defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. A compilation is protected by copyright. *See* Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 358 (1991) (noting that copyright in compilation is limited to the compiler's original "selection, coordination, and arrangement."). Thus, this compilation would be subject to copyright protection. Moreover, the DMCA would prohibit third parties from "accessing" this DVD without the permission of the copyright holder of the compilation. *See* 17 U.S.C. § 1201(a) (providing that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."); *see also* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444 (2d Cir. 2001) (holding that those individuals who "decrypt" an encrypted DVD with the authority of a copyright owner are exempted from liability under the DMCA; however, authority to "view" a DVD does not create a right to decrypt a DVD).

copyright protection for existing works will actually result in works being transferred into digital format. Congress simply assumes that extending copyright protection will automatically motivate movie studios and publishing houses to convert older works into digital format.[107] Again, much like the lack of a requirement that these industries use funds received from extended copyright protection to fund new works, there is nothing in the CTEA that requires or compels copyright holders to ensure works get placed into a reproducible and indelible format.[108] It may very well be that vast amounts of works that were given a twenty-year extension may end up sitting on some warehouse shelf in the middle of nowhere without ever being saved to an indelible format.[109] While this fate probably will not befall all of the works that receive extended copyright protection, there is no provision in the CTEA that would ensure or encourage another result.[110]

In stark contrast to the above-mentioned speculations stands this unquestioned reality: the CTEA's retrospective protection for existing works will prohibit others from using works that would have otherwise been used *but for* the passage of the CTEA. It is incontrovertible that works in the public domain provide a fountain of opportunities and material for the creation of works that would otherwise be classified as "derivative works" under the Copyright Act.[111] For example, upon falling into the public domain, *The Secret Garden,* written by American novelist Frances Hodgson Burnett, experienced an "explosion of new book, film, and stage versions."[112] Other recent and quite successful films owe their rebirth to artists that relied on the resources available in the public domain. Jane Austen's *Sense and Sensibility,* and William Shakespeare's *Hamlet* and *Romeo and Juliet* are three examples. Similarly, there are numerous examples of individuals and organizations that were poised to catch copyrighted works slated to fall

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107. *See* S. REP. NO. 104-315, at 13.

108. *Id.*

109. *See* John McDonough, *Motion Picture Films and Copyright Extension, at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/McDonough.html (last visited July 15, 2002) (opining that copyright extension will not result in greater distribution of older films "because in most cases their copyright owners are not exploiting them today and have not exploited them for decades.").

110. *See supra,* note 2.

111. A derivative work means a work that is "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1998).

112. Dennis S. Karjala, *Copyright Extension Would Enrich Heirs, Impoverish Culture, at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/AzRep9-01-98.html (last visited July 15, 2002).

into the public domain but were stymied by the CTEA.[113] Eric Eldred is one such example, but there are many more.[114] For instance, The Internet Archive is an organization dedicated to "offering permanent access for researchers, historians, and scholars to historical collections in digital format."[115]

Distilled to its essence, the CTEA is the product of unsupported congressional speculation. There is no indication that there was a social need to strengthen incentives to create new and derivative works by extending copyright protection. In fact, given the rather generous amount of *posthumous* protection under the Copyright Act of 1976, it seems unlikely that such a need could truly exist. Additionally, there is nothing in the CTEA that would compel or encourage the income received from copyright extensions to be used to fund new and derivative works. Likewise, the CTEA contains no provisions to ensure that works embodied in older technologies will be transferred into indelible formats. Against this backdrop shines this reality: the CTEA will have a significant impact in quelling others from engaging in artistic endeavors.

C. Congress' Unsupported Assumptions Make Misguided Copyright Policy

Given that the CTEA is premised upon questionable congressional assumptions and the reality that the CTEA will stymie would-be creators from plying their trade, the following question must be posed: does the CTEA embody sound copyright policy? The question can be answered in the affirmative only if the upshot of the twenty-year displacement of society's rights can be said to ultimately create a more vibrant and enriched public domain.[116] Unfortunately, there is no answer to this question; for this reason, Congress should have declined to extend copyright protection.

Whether the public domain will ultimately be better off because of the CTEA cannot be prospectively determined by congressional

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113. There is also a financial benefit that often results as works fall into the public domain. For example, when a popular novel makes its way into the public domain, new publishers often take that work and reproduce it with "a wide range of versions of differing production qualities and prices, giving the public more choice at a lower price." *Id.* Moreover, when musical theatre works go into the public domain, "schools, churches and community theaters can stage them without worrying about what is often a prohibitively high royalty payment." *Id.*

114. *See* LESSIG, *supra* note 99.

115. Brief of Amici Curiae of The Internet Archive On Behalf of Petitioners, No. 01-618, *available at* http://www.arl.org/info/frn/copy/ia_brief.html#foots (last visited July 15, 2002).

116. After all, the goal of any copyright policy is to ensure that the policy is crafted in such a manner as to ultimately benefit the public welfare. *See* United States v. Paramount, 334 U.S. 131, 158 (1948) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

prognostication or by the theories of luminaries and lobbyists in the realms of copyright law and the arts.[117] The legislative branch, contrary to its assertions that the public domain will be enriched, has no idea as to whether doling out a twenty-year extension for existing copyrights will ultimately enrich the public domain. Perhaps there will be no increased flow of creative juices or any industry movement to ensure older media are protected in indelible formats. Similarly, the anti-extensionists cannot assert with all certitude that the CTEA will strike a detrimental or harmful blow to the public domain.[118] It is possible that the CTEA will make the entertainment industries flush with cash, which will spur them into preserving extant works of authorship and bankrolling new and derivative works that would not have otherwise been preserved or created. Whether the CTEA actually enriches the public domain will turn on innumerable variables, such as whether the CTEA actually incentivizes creators, demographic and artistic trends, and technological advances, to name just a few. In short, there exist two plausible outcomes for the public domain as a result of the CTEA. Congress might be right that the CTEA will ultimately lead to a healthier public domain, or, conversely, Congress might be far afield with that assumption.

Congress should have erred on the side of caution and not enacted the CTEA because copyright extension of twenty years could lead to one of two possible outcomes. When we as a society are uncertain as to how a particular resource is going to be used, "we have more reason to keep that resource in the commons."[119] Conversely, when we have a sharper understanding of how a resource will be consumed, "we have more reason to shift that resource to a system of control."[120] The justification for such a position is indeed straightforward: "[w]here a resource has a clear use, then, from a social perspective, our objective is simply to assure that that resource is available for this highest and best use."[121] This is precisely the reason why the CTEA

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117. Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L. J. 655, 657 (1996) ("The fact is that we do not really know what difference twenty extra years would make.").

118. *See, e.g.*, Brief of Amici Curiae of Association of Law Libraries, American Library Association, Association of Research Libraries, Digital Future Coalition, Medical Library Association, and Society of American Archivist in Support of Petition for Writ of Certiorari, Eldred v. Ashcroft, No. 01-618 (concluding that "[u]nless the decision of the D.C. Circuit is reversed, the CTEA and subsequent extensions of copyright terms will continue to impede the growth of the public domain."), *available at* http://www.arl.org/info/frn/copy/Ashcroft.html (last visited July 15, 2002).

119. LESSIG, *supra* note 99, at 88–89.

120. *Id.*

121. *Id.*

represents bad copyright policy, at least to the extent that the CTEA extended copyright protection for those works that had already been created. Because Congress could not possibly know in advance what fate awaits the works of authorship given extended copyright protection, Congress should not have shielded those resources from entering the commons of the public domain.[122] Had Congress not enacted the CTEA, the full weight of human innovation could have been brought to bear on works of authorship that would have otherwise tumbled into the public domain.[123] Instead, these works protected by extended copyright may simply languish for another twenty years on warehouse shelves, thereby not enriching anything and certainly not contributing to the wealth and vitality of the public domain.[124]

Congress should not have enacted the CTEA because it cannot be stated that it will have a positive effect on the public domain. The most that can be stated for the CTEA is that it *might* provide a benefit to the public domain. This is an insufficient basis for implementing a law with the depth and breadth of the CTEA.

V. RETOOLING THE CTEA

This section proposes a modest number of changes to the method by which Congress goes about enacting copyright term extension laws. It also makes suggestions regarding how the CTEA could have been altered to achieve some of the goals that were set forth in the legislative history to the CTEA. Certainly these ruminations and suggested retoolings are not complete and are not intended to be so. Rather, the intent of this section is merely to underscore how some of the problems with the CTEA could have been averted, and to illustrate the merits of an alternative statute.

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122. *See id.*

123. *See* LESSIG, *supra* note 99. Ironically, Senator Orrin Hatch, one of the leading figures in promoting the CTEA, noted that "copyright protection should be expanded unless the extent of such protection would *hamper creativity* or the wide dissemination of works." *See Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 735 (1998) (emphasis added).

124. Not only would a CTEA-free society be more beneficial from a social perspective, it would be more harmonious from a constitutional standpoint as well. The Constitution, of course, requires that copyright protection last only for "limited times." U.S. CONST. art. I, § 8, cl. 8. Whether the CTEA is actually unconstitutional will be determined in the near future by the U.S. Supreme Court. But whatever the Court determines, every time copyright protection is extended—either for existing or future works—Congress arguably migrates further away from that constitutional imperative. Thus, each successive move toward longer copyright duration inches closer to the precipice of unconstitutionality.

A. Untying Copyright Duration from the Marketable Life Formula

The Problem: Congress has taken the position that copyright policy should be calibrated to maximize the return to the copyright holder. This standard for copyright protection appears inconsistent with the constitutional text and collides with the Supreme Court's view that copyright protection is intended to provide only a fair return to the author. By implementing legislation based on this maximum-return dogma, Congress has ignored the practical realities of today's technology that provide the copyright holder with significant opportunity to exploit a given work. Instead, Congress simply doled out a twenty-year extension without completely analyzing the nature and quality of the return that could have been received by copyright owners under the pre-CTEA version of copyright duration.

A Potential Solution: Congress should reformulate its present copyright philosophy. It does not make sound policy to simply extend copyright duration because technology provides works of authorship with longer marketable lives. Instead, Congress should assess what opportunities are available to the copyright holder for exploiting a given work. Such a philosophy makes better sense because it is tied directly to the realities of the financial returns that can be achieved by the copyright holder. Because copyright is geared to ensure a fair return to that holder, copyright duration should be based on a realistic assessment as to what types and amounts of returns are at the disposal of copyright holders. If copyright duration is divorced from the practical realities of exploitation, there is no means of assessing whether a proposed term of copyright duration is fair, excessive, or deficient. Thus, in order to truly be able to assess what type of return is fair, opportunities for exploitation should be the focal point of the congressional inquiry, not the length of protection for works of authorship.

Such an approach creates the beneficial byproduct of enhanced copyright exploitation and protection by the copyright holder. If copyright duration were tied directly to available opportunities for exploitation, this would potentially act as an enhanced motivator for copyright holders. For example, suppose Congress was to determine that because of all of the opportunities for exploiting copyrighted works in the technological climate of today, a fair return could be achieved within thirty years from the date of creation of a work. If a copyright holder knew that he or she would be granted a thirty-year monopoly from the date of creation, then that holder may very well act in a proactive manner to ensure that that the work is exploited through as many avenues as possible. The end result of this aggressive exploitation would enhance the probability that more individuals in society

would become exposed to the work and would thereby learn or otherwise take something from it.

B. Exploratory Expedition to Assess Copyright Needs

The Problem: Congress erroneously set out to strengthen incentives to create new and derivative works by extending copyright term duration for all existing and future works. This was ostensibly done because the promise of additional income would (1) increase existing incentives, and (2) provide additional income to create new works. There is no indication that there is any need for increased incentives and there is nothing within the CTEA itself that will ensure additional income is applied to the creation of new works.

A Potential Solution: Congress should have refrained from simply setting out to strengthen anything without first assessing whether such a need exists. Instead, Congress should have used its vast and unbridled resources to determine whether strengthening is at all necessary.[125] Congress frequently has studies conducted before legislation is passed or requires simultaneous studies to be conducted on how legislation is affecting various segments of society. In fact, in the copyright realm, Congress recently directed the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to prepare a report for Congress examining the effects of the amendments made by Title 1 of the Digital Millennium Copyright Act.[126] Congress thought this was necessary so that it could have a better grasp on technological advancements and how they would in-

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125. *See* Hamilton, *supra* note 117, at 658 (observing that "[a]s so often happens, with the duration extension issue, Congress has not exercised its fact finding muscle. It is not as though Congress lacks expertise on copyright issues. The Copyright Office is part of the legislative branch, and could easily and appropriately serve as the base for such fact finding.").

126. 17 U.S.C. § 1201(a)(1)(C) provides, in relevant part, that

> the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works.

See also 15 U.S.C. § 7005 of the Electronic Signature in Global and National Commerce Act, which required that

> [w]ithin 12 months after June 30, 2000, the Secretary of Commerce shall conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the United States Postal Service and private express mail services. The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 12-month period.

terplay with the provisions of the DMCA.[127] Congress should have engaged in a similar expedition by requiring that an examination be conducted as to how the proposed copyright term extensions would strengthen existing incentives and affect the various interests involved.

Additionally, Congress should not have simply enacted a term extension law that did not require something in return from copyright holders. Because one of the rationales for strengthening incentives was to ensure that the added income would be used to subsidize the creation of new works,[128] Congress should have set up a provision within the CTEA that would have facilitated such an outcome. Congress should have explored the possibility of instituting some procedure that would have made copyright owners responsible for tracking the monies received from copyright extension and accounting for the expenditure of those funds. The following example illustrates the merits behind such an accounting procedure. Suppose the heirs of F. Scott Fitzgerald were able to take advantage of an additional twenty years of copyright protection for *The Great Gatsby*.[129] If those heirs were not required, or at least encouraged, to apply the funds received to some sort of artistic endeavor, then neither of the congressional goals behind the "strengthening incentives" rationale are satisfied. Instead, the heirs of F. Scott Fitzgerald are simply given a bonus twenty-year income stream without any burden whatsoever. Such a result is of questionable constitutionality,[130] and it does nothing to ensure that copyright term extension will greatly enrich the public domain with the creation of new works.[131]

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127. *See id.*

128. *See* S. REP. NO. 104-315, at 13.

129. In fact, the heirs of Fitzgerald are going to benefit from the provisions of the CTEA. *The Great Gatsby* was slated to fall into the public domain in the year 2000. With the additional extensions provided by the CTEA, Gatsby will survive until 2020. *See* Brigid McMenamin, *Mickey's Mine!*, at http://www.public.asu.edu/~dkarjala/commentary/Mcmenamin8-23-99.html (last visited July 15, 2002).

130. Many scholars believe that extending copyright protection for existing works is unconstitutional because such an extension does not "promote" anything. Because the U.S. Constitution vests Congress with the power to "promote" the arts and sciences, retrospective copyright protection is unconstitutional. *See* Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 59 (2000) (arguing that legislation extending a particular copyright is unconstitutional because it seems unlikely to "promote the progress of science and the useful arts" and undercuts any constitutionally significant notion of "limited time.").

131. The Librarian of Congress and the Copyright Office are experienced at dealing with a variety of financial issues attendant to the copyright licensing process. *See, e.g.*, 37 C.F.R. § 251.2 (establishing a procedure for the Librarian to "appoint and convene a Copyright Arbitration Royalty Panel" for such purposes as making "determinations concerning royalty rates and terms for the subscription digital audio transmissions compulsory license"); 37 C.F.R. § 252.1 (establishing a procedure "whereby parties claiming to be entitled to cable compulsory license royalty fees shall file claims with the Copyright Office"); 37 C.F.R. § 253.1 (establishing "terms

Certainly these solutions do not contain an exhaustive recitation of the ways to remedy the maladies of the CTEA's strengthing rationale. In fact, at the end of the day these solutions might prove to be inadequate or ineffective at furthering the congressional purpose of strengthening incentives to create new and derivative works. These options, or something akin to them, should have been explored before Congress approved a twenty-year copyright term extension for all existing and future works. Had these options been pondered, perhaps the end result would have looked different from the unfettered bounty of blanket copyright term extension.

C. *Implementing a* Quid Pro Quo

The Problem: Congress provided copyright extension in part so that the entertainment industry would have incentive to transfer existing copyrighted material into nonperishable media.[132] The CTEA, however, provides no mechanism to ensure that the works in perishable media are transferred into an indelible format. It is theoretically possible, therefore, that even though copyright extension has been granted for these works, they might still remain in perishable formats at the end of that extension period.

A Potential Solution: Congress could have included a provision in the CTEA that allowed copyright term extension for existing works only if those works were transferred into some sort of indelible format. If Congress were truly interested in ensuring that preservation of works resulted from the copyright extensions, Congress could have been much more swift than providing a wholesale extension of copyright for the masses. Congress could have tailored the provisions of the CTEA to ensure that the copyright extensions actually produced tangible results.

When Congress truly wants to accomplish a certain result in the arena of artistic endeavors, it is not bashful or reticent to tie certain requirements to statutory benefits. Take, for instance, the National Foundation on the Arts and the Humanities Act.[133] Under that Act, the federal government acts as an artistic benefactor to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the re-

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and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 1998 and ending on December 31, 2002"). Thus, a provision that established some sort of copyright term extension accounting procedure might not be all that more difficult to administer than the current administrative procedures.

132. *See* S. REP. NO. 104-315, at 12.

133. *See* 20 U.S.C. § 951 *et. seq.*

lease of . . . creative talent."[134] However, there are certain requirements that recipients must satisfy before they are awarded federal funds.[135] The provisions of that Act do not simply provide a benefit without exacting something from the creator.[136] The CTEA, on the other hand, provides a twenty-year benefit without ensuring that works are ultimately preserved for future consumption and preservation. Were Congress to make extended copyright duration contingent on works being preserved in an indelible format, this would at least help ensure that some social benefit results from extended protection.

VI. CONCLUSION

It is impossible to know what effect the CTEA's twenty-year deferment will have on the public domain. What is known is that the CTEA is based upon a wayward notion of copyright that seeks to maximize the returns to the copyright holders. Such a scheme is of questionable legitimacy given the U.S. Constitution and the U.S. Supreme Court's previous decrees. Further, Congress set sail for the land of copyright term extensions without thoroughly analyzing and assessing whether such extensions were necessary for authors or ultimately beneficial for the greater public welfare. The ship can still be righted, but the jetsam need first be abandoned. Congress could amend the CTEA and ensure that copyright duration is based on a practical assessment of what opportunities await the copyright holder. Congress could also retool the various provisions of the statute to ensure that the goals of preserving and creating incentives would be more likely to occur. Were Congress to make these adjustments, we would at least be able to go forward, knowing that there is a greater probability that the public good will not be compromised.

134. 20 U.S.C. § 951(7) (2000).

135. *See id.* § 954(i). For example, an artist or entity that seeks federal funding must give "a detailed description" of the work, provide "interim reports" describing the progress of the work, and give assurances that the work will "meet the standards of artistic excellence and artistic merit" required under the Act. *Id.*

136. *See id.*