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UNCHAINING RICHELIEU'S MONSTER: A TIERED REVENUE-BASED COPYRIGHT REGIME

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ABSTRACT

This Article proposes a tiered revenue-based copyright regime, which would require copyright holders to select one of two different copyright terms. The first tier would provide a fixed, nonrenewable copyright term of 10-14 years, while the second tier would offer a one-year copyright term that could be indefinitely renewed as long as the work is successful enough to meet or exceed a revenue threshold.

A tiered revenue-based copyright regime will break the gridlock between copyright proponents lobbying for longer copyright terms and public domain advocates insisting that terms are already remarkably excessive. It will entice Hollywood to set orphans free and to accept dramatically reduced copyright terms for most artwork in exchange for gaining longer protection for the most successful commercial works. It will require all artists seeking copyright protection to register each work and will immediately transfer all works that are not registered—most newly created noncommercial art and all existing orphans—to the public domain. It will increase the speed at which the overwhelming majority of commercial art moves into the public domain, because artists selecting the first tier would have only 10-14 years of copyright protection—a much shorter term than current law provides. Moreover, it will free much of the commercial art in the second tier within one or a few years of copyright registration, for the revenue-based annual renewal system will be a final filter to ensure that only the most profitable works continue to stand aloof from the commons.

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INTRODUCTION

> Because a knowledge of letters is entirely indispensable to a country, it is certain that they should not be indiscriminately taught to everyone. A body which had eyes all over it would be monstrous, and in like fashion so would be a state if all its subjects were learned; one would find little obedience and an excess of pride and presumption. The commerce of letters would drive out that of goods, from which the wealth of the state is derived.
>
> —Cardinal Richelieu[1]

Unlike Cardinal Richelieu, we do not actively suppress education in the hopes of preserving the public's obedience and the state's wealth. Instead, we stifle individual creativity and our society's cultural vibrancy by maintaining an excessively restrictive copyright regime alleged to spur economic growth. But the notion that indiscriminate increases in copyright protection will further stimulate our economy is a myth. Numerous respected scholars have shown that almost all of the economic benefits from copyrights accrue early on in

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1. CARDINAL RICHELIEU, THE POLITICAL TESTAMENT OF CARDINAL RICHELIEU 14-15 (Henry Bertram Hill trans., Univ. of Wisc. Press 1961) (1687). Richelieu continues,

> It would ruin agriculture, the true nourishment of the people, and in time would dry up the source of the soldiery, whose ranks flow more from the crudities of ignorance than from the refinements of knowledge. It would, indeed, fill France with quibblers more suited to the ruination of good families and the upsetting of public order than to doing any good for the country. If learning were profaned by extending it to all kinds of people one would see far more men capable of raising doubts than of resolving them, and many would be better able to oppose the truth than to defend it. It is for this reason that statesmen in a well-run country would wish to have as teachers more masters of mechanic arts than of liberal arts.

Id.

almost all copyright terms.[2] Professor James Boyle observes:

> 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.[3]

Nobel laureates George A. Akerlof, Kenneth J. Arrow, James M. Buchanan, Ronald H. Coase, and Milton Friedman and 12 other economists submitted an Amici Curiae in Support of Petitioners in *Eldred v. Ashcroft*[4] showing that the copyright term extensions enshrined in the 1998 Sonny Bono Copyright Term Extension Act[5] would only increase an author's expected income from a book, assuming the author lives for 30 years after the book's release, by no more than roughly 0.33% or one-third of one percent.[6] At this point in the history of United States copyright, the returns from extending copyright protection have essentially vanished. In his dissent in *Eldred*, Justice Breyer states, "The present extension will produce a copyright period of protection that, even under conservative assumptions, is worth more than 99.8% of protection *in perpetuity*."[7]

This push to extend copyright does not make sense given the historical data. When copyright owners were allowed to renew their holdings after 28 years, roughly only 15% did so in fiscal 1959.[8] Similarly, fewer than 11% of the "copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term, even though the cost of renewal was small."[9] At least two reasons explain these low figures. First, as mentioned above, demand for most copyrighted artwork exists primarily at its release—not decades later. Second, a dollar earned 40 or 50 years from now is worth only a few pennies today; the longer the copyright terms, the smaller the financial incentive to create with each additional year of protection.

Moreover, copyright protection appears to be little more than an

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2. HM TREASURY, GOWERS REVIEW OF INTELLECTUAL PROPERTY, 2006, at 52 (U.K.) *available at* http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf.

3. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 11 (2008).

4. 537 U.S. 186 (2003) (affirming the legitimacy of the 20-year extension to copyright's duration).

5. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

6. Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 10-12, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

7. Eldred v. Ashcroft, 537 U.S. 186, 255-56 (2003) (Breyer, J., dissenting).

8. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDY NO. 31, at 187 (Comm. Print 1961) (prepared by Barbara Ringer), *available at* http://www.copyright.gov/history/studies/study31.pdf.

9. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 212 (2003).

afterthought for many artists, not a critical factor in deciding whether to create. When registration was a prerequisite for protection prior to 1909, scores of artists never even sought to obtain copyright for their works. For example, in the United States between 1790 and 1800, of the over 21,000 works published, only 648 works were registered in order to obtain copyright protection[10]—authors only bothered to seek copyright on less than four percent of works created. Examining registration and renewal statistics together, it seems unlikely that potential artists will be motivated to create by the prospect of receiving pennies in copyright royalties decades into the future.

The insignificant added benefit to copyright holders of extending copyright terms does little to increase the incentives that artists face in deciding whether and how much to create.[11] William Patry states, "[I]n my 27 years of practicing copyright law, I have never seen a study presented to Congress that even makes a stab at demonstrating that if the proposed legislation is passed, X number of works that would not have been created will be."[12] In fact, Kai-Lung Hui and I.P.L. Png provide empirical evidence that the Sonny Bono Act's extension of copyright did not increase the creation of United States movies.[13]

Instead, such copyright term extensions leave society with millions of copyright orphans—artwork that is commercially unavailable and without a known copyright owner. A majority of film and book holdings are estimated to be orphan works.[14] By definition, no benefit arises from the protection of these orphans because there are no known copyright holders to receive royalties. Yet millions of orphan works are caught in the equivalent of legal purgatory, with society bearing the harm of being unable to read, listen to, or watch them for free. The effect of the dramatic increase in the length of copyright over the last few decades

> is simply to toll, or delay, the passing of works into the public domain. This latest extension means that the public domain will have been tolled for thirty-nine out of fifty-five years, or 70 percent of the time since 1962. Thus, in the twenty years after the Sonny Bono Act, while one million patents will pass into the public domain, zero copyrights will pass into the public domain by virtue of the expiration of a copyright term.[15]

Such lack of access is not a well functioning market, nor is it in line with the spirit of the Constitution's Progress Clause.

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10. William J. Maher, *Copyright Term, Retrospective Extension, and the Copyright Law of 1790 in Historical Context*, 49 J. COPYRIGHT SOC'Y U.S.A. 1021, 1023-24 (2002).

11. *Id*.

12. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 62 (2009).

13. *See generally* Kai-Lung Hui & I.P.L. Png, *On the Supply of Creative Work: Evidence from the Movies*, 92 AM. ECON. REV. PAPERS & PROC. 217 (2002).

14. BOYLE, *supra* note 3, at 9 (citing reports by the Center for the Study of the Public Domain at Duke University School of Law for film holdings).

15. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 134-35 (2004).

Not only does society suffer from not having legal access to a vast collection of existing artwork, but it also loses potential artistic creations; for borrowing from the past can be essential to the creative process, and uniformly long copyright terms make it harder for artists to borrow. Copyright attempts to mediate between two supposed goods: facilitating the "free flow of ideas, information and commerce" and motivating authors to produce by using economic incentives.[16] Extending copyright terms further tightens these constraints and means that "no one can do to the Disney Corporation what Disney did to the Brothers Grimm."[17] This is anything but a minor limitation. Shakespeare and Milton are but two authors of many who created great works unencumbered by such constraints.[18] Individual creativity and our society's culture are significantly impeded not only because copyright terms on works are too long and too broad but also because the continued protection of copyright orphans prevents artists from uncovering such artwork and presenting it anew to the culture. The rediscovery of abandoned works is much more powerful now than even 15 years ago because we have a medium that makes widespread availability almost costless—the Internet.

Numerous other harms result from the current copyright regime and the relentless push to extend terms. Excessively long copyright terms impair free speech principles.[19] By restricting the commons and hence reducing the diversity in sources of information, they enable media to more easily selectively disclose information or skew the nature of what is communicated.[20] Further, a copyright system with exceedingly long terms limits the ability of citizens to inform themselves, because such terms increase the "power over the price of information . . . in the hands of intellectual property owners."[21]

Commercial entities whose revenue derives largely from copyright—what I am calling here "Big Copyright"[22]—have a long history of lobbying for copyright term extensions. Thomas Babington Macaulay and others successfully fought off an attempt to extend copyright over a century and a half ago in the United Kingdom. In an 1841 speech to the House of Commons,

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16. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

17. Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 764 (2003). Disney has borrowed many stories and characters from the Grimm brothers, including, for example, Pinocchio and Cinderella.

18. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 2 (1993).

19. *See generally* Neil W. Netanel, *Copyright and the First Amendment; What* Eldred *Misses—and Portends*, *in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths & Uma Suthersanen eds., 2005).

20. Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1267 (2003).

21. PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 4 (2002).

22. Big Copyright does not include all of corporate America. Numerous multinationals, like consumer electronics firms, in fact have traditionally come into conflict with Big Copyright in regard to copyright policy.

Macaulay vividly and skillfully described the costs of extending copyright well beyond the death of artists:

> Dr. Johnson died fifty-six years ago. If the law were what my honourable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grandson of a third bookseller, who had bought the copyright from Black Frank, the Doctor's servant and residuary legatee, in 1785 or 1786. Now, would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. I firmly believe that a hundred years ago, when he was writing our debates for the Gentlemen's Magazine, he would very much rather have had twopence to buy a plate of shin of beef at a cook's shop underground.[23]

It has been recognized that the recent successful campaign for an additional 20 years of copyright protection was lobbied for,[24] depending on one's perspective, by the likes of Disney to propagate their own economic welfare, not the cultural, political, and economic interests of society at large.[25] In fact, critics deride the legislation as the "Mickey Mouse Protection Act."[26] Even pro-market publications like *The Economist* talk of "absurdly long copyright periods."[27] The publication states, "Starting from scratch today, no rational, disinterested lawmaker would agree to copyrights that extend to 70 years after an author's death, now the norm in the developed world."[28]

Some have argued that "corporate capture can only be part of the explanation" for the push for longer copyright terms; other factors like the "honest delusion" of "maximalism," which equates more copyright with more innovation, and "authorial romance," which equates invention with absolute originality, are partially to blame.[29] While this is inevitably true, citizens' mistaken precepts do not mean that anyone but Big Copyright hires an army of lobbyists to push for extended copyright terms. Further, through public

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23. Thomas Babington Macaulay, speech delivered in the House of Commons (Feb. 5, 1841), *in* 8 THE LIFE AND WORKS OF LORD MACAULAY: COMPLETE IN TEN VOLUMES 200-01 (Edinburgh ed., Longmans 1897).

24. Joyce Slaton, *A Mickey Mouse Copyright Law?*, WIRED, Jan. 13, 1999, *available at* http://www.wired.com/politics/law/news/1999/01/17327.

25. For other reasons to possibly dislike Disney, see generally CARL HIAASEN, TEAM RODENT: HOW DISNEY DEVOURS THE WORLD (1998).

26. *Copyrights: A Radical Rethink*, ECONOMIST, Jan. 23, 2003, at 15, *available at* http://www.economist.com/node/1547223.

27. *Digital Publishing: Google's Big Book Case*, ECONOMIST, Sept. 5, 2009, at 18.

28. ECONOMIST, *supra* note 26.

29. James Boyle, *Deconstructing Stupidity*, FIN. TIMES (Apr. 21, 2005), *available at* http://www.ft.com/cms/s/2/39b697dc-b25e-11d9-bcc6-00000e2511c8.html.

relations campaigns Big Copyright deliberately perpetuates misleading justifications of the theory underlying copyright law. Lewis Hyde describes how the Motion Picture Association of America (MPAA) persuaded Californian legislators to mandate "that all public schools must develop an 'education technology' plan" that instructs kids on copyright law through the distorted lens of Big Copyright's willful misunderstanding.[30] Even the Boy Scouts in Los Angeles offers a "Respect Copyright" merit badge; "the MPAA wrote the curriculum for that, too."[31] These campaigns "teach a series of simplifications, even falsehoods, when it comes to the ownership of art and ideas," for example, one lesson falsely states that "intellectual property is no different than physical property."[32]

This extension of copyright terms has been but a part of the larger expansion of intellectual privilege in the last few decades,[33] which some have deemed to be another "enclosure movement."[34] Not only has the length of copyright protection increased—"tripled in the past thirty years"[35]—but also penalties for violating copyright have become more draconian.[36] In addition, what is protected under copyright was expanded in the fields of software,[37] architectural works,[38] and choreographed works.[39] Copyright holders' power to stop derivative uses of their art has increased, and "copyright's reach has changed, as every action becomes a copy and hence presumptively regulated."[40] Further, it has also become generally illegal to circumvent digital rights management (DRM) technologies.[41]

The Constitution states that Congress shall have power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[42] It goes without saying that the phrase "for limited times" is an explicit Constitutional limitation to the duration of copyright. While the initial copyright term for new works was rather modest—under the first copyright law in the United States in 1790, 14 years plus an option to renew for an additional

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30. LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP 6-7 (2010).

31. *Id.* at 7.

32. *Id*. at 8.

33. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1042 (2005).

34. *See generally* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

35. LESSIG, *supra* note 15, at 161.

36. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

37. 17 U.S.C. § 117 (2000).

38. 17 U.S.C. § 102(a)(8) (2000).

39. 17 U.S.C. § 102(a)(4) (2000).

40. LESSIG, *supra* note 15, at 161.

41. Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1205 (2000).

42. U.S. CONST. art. I, § 8, cl. 8.

14 years if one survived—the long-term upward tick in copyright terms is staggering. The next ratchet in term length was to 42 years in 1831, to 56 years (28 years with a renewable option of another 28 years) under the Copyright Act of 1909, to the life of the author plus 50 years (corporate authors—works-for-hire—receiving 75 years from publication) under the Copyright Act of 1976,[43] and then to the life of the author plus 70 years (corporate authors receiving 95 years)[44] in the Copyright Term Extension Act of 1998.

This last act granted copyright extensions not simply to future artwork but to existing artwork, even when the artists who created the pieces are already dead. This change demonstrates that incentives are often irrelevant to the drive to expand terms, since incentives will clearly neither motivate people to do something they have already done nor inspire the dead.[45] More often than not, legislators and judges have not used historical understanding to analyze this upward surge. For example, many countries' borders or forms of government do not survive 70 years, yet copyright terms can easily last for 100-130 years depending on an artist's age when she created a work. In fact, when the United Nations was established less than 70 years ago in 1945, there were only 51 U.N. member nations, compared to 193 in 2011.[46]

Any social justice movement has to decide whether it is strategically worth directly opposing corporate America on a particular point, or whether it should instead formulate a proposal that improves the status quo without upsetting corporate America's prerogatives. The decision whether to fight the giant or search for a policy solution that does not significantly unsettle it depends on numerous factors, including whether the social movement has a practicable plan to improve the status quo and also how much harm corporate America is actually inflicting on society.

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43. Numerous Congressional enactments extended the second term for renewed copyrights that were to expire between September 19, 1962 and December 3, 1976, to the end of 1976. *See* Pub. L No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 86 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); and Pub. L. No. 93-573, §104, 88 Stat. 1873 (1974).

44. For works for hire, the 1976 Act provides either 75 years from publication or 100 years from creation, whichever ends first. The Copyright Term Extension Act lengthened these terms to 95 and 120 years, respectively. Pub. L. No. 105-298, §102, 112 Stat. 2827 (1998).

45. Thomas Jefferson designed the initial United States copyright term to last no longer than the life of the copyright holder. While his 19-year term recommendation, which he calculated using actuarial tables, was never passed, the 14-year provision under the 1790 law, mentioned above, with an option for a second 14-year renewal if the artist was still alive, essentially freed the protected works at the grave of the author. PAUL K. SAINT-AMOUR, THE COPYWRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 125 (2003).

46. UNITED NATIONS, *Member States: Growth in United Nations Membership, 1945-Present*, http://www.un.org/en/members/growth.shtml (last visited Dec. 20, 2012).

Jon Pareles has stated: "Any song that is well enough known to make a takeoff worthwhile has probably already raked in plenty of profits from sales, licensing agreements, sheet music, etc. Sometimes I'm tempted to suggest that any song that has sold more than a million (or maybe two million or five million) copies ought to go directly into the public domain, as if its fans have ransomed it from the copyright holders."[47] I find Pareles's suggestion not only innovative but also appealing—its ransom imagery touches on copyright as a monopoly that was supposedly bargained for with society and hence should be theoretically subject to renegotiation. Yet Pareles's idea obviously provides no enticement to Big Copyright to agree to such a bargain. If the public fought a protracted, rough battle, it might prevail with Pareles's suggestion as law, yet even so such a prize would not get society what is more important—free and quick access to the over 99% of less successful commercial and noncommercial artwork that is currently restricted by copyright. Further, if as a society we want rapid and marked improvement on the issue of copyright's length, we need to attract, not repel, Big Copyright.

In the words of Alexander Bickel, "No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden."[48] Edmund Burke previously expressed a similar sentiment, stating, "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others; and we choose rather to be happy citizens than subtle disputants."[49] Compromise can at least be a necessary evil.

When some of the more prominent copyrights held by Disney once again approach their expiration dates, corporate America will lobby anew for increased copyright terms.[50] The danger of this is, as Professor Peter Jaszi has notably suggested before the Senate Judiciary Committee, that Congress can legislate a perpetual term "on the installment plan."[51] Crusaders against such

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47. Jon Pareles, *Parody, Not Smut, Has Rappers in Court*, N.Y. TIMES, Nov. 13, 1993, *available at* http://www.nytimes.com/1993/11/13/arts/critic-s-notebook-parody-not-smut-has-rappers-in-court.html.

48. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 64 (Yale Univ. Press, 2d ed. 1986).

49. Edmund Burke, On Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* 1 SELECT WORKS OF EDMUND BURKE 221, 278 (E.J. Payne ed., Liberty Fund 1999).

50. Professor Bell has argued that copyright "exhibits means and ends remarkably similar to those of social welfare programs" and that such an analogy can instruct us on "understanding copyright as a statutory mechanism for redistributing rights." Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 229 (2003).

51. *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the S.*

encroachment have an important strategic decision to make: to outright reject further increases in copyright protections or to propose a new copyright system that accommodates both the segment of corporate America that reveres copyright and those of us who desire a culture less restricted by it.

Taking this second approach, I propose a tiered revenue-based copyright regime.[52] It would give the "one-in-a-million" copyright holder the ability to cash out her lottery ticket, without having to derail our culture. It would do this by presenting all artists with two different copyright terms, which they would have to choose between. The first tier would provide a fixed, nonrenewable copyright term of 10 to 14 years, while the second tier would offer a one-year copyright term that could be indefinitely renewed as long as the work is successful enough to meet or exceed a revenue threshold.

A two-tiered revenue-based copyright regime will break the gridlock between Big Copyright lobbying for longer copyright terms and public domain advocates insisting that terms are already remarkably excessive. It will solve the problem of exceedingly long copyright terms for most artwork in exchange for giving Big Copyright the opportunity to have much longer copyright protection on its most successful commercial works. It will immediately free millions of orphaned works, and its structure will institutionally preclude orphans from reemerging. It will require all artists seeking copyright protection to register each work, and thus keep most noncommercial art in the public domain. It will increase the speed at which the overwhelming majority of commercial art moves into the public domain, because artists selecting the first tier would have only 10 to 14 years of copyright protection—a much shorter term than current law provides. Moreover, it will free much of the commercial art in the second tier within one or a few years of copyright registration, for the revenue-based annual renewal system will be a final filter to ensure that only the most profitable works continue to be excluded from the commons.

This proposal addresses only copyright length, not other ills plaguing copyright like its excessive breadth and depth. Further, the proposed copyright regime is limited to artwork—e.g., I do not consider copyright on software. Also, it is assumed that if a tiered revenue-based copyright regime is implemented, the United States would have to withdraw from at least the Berne Convention, which compels all signatories to subscribe to a minimum copyright term of the life of the artist plus 50 years and requires that no formalities be placed on artists.[53]

Comm. on the Judiciary, 104th Cong. 72 (1995) (statement of Professor Peter Jaszi, American University, Washington College of Law).

52. There is a different and unrelated proposal for using tiers within copyright law based on the originality of copyrighted material. *See generally* Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009).

53. Landes, Posner, and I do not see withdrawal from Berne as an insurmountable impediment. Landes and Posner make explicit the need to withdraw from Berne for their proposed indefinitely renewable copyright scheme: "This would require the United States to

Part I expounds on the details and advantages of a tiered revenue-based copyright system. It also discusses numerous ways to modify such a regime. Part II demonstrates the advantages of such a proposal over other proposed revisions to the length of copyright's term. Part III addresses six potential objections to a tiered revenue-based copyright regime. Finally, Part IV concludes by arguing that the proposed regime represents a significant step in our progress toward a more expansive and vibrant public domain.

I. THE PROPOSAL

In the tiered revenue-based copyright regime,[54] copyright holders would have to select one of two tiers or tracks of copyright protection for their artwork.[55] Both tiers would require registration of artwork, preferably online given the lower transaction costs and ease with which the public can check on the copyright status of registered works. Online registration might also encourage the public to track the revenue claims of copyright holders.[56]

Tier One would grant a work automatic copyright protection for a set period of time—e.g., 10 or 14 years—without any option to renew the copyright. Protection for 10 years is reasonable because, as already stated by Boyle, this is the upper range of protection from which almost all copyrighted artwork will bring in revenue. The suggested alternative of 14 years is simply a historical nod to the length of the initial term in United States copyright law, minus the possibility of a 14-year extension. While such relatively short terms might seem radical to some, *The Economist* has proposed going back to this original term from 1790.[57] A third possible term length would be 20 years to align copyright terms with patent terms. The point of Tier One is to introduce

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withdraw from the Berne Convention . . ." LANDES & POSNER, *supra* note 9, at 215 n.15. They cannot see such withdrawal as insurmountable or they would not have suggested such a scheme. *But see* Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 552 (2004).

54. In researching another article, I stumbled across the work of Hala Essalmawi from Egypt. She tangentially mentions using revenue as a determinant of copyright length. Hala Essalmawi, *Options and Alternatives to Current Copyright Regimes and Practices*, *in* ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 627, 630 (Gaëlle Krikorian & Amy Kapczynski eds., 2010).

55. This regime would also mandate altering when copyright protection generally starts to some formulation of publication or registration, again harking back to previous copyright requirements.

56. This last possible function is similar to Beth Simone Noveck's idea of peer-to-patent, allowing the public to comment on the appropriateness of patent applications. BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 3-15 (2009).

57. ECONOMIST, *supra* note 26, at 15. Yet, "to provide any incentive at all, more limited copyrights would have to be enforceable, and in the digital age this would mean giving content industries much of the legal backing which they are seeking for copy-protection technologies." *Id*.

copyrighted works into the public domain as soon as possible.

Tier Two would grant only one year of automatic copyright protection but would allow the protection to be renewed indefinitely for a fee as long as the copyrighted work meets or exceeds a revenue threshold. Every year the copyright holder would have to submit verification that the work meets or exceeds the revenue benchmark in order to obtain another year of copyright protection. Different revenue benchmarks could exist depending on the type of work copyrighted.

The structure of Tier Two would include five additional key features. First, the revenue threshold would be set high—i.e., the revenue that a copyrighted work would have to produce each year would be substantial. Second, the revenue threshold for each copyright would increase from year to year at a rate higher than the inflation rate. For example, the adjusting revenue threshold could be set to increase at the rate of inflation plus two percent each year.[58] Third, copyright holders would have to pay a substantial fee to renew their copyright if it meets the vigorous revenue requirements. Fourth, the renewal fee would be ever increasing at a rate higher than inflation, e.g., it could be benchmarked to the rate of inflation plus two percent per year. Fifth, a limit would be placed on the percentage of works copyrighted through Tier Two that could be renewed each year. For example, a maximum of one-tenth of one percent or one percent of all copyrighted material could be renewed each year. If more than one-tenth of one percent or one percent of copyrights meet the revenue threshold for renewal in a given year, the threshold would automatically increase. If this occurs, only the highest revenue-generating copyrighted works would continue to receive copyright protection. The number of works in Tier Two that are allowed to retain their copyright each year could be either a percentage of all current copyrighted works or a percentage of only the works in Tier Two. The latter restriction would make it more difficult for a work to be renewed.

Tier Two would cater to large business enterprises that are confident that they have just created the next Mickey Mouse. Tier One would most likely cater to the vast majority of creators who are risk-averse, doubtful that they could satisfy the revenue benchmark of Tier Two, or not willing to pay the substantial annual renewal fees.

The value of having two tiers in a copyright regime is similar to the value of the legal formalities that artists formerly fulfilled in order to obtain copyright protection. Both ideas attempt to filter art into different categories in order to get more works into the public domain more quickly. Since the proposed tiered revenue-based copyright system includes a registration requirement for all works, most noncommercial works would immediately flow into the commons,

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58. This proposal is similar to the idea "that the older a copyrighted work is, the greater the scope of fair use should be." Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002).

and copyright orphans would be kept to a minimum. Plus, a tiered regime not only would distinguish between commercial and noncommercial art, but also it would divide commercial art into two tiers to accelerate the speed at which most of it enters the public domain. The two tiers would allow commercial artists to judge how risk-averse they are in their calculations of the likely revenue from their artwork. For example, if an artist has doubts about the earning potential of a piece, she would likely opt for the nonrenewable protection provided through Tier One. This calculus would partly determine how quickly commercial art enters the public domain, depending on which tier the artist chooses.

The revenue-based structure of Tier Two is attractive not only because it would move more commercial artwork more quickly into the public domain, but also because it would make the consuming public the final arbiter of copyright protection.[59] The public's implicit consent to renewal would come in the form of a good number of people having enough interest in a copyrighted work to pay for access to it. For this reason, a revenue-based renewal system is more likely to be deemed constitutional than a copyright system that allows for unlimited renewals based simply on the actions of the copyright holder, as with Landes and Posner's proposal for the automatic unlimited renewal for a fee, discussed below.

A tiered revenue-based copyright regime could be modified in numerous ways. First, the number of years of automatic copyright protection under Tier One could be reduced or extended to ensure that copyright reform is significant yet feasible within the current climate.

Second, there could be more than two tiers. For example, a Tier Three could grant five to seven years of automatic copyright protection, plus annual renewal into perpetuity as long as the copyrighted work meets a revenue benchmark. Of course, Tier Three's revenue benchmarks would be significantly higher than those of Tier Two. Tier Three would provide more upfront security to copyright holders but at the cost of greater difficulty in renewing because of higher revenue requirements.

Third, the revenue requirements under Tier Two could be timed differently. Instead of having annual revenue benchmarks, Tier Two could have two- or three-year benchmarks.[60] Or the length of time of each successive benchmark

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59. A copyright holder could advertise heavily to boost revenue targets, but she could not buy her way out of the revenue requirements by selling use rights to herself so that she would meet the revenue requirements. This ban would have to include careful restrictions on internal transfer pricing between subsidiaries of conglomerates or possibly not counting such sales. While subsidiary X could generate revenue from its copyright by selling royalties to subsidiary Y, the transaction would not be included in revenue totals determining whether or not copyrights would be renewed.

60. Under such a revision—e.g., a three-year renewal period—the revenue threshold could be formulated in several ways: (1) an average revenue threshold for all three years, (2) a peak threshold whereby the copyright would be renewed if in one of the three years

could steadily increase or decrease over time. For example, the first benchmark period could be one year, the second benchmark period two years, and so on.

Fourth, the annual revenue benchmarks could be set to increase by only the inflation rate instead of a rate higher than inflation, or by a rate that would actually decrease over time—i.e., make benchmarks easier to meet.

Fifth, the registration requirement could be limited to Tier Two, with Tier One being the default option that would automatically apply if an author does not take the affirmative steps to select Tier Two.

Sixth, the renewal fee under Tier Two could be increased to deter strategic copyrighting. Landes and Posner suggest a "stiff renewal fee" because their proposal for "indefinite renewals" is potentially vulnerable to "[a] more serious concern" that "copyright holders might renew their copyrights for strategic purposes, hoping one day to 'hold up' an author who wanted to copy their work. This practice would resemble strategic patenting."[61] Regardless of whether a "stiff renewal fee" ameliorates the problem,[62] a tiered revenue-based copyright system is not likely to be susceptible to such risk because the holder's decision is not the final factor determining renewal.

Seventh, the renewal fee for artwork in Tier Two could be lowered to offset the difficulty of meeting revenue benchmarks. The fee could be nominally constant, without taking inflation into account, over the life of a copyright. Alternatively, the real value of the fee could be held constant—i.e., adjusted for inflation regularly. Or this substantial renewal fee could nominally decrease over time. It could even go in the opposite direction of the trend established for the amount at which the revenue threshold is set.

This proposal to reform copyright is feasible because corporate America can be persuaded to accept a system that offers indefinite copyright protection on its blockbuster creations for as long as such an arrangement increases its overall profits. The motivation behind a tiered revenue-based copyright regime is to give Big Copyright what we know it wants—the promise of possibly infinitely extendable copyrights—in exchange for increasing the scope and vitality of the public domain. Should the open commons movement care whether Mickey Mouse is perpetually copyrighted as long as the copyright term is significantly shortened for most works, the problem of orphan works is solved, the fair use doctrine is broadly construed, and substantial similarity provisions are narrowly tailored? Lessig thinks not.[63] Even if we should, the current regime is suboptimal because it ensures that Big Copyright will always demand longer copyright terms, paralyzing society under a one-size-fits-all copyright regime. A tiered revenue-based copyright system would dissolve corporate America's insistence on a monolithic copyright system.

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revenue exceeds the threshold, or (3) an annual revenue threshold for each of the three years.

61. LANDES & POSNER, *supra* note 9, at 221.

62. *Id*.

63. LESSIG, *supra* note 15, at 221.

II. ADVANTAGES OVER OTHER PROPOSED REVISIONS TO THE COPYRIGHT TERM

The benefit of a tiered revenue-based copyright system is that it dramatically expands the public domain without trampling on the toes of Big Copyright. Numerous other schemes attempt to do the same: The Public Domain Enhancement Act; the Shawn Bentley Orphan Works Act of 2008 and the Orphan Works Act of 2008; Sprigman's reformalization of copyright proposal; and the indefinitely renewable copyright regime suggested by William Landes and Richard Posner.[64]

A. *Public Domain Enhancement Act*

The proposed Public Domain Enhancement Act,[65] now dead, was a practical attempt to lessen the harm brought on by exceedingly long copyright terms. The bill would have introduced into the public domain abandoned copyrighted works after 50 years by requiring copyright holders to pay a registration tax of $1 "due 50 years after the date of first publication or on December 31, 2006, whichever occurs later, and every ten years thereafter until the end of the copyright term."[66]

The MPAA ultimately opposed this act on what Professor Lessig states were "embarrassingly thin" grounds.[67] He goes on to argue that the underlying reason for such opposition was an

> effort to assure that nothing more passes into the public domain. It is another step to assure that the public domain will never compete, that there will be no use of content that is not commercially controlled, and that there will be no commercial use of content that doesn't require *their* permission first. . . . Their aim is not simply to protect what is theirs. *Their aim is to assure that all there is is what is theirs*. . . . [T]hey fear the competition of a public domain connected to a public that now has the means to create with it and to share its own creation.[68]

The Public Domain Enhancement Act was much better than the status quo, but it was neither as progressive nor as palatable as a tiered revenue-based copyright regime.

My proposal is more progressive because it would more quickly move

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64. This list is not meant to be exhaustive.

65. H.R. 2408, 109th Cong. (2005).

66. Cong. Research Service, *H.R. 2408 (109th): Public Domain Enhancement Act Official Summary*, http://www.govtrack.us/congress/bill.xpd?bill=h109-2408&tab=summary (last visited Oct. 31, 2012). To avoid violating the Berne Convention, this requirement would have applied only to copyright holders of art created by American artists. Article 5(2) of the Berne Convention only prohibits a signatory state from imposing formalities on foreign authors. Berne Convention for the Protection of Literary and Artistic Works, Paris Act art. 5(2), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

67. LESSIG, *supra* note 15, at 253.

68. *Id*. at 255-56.

most artwork into the public domain. The registration requirement would immediately free all orphans and most noncommercial creations, while the shorter terms and the revenue requirements would free a substantial portion of commercial artwork much more rapidly.

Further, my proposal would have a better chance than the Public Domain Enhancement Act of getting Big Copyright to cooperate with those desiring a more open commons, because it offers the incentive of much longer terms on the most successful commercial artwork. It is impossible to know whether Big Copyright would view such an enticement as attractive enough to overcome its desires to keep the public domain debilitated and orphan works locked in legal limbo, yet there is cause to be optimistic. First, most copyright orphans have been abandoned for a reason—they either were never commercially successful or have already outlived any commercial usefulness. Second, Big Copyright's successful commercial art almost by definition has been more successful than copyright orphans, from a market perspective. Third, if orphans are freed, roughly two groups could make use of the material: Big Copyright and amateurs or individual creators. Big Copyright competes with itself routinely and there is no reason why any one firm in Hollywood would benefit substantially more than any other in being able to potentially exploit orphans that have been released into the public domain. At the same time, Big Copyright cannot truly fear that amateur or individual artists would use such newly freed orphans more effectively than Hollywood itself.

B. *Shawn Bentley Orphan Works Act of 2008 & Orphan Works Act of 2008*

The Shawn Bentley Orphan Works Act of 2008[69] proposed, among other things, to significantly reduce remedies, under certain circumstances, for infringement of orphan works. While it passed the Senate, a similar House bill, the Orphan Works Act of 2008, died.[70]

The Shawn Bentley Orphan Works Act of 2008 tried to limit "the remedies in a civil action brought for infringement of copyright in an orphan work, notwithstanding specified provisions and subject to exceptions, if the infringer meets certain requirements."[71] These conditions included "perform[ing] and document[ing] a reasonably diligent search in good faith to locate and identify the copyright owner before using the work" and, if the copyright holder was known, providing attribution to her.[72] Compensation would be restricted to

69. S. 2913, 110th Cong. (as passed by Senate, Sept. 27, 2008).

70. H.R. 5889, 110th Cong. (2008).

71. Cong. Research Service, *S. 2913 (110th): Shawn Bentley Orphan Works Act of 2008 Official Summary*, http://www.govtrack.us/congress/bill.xpd?bill=s110-2913&tab=summary (last visited Oct. 31, 2012).

72. *Id*.

reasonable compensation for the copyrighted artwork. No compensation would be necessary if the use was by a nonprofit institution and was "performed without any purpose of commercial advantage and is primarily educational, religious, or charitable in nature."[73]

Like the Public Domain Enhancement Act, both orphan works acts had real promise in attempting to increase access to copyright orphans, yet not as much as a tiered revenue-based copyright system. Neither orphan works act aspired to reduce the length of copyright: each simply aimed to reduce the potential cost of using orphan works, if one follows the procedures within the proposed acts. A tiered revenue-based copyright regime is superior to both orphan acts on the same three grounds discussed above with regard to the public domain act: (a) it gets the vast majority of noncommercial artwork into the public domain much more quickly, (b) it also moves more commercial artwork into the commons more rapidly, and (c) it has a greater chance of enticing, not antagonizing, Big Copyright because it offers Hollywood a substantial incentive in the form of much longer copyright terms on the most successful works.

C. *Sprigman's Reformalization of Copyright*

Christopher Sprigman has argued that the reformalization of copyright by creating new-style formalities would allow for substantial reform to "take place without damaging the interests of copyright owners who would otherwise have strong incentives to oppose the creation of a less restrictive copyright regime."[74] He writes:

> The simplest solution would be to preserve formally voluntary registration, notice, and recordation of transfers (and reestablish a formally voluntary renewal formality) for all works, including works of foreign authors, but then incent compliance by exposing the works of noncompliant rightsholders to a "default" license that allows use for a predetermined fee. The royalty payable under the default license would be low. Ideally, the royalty to license a work that a rightsholder has failed to register . . . should be set to approximate the cost of complying with these formalities (i.e., the total cost of informing oneself about the details of compliance and then satisfying them).[75]

Sprigman argues that such a reform would "ease[] access to commercially valueless works for which protection (or the continuation of protection) serves no purpose and [would] focus[] the system on those works for which protection is needed to ensure that the rightsholder is able to appropriate the commercial value of the expression."[76]

Sprigman's new-style formalities reform is a reasoned policy option that should be seriously considered. It has at least one benefit over a tiered revenue-

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73. *Id*.
74. Sprigman, *supra* note 53, at 568.
75. *Id*. at 555.
76. *Id*.

based copyright regime: Sprigman's view that the Berne Convention would permit such new formalities, though he admits "there are arguments both ways."[77] While his reform would improve access to commercially unsuccessful work, it would not immediately place it into the public domain like a tiered revenue-based copyright system would. My proposal opens the door to bringing much more commercial artwork into the public domain much more quickly for two reasons. First, the nonrenewable term of Tier One would free the vast majority of registered artwork within 10 to 14 years. Second, artwork registered under the annual renewal system of Tier Two would also quickly enter the commons if it fails to meet the revenue thresholds necessary to maintain copyright protection. This would especially be the case if there is a yearly percentage cutoff as to how much commercial artwork could continue to be protected.

D. *Landes & Posner's Indefinitely Renewable Copyright Regime*

Testifying in 1906 before Congress against the need for copyright term limits, Samuel Clemens, a.k.a. Mark Twain, said, "There is only about one book in a thousand that can outlive forty-two years of copyright. Therefore why put a limit at all? You might just as well limit a family to 22. It will take care of itself."[78] Following in the footsteps of Twain, Landes and Posner propose a copyright regime of indefinitely renewable copyrights in which copyright holders could pay a fee to have their copyrights renewed after short fixed terms.[79] Under their proposal, all new and existing copyrighted artwork would need to be registered, and copyright holders could extend their copyrights as many times as they desire.

Landes and Posner's proposal has numerous attractive characteristics, yet a tiered revenue-based copyright regime has more advantages.

First, my proposal is more effective in moving commercial artwork into the commons. Whether we consider it a good thing or a tragedy,[80] a substantial portion of our culture comprises commercially successful artwork (films, music, TV, etc.). Landes and Posner's scheme would lead (unless stiff renewal fees are contemplated) to most commercially successful artwork being absent from the public domain for an extremely long time. My proposal is more capable of moderating the amount of successful commercial art that stays

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77. *Id*. at 556.

78. Clemens's testimony was reprinted in Samuel L. Clemens, *Copyright in Perpetuity*, 6 GREEN BAG 2d 109, 111 (2002).

79. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). Their idea is also articulated in LANDES & POSNER, *supra* note 9, at ch. 8.

80. *See generally* MAX HORKHEIMER & THEODOR ADORNO, DIALECTIC OF ENLIGHTENMENT (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002) (criticizing the value of commercial artwork).

locked up; it pushes all but the most profitable copyrighted works into the public domain and does so within a reasonable timeframe.

Second, both proposals create some transparency by requiring registration, but my proposal is more transparent and less susceptible to abuse because it prevents copyright holders from having full control over the terms of their copyright protection. Under Landes and Posner's proposal, the decision to renew lies solely with the copyright holders, who can continue pay for copyright protection indefinitely. They can refuse to ever allow anything into the commons, either to prevent their opponents from potentially benefiting from their creations or out of a pack rat mentality. Under my proposal, copyright holders may choose to pursue renewal, but whether a renewal is granted depends on whether the work in question meets the revenue threshold. Ultimately, it would fall to the public to decide, through their pocketbooks, whether a copyright should be extended.

This benefit of the public's implicit consent as the determining factor for renewal ties into the third advantage: a tiered revenue-based copyright regime would have a better chance of meeting constitutional objections than the system proposed by Landes and Posner. This is because a tiered revenue-based copyright regime would not guarantee copyright holders direct control or indefinite protection. Landes and Posner simply state that their "concern is with the economics rather than the constitutionality of indefinite renewal."[81] In a footnote they go on to say, without explanation, that "[i]n light of" *Eldred v. Ashcroft*, "it is unlikely that a system of indefinite renewals, which has more to commend it than the Sonny Bono Act, would be held unconstitutional."[82]

Fourth, a tiered revenue-based copyright system can be modified. For example, while my proposal requires registration of all artwork, it could easily be altered to eliminate that requirement for the fixed term tier. Such flexibility is not possible with Landes and Posner's proposal.

While my proposal has more advantages than Landes and Posner's, it does have at least two comparative drawbacks.

First, the transaction costs of my proposed reform are slightly higher, yet even Landes and Posner suggest collecting some revenue figures because "a single fee for all types of copyrighted work is unlikely to be optimal. An alternative that would minimize legislative and regulatory discretion, and hence rent seeking, would be to make the fee equal to a fixed percentage of the first year's inflation-adjusted revenues from the sale or rental of the copyrighted work."[83] More important, the transaction costs in my proposal are borne by those expecting to benefit from society's largesse, not by the public in general. Plus, the higher transaction costs to those seeking further copyright protection are outweighed by the benefit of significantly expanding the public domain.

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81. LANDES & POSNER, *supra* note 9, at 211.

82. *Id*.

83. *Id*. at 219-20.

Second, while a tiered revenue-based copyright regime would reduce rent seeking by Big Copyright relative to our existing system, Landes and Posner's suggested revisions would even further diminish rent-seeking activity—though not entirely eliminate it given that Big Copyright could still lobby for "lower renewal fees and longer renewal terms."[84]

Finally, Landes and Posner's reform could import my proposal of multiple tiers into their formulation. For example, one tier could provide a nonrenewable term at little or no cost, while a second tier could allow for renewals but have expensive renewal fees.

III. POTENTIAL PROBLEMS

A tiered revenue-based copyright system is not a perfect solution, but it is better than the current copyright system and the proposals described in Part II above. Below are responses to some of the most common criticisms of this proposition that have not already been discussed.

A. *Too Difficult to Track Revenue*

Very few, if any, variables can be perfectly and costlessly measured. While measuring copyright revenue will not be immune from some abuse and some complications in calculation,[85] the proposed regime's features will not be easy to abuse or impossible to assess.[86] Also, Landes and Posner's suggestion for their proposal of indefinite copyright renewals is applicable to a tiered revenue-based copyright system:

> The aggregate transaction costs [of the proposal] . . . would depend on the number and possibly the value of licenses (holding tracing costs constant), the transaction costs per license, and the administrative cost of operating the renewal system. Since the number of licenses would depend in part on the total number of works renewed, aggregate transaction costs could actually fall compared either to a system of automatic renewals or to a single term of life plus seventy years.[87]

Past and present day examples of copyright payment and/or registration systems that are arguably more complex than the measurements required by my proposal also suggest that a tiered revenue-based copyright regime is practically feasible. Historically, the expense of obtaining copyright was more costly and time-consuming than it is under current law. Copyright was intelligently structured as a quasi-test of an artist's intent to seek copyright

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84. *Id*. at 221.

85. The same is true for other related possible scenarios such as gauging the value of individual copyrights that are combined to create a larger work, for example, a film.

86. Simpler variables, if any decent candidates exist, would cost less to measure but would be less useful for the present purposes.

87. LANDES & POSNER, *supra* note 9, at 217.

protection. These historical requirements, which began to be eroded from 1909 onwards, entailed registration of the artwork, the deposit of copies of the artwork with the Copyright Office, and placing a notice of copyright protection on every published copy of the work. What did society gain from the easing of such requirements? Arguably little more than a copyright regime that automatically defaults to extending copyright protection to almost everything, including our shopping lists. Such historical hoops served a similar purpose to the aims of my proposal—keeping the public domain robust—while not being too burdensome. Simply returning to the previous requirements would be a major step forward, yet Big Copyright would have no incentive to do so.

One contemporary real world example of a complex copyright arrangement is the 1992 Audio Home Recording Act (AHRA). In addition to requiring Serial Copy Management System (SCMS) controls and stating that no action claiming copyright infringement can be brought against individuals making musical copies for private, noncommercial use, the AHRA enables manufacturers of digital audio equipment to sell digital tapes and recorders if they pay royalties on all such sales.[88] The royalties are divided among background musicians, vocalists, featured recording artists, record companies, composers, and music publishers.[89] While the percentage each of the groups receives is fixed by statute, the law does not mandate how individuals within these groups must be compensated. This example demonstrates that law can be functional even if many variables cannot be perfectly measured or observed.

A second example is the American Society of Composers, Authors and Publishers (ASCAP). It is a performing rights organization of over 450,000 composers, lyricists, songwriters, and publishers[90] that licenses billions of nondramatic public performances of their copyrighted artwork each year and then distributes the royalties to its members.[91] ASCAP is

> guided by a "follow the dollar" principle in the design of [its] payment system. In other words, the money collected from television stations is paid out to members for performances of their works on television, the money collected from radio stations is paid out for radio performances, and so on . . . . The value of each performance is determined by several factors, including the amount of license fees collected in a medium (television, cable, radio, etc.), how much we receive in fees from the licensee that hosted the performance, and the type of performance (feature performance, background music, theme song, etc.).[92]

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88. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as 17 U.S.C. §§ 1001-1010).

89. 17 U.S.C. §§ 1004-1008.

90. *What Is ASCAP?*, ASCAP, http://www.ascap.com/about/ (last visited Dec. 20, 2012).

91. *ASCAP Payment System: How You Get Paid at ASCAP*, ASCAP, http://www.ascap.com/members/payment/ (last visited Dec. 20, 2012).

92. *Id*.

In fact, royalty calculations for an individual musical work are more complicated than the above summary suggests. ASCAP multiplies five variables (use weight, licensee weight, "follow the dollar" factor, time of day weight, and general licensing allocation) together and then adds radio feature premium credits and TV premium credits to arrive at a final tally.[93] The general licensing allocation drives home the point that intricate systems for approximating values that cannot practically be precisely measured can successfully work. The general licensing allocation is calculated by the following method: "Fees collected from non-broadcast, non-surveyed licensees (bars, hotels, restaurants and the like) are applied to broadcast feature performances on radio and all performances on television, which serve as a proxy for distribution purposes."[94]

While these two examples are not perfect precedent for proving that revenues can be measured accurately enough without bankrupting artists and regulators, they serve as positive indicative guides. Measuring the revenue of copyrighted artwork will not be flawless or even elegant, but it is practically achievable on a large scale.

B. *Negative Effects of Locking Up the Most Successful Commercial Art*

This proposal would make access to the most successful commercial artwork more expensive and hence more restricted.[95] In this regard, it could be viewed as harmfully revising the definition of a free society. Yet, as will be argued below, such concerns are minor impediments relative to the benefits the proposed reform will bring.[96] Professor Lawrence Lessig forcefully states that

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93. *ASCAP Payment System: Royalty Calculation*, ASCAP, http://www.ascap.com/members/payment/royalties.aspx (last visited Dec. 20, 2012).

94. *Id*.

95. A related potential concern is the possibility expressed by Felix Cohen many years back: "The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935). While Cohen's observation can be piercing in other contexts, it does not fit the facts or the nature of this proposal. As is clearly evidenced by the existence of millions of copyright orphans, legal protection does not always automatically create economic value.

96. It is feasible, though not necessarily likely, that with the enactment of this proposal, the most successful commercial works may actually lose cultural significance. Because such works will always cost more, they will be used less by other artists and—at least after their initial splash—will be consumed less and less by individuals. While this effect would decrease the extent to which the most successful works are engrained in our cultural DNA, Big Copyright could ward off such a fate by advertising its star earners year in and year out to increase their impact or at least counteract their decline. Yet constant advertising would carry the risk of overexposing the public to the advertised works, thus causing consumers to revolt against them. For the effects of marketing on copyright's ability to spur new creation, see generally Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH.

at some point artwork should be free for others to take and criticize in whatever way they want.

> It should be free, that is, not only for the academic, who would certainly be allowed to quote the book in a critical essay; it should be free as well for authors . . . as well as film directors or playwrights to adapt or attack as they wish. That's the meaning of a free society, and whatever compromise on that freedom copyright law creates, at some point that compromise should end.[97]

I have previously argued, and still maintain, that copyright needs to be abandoned in rich countries because the overabundance of successful commercial art harms citizens.[98] In the United States, for example, copyright has done such a good job of supporting the production of polished commercial art that it has turned the average citizen into a passive overconsumer. Americans on average consume 8.54 hours a day of entertainment and news.[99] This statistic does not even include hours spent surfing the Internet. Rich countries need to eliminate the source of this overconsumption—i.e., copyright—so that more individuals have the inclination as well as the time to create for themselves. The elimination of copyright would decrease the amount of commercial art produced. It would encourage individual productivity by putting a large dent in the amount of time citizens spend passively consuming others' artwork. This newly available time could be used for many different ventures, including, for some, spending a few hours a week creating on their own.

I have also claimed, and still contend, that copyright should be abandoned in poor countries because access to rich country artwork facilitates the embrace of liberal values.[100] One of the most effective ways to promote democracy and reduce intolerance in developing countries is by exposing citizens to developed country artwork, which even in its most commercial forms communicates liberal values subtly, or not so subtly, in the background. While some poor country art may do a better job of communicating liberal values than some rich country art, and while some rich country art may be terrible at conveying such values, on average rich country art, warts and all, does a better job of demonstrating the vitality and necessity of democracy, liberty, freedom of expression, equality, and human rights. Eliminating copyright in developing countries would allow rich country art to be freely distributed and, over the long run, to be a factor in convincing large numbers of individuals in poor countries of the ethical necessity of adopting democratic values.

L.J. 785 (2004).

97. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 199 (2001).

98. *See generally* Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity*, 55 J. COPYRIGHT SOC'Y U.S.A. 361 (2008).

99. *Id*. at 366.

100. Martin Skladany, Culture and Copyright in Developing Countries (Dec. 20, 2012) (unpublished manuscript) (on file with author).

I mention the above to assure the reader that I am a romantic when it comes to believing copyright should and can radically change to enlarge our lives through promoting freedom of thought and action. As will be discussed below, anything is possible in the long term—e.g., the civil rights movement, the fall of communism. Professor Lessig's claim about what a free society necessitates is alluring and convincing to me, yet this Article is about being brutally honest about how much cultural freedom we can realistically expect to win in the short term. We should be willing to give Disney more of what it wants so that it stops deforming and shackling most of our culture. Such a calculation is by necessity utilitarian. Lessig is no stranger to such compromises, as he explicitly mentions,[101] yet he asserts that "at some point" the compromise that copyright engenders "should end." My assertion is simply to redo the calculus—lock up a much smaller amount of content for a longer time in order to allow a vast amount of content to become free much sooner. Unlike Landes and Posner's proposal, which would likely be in violation of the Constitution, mine asserts that copyright should not be unilaterally perpetual for holders who simply pay renewal fees. Yet I admit that practically speaking for the most successful commercial artwork, I am pushing back the date significantly.

Lessig, many copyright scholars, and I desire to significantly shorten copyright's length. If we do nothing now because we do not have the necessary mobilization for radical reform, then the most successful commercial artwork will be locked up for a long time regardless, given Big Copyright's ability to simply lobby for a Cher Copyright Term Extension Act as a follow-up act to the Sonny Bono Copyright Term Extension Act.

C. *Overexposure Risk for Big Copyright*

Trademark and right-of-publicity laws recognize the possibility that the underlying property can be devalued by overexposure. Landes and Posner ask whether this is a factor that needs to be considered for copyrightable expression. They state, "There is some evidence that it is a concern of the Walt Disney Company with regard to its copyrighted characters, such as Mickey Mouse."[102] They continue:

> We must not press the congestion argument . . . too far. While examples can be given of works even of elite culture that may have been damaged by unlimited reproduction (the *Mona Lisa*, the opening of Beethoven's *Fifth Symphony*, and several of Van Gogh's most popular paintings come immediately to mind), there are counterexamples: the works of Shakespeare seem unimpaired by the uncontrolled proliferation of performances and derivative works, some of them kitsch, such as Shakespeare T-shirts and the

101. LESSIG, *supra* note 97, at 199.

102. LANDES & POSNER, *supra* note 9, at 224.

> movie *Shakespeare in Love*. And in the field of popular culture, think only of Santa Claus as an example of the power of an iconic character to survive incessant use, apparently undamaged.[103]

Landes and Posner are correct that the *Mona Lisa* and the works of Shakespeare are different, but they take this difference, which rests on the *Mona Lisa* being "damaged" too far. Sure, the *Mona Lisa* may be kitsch because of its immense popularity, unlike Shakespeare's work, but at the same time it continues to be a highly respected masterpiece that caps a visit to the Louvre for millions. More to the point, from the perspective of Big Copyright, this dual personality of the *Mona Lisa*, if it were still under copyright, would not harm its revenue stream; rather, it would very likely increase it. Kitsch can sell brilliantly on its own, but when combined with genius it is an asset Big Copyright would love to own.

I do not doubt that Disney manages the proliferation of its copyrighted characters in order to maximize profits without risking overexposure. However, given the existence of Disney World, Disney Land, its foreign theme parks outside of Paris and Tokyo, Disney stores, etc., this overexposure concern does not appear to pose a real threat to the viability of a tiered revenue-based copyright regime. Essentially, what would overexposing a work mean for Disney when its existing promotional efforts are so extensive?

Under my proposal, all copyright holders who choose to protect their works under Tier Two would understand that they potentially face this overexposure concern. Even if only a small percentage of works registered under Tier Two achieve renewal, no copyright holders would have an incentive to overexpose their holdings if they are reasonably confident that such holdings could relatively easily meet the revenue thresholds. For example, would anyone doubt that Mickey Mouse will be one of the consistently highest revenue-producing works? And if Disney does not think that Mickey Mouse is currently being overexposed, how could anyone think that an icon less famous and less assured of meeting the revenue threshold is in danger of overexposure?[104]

D. *Destroying the Market for Copyright Artwork*

Some might claim that a tiered revenue-based copyright regime with one tier having an annual revenue requirement would annihilate the commercial art market because the public would simply wait a year before paying to see or listen to any artwork with a renewable copyright. Such an argument overlooks current marketing practices and consumer behavior.

For example, the current Hollywood practice is to roll out a film gradually in different forms. Many movies are first available only in theaters. When

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103. *Id*. at 226-27.

104. Granted such a copyrighted artwork on the revenue threshold boundary could fill a small niche market and hence risk overexposure within that small segment.

released on DVD or online, some movies can initially only be bought, with the option of renting coming a month or two later. Most of these steps occur within a year, and a marketing push often precedes each step to create and maintain a movie's "must-see" status.

Even if a large enough group of individuals is willing to wait for a copyrighted work to fail to meet a revenue benchmark so that it would be released into the public domain, there would be no certainty *ex ante* that the work would not meet the revenue cutoff. Hence, such a group could wait for decades or longer to see a Mickey Mouse movie for free. Such uncertainty could even create a situation similar to the prisoner dilemma: while it would be in the group's best interest to wait a year and deny the copyright holder enough revenue to meet the benchmark, individual members might prefer to purchase the product the day of its release instead of having to deal with the uncertainty of trusting others not to buy it immediately. This is not to claim that some individuals might happily resist all the marketing, live with the uncertainty, and wait for a work to go off copyright; but this group is likely to be small and hence would not significantly chip away at the commercial art market.

E. *Dangers of Striking a Deal with Big Copyright*

Another concern is that Big Copyright might agree to this proposal but then, over the long term, fight to change the provisions of the bargain. While such a possibility is unfortunate, whenever reaching across the aisle, one has to consider such behavior. *Si vis pacem, para bellum*: if you wish for peace, prepare for war.[105] In fact, Big Copyright should plan for the same contingency—public domain advocates continuing to push for shorter copyright terms—though neither side should necessarily expect any success if it ventures away from a compromise built on a tiered revenue-based system.

Two main concerns exist.[106] First, Big Copyright might attempt to compromise the stringency of revenue thresholds or increase the length of renewal periods. Yet Big Copyright has little incentive to prolong copyright on all artwork if it does not own most of it and if much of what it owns is essentially worthless after a decade. Second, Big Copyright might also strategize to bring back copyright orphans in one form or another to reduce the size of the public domain so that there is less competition for its holdings. Such potential competition from works in the public domain is uncertain, given that orphan works are often orphaned because they were unsuccessful

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105. FLAVIUS VEGETIUS RENATUS, VEGETIUS: EPITOME OF MILITARY SCIENCE 63 (N.P. Milner trans., 2d rev. ed., Liverpool Univ. Press 1996) (ca. 430-435).

106. Another concern is that Big Copyright could always reissue a lapsed copyright in a form different enough to get a new copyright. This already occurs and is difficult to eliminate outside of abandoning copyright entirely. The saving grace is that the related works are not identical.

commercially. Also, Big Copyright could benefit from a clearing of copyright orphans into the public domain, because all artists—commercial as well as noncommercial—would gain an enormous amount of newly available free material to borrow from. Furthermore, Big Copyright would have to seriously consider whether any added revenue that might result from breaking the compromise is worth (a) the potential financial cost of lobbying to make an extra buck on lackluster holdings and (b) the risk of breaking faith with society, given the danger of being painted evil like Big Pharma. Finally, it must be remembered that one of the biggest strengths of a tiered revenue-based copyright regime is that relative to the current copyright system it would reduce rent seeking on copyright's term length.

If Big Copyright accepts a tiered revenue-based copyright regime, incentives could be built into the new legislation to discourage powerful commercial interests from later lobbying to loosen the requirements. First, Big Copyright could be required to contribute money to a nonprofit that would lobby to ensure that the new copyright system's term provisions are not altered in the future to favor Big Copyright. Second, a poison pill could be attached to the tiered revenue-based copyright regime bill—i.e., if the regime is altered for the benefit of Big Copyright, the poison pill dilutes its copyright ownership but not everyone else's. Alternatively, the bill could require a transition period during which all copyright holders (or just those who pushed for the bill that alters the tiered copyright regime) have their copyright diluted (i.e., scope of protection weakened).

F. *Practical Impossibility of Legislative Reform*

While the above objection points to the dangers of concluding an agreement with Big Copyright, a further objection is that a deal cannot be struck given how copyright law is made in practice. Essentially, Congress will listen to and broker compromises only with those showering them with campaign contributions and bringing along celebrities.

The process of copyright legislation has been characterized by the need for consensus among opposing stakeholders, where all parties must benefit and where no party and its interests are deprived of a seat at the table. A series of conferences of different parties with a stake in copyright guided legislation forward that ultimately revised copyright law into the Copyright Act of 1976.[107] During this period, Register Abraham Kaminstein of the Copyright Office stated "that the key to general revision would be to draft a copyright bill that benefited each of the competing interests. In that, the conferences succeeded. The bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers

107. JESSICA LITMAN, DIGITAL COPYRIGHT 53 (2001).

remained."[108] Such legislation by negotiated settlement where copyright stakeholders significantly influence copyright law has been the norm for almost a century.[109] This norm has created a troubling situation where, as Professor Jessica Litman writes, "current stakeholders are unwilling to part with short-term statutory benefits in the service of long-term legal stability" and interested parties "disfranchised by current law lack the bargaining chips to trade for concessions."[110]

The picture painted above is not at first encouraging. Yet Litman later lists libraries, schools, consumer groups, and civil liberties nonprofits as some of the interests "who employ paid Washington lobbyists to speak up for the needs of unrepresented citizens."[111] So there are at least some public-spirited groups that can make it to the negotiating table. Further, commercial interests at the table can fight vigorously against each other when their interests conflict. Moreover, as pointed out by Boyle, the situation has looked at least as bleak in the past for other issues like the environment, yet broad and robust actors eventually coalesced into a powerful movement.[112]

Whether a deal can be struck also depends on the nature of the deal. A tiered revenue-based copyright system is designed to make the proposed reform enticing to Big Copyright, unlike other proposals that do not offer Big Copyright any incentives.

CONCLUSION

Big Copyright will forever engage in rent-seeking activity. As Mancur Olson has demonstrated, this is the nature of political systems.[113] In the short run, activists dedicated to reducing the length of copyright protection have few options, if any, besides negotiating a deal that will entice Big Copyright to set orphans free and to accept dramatically reduced copyright terms for the vast majority of artwork in exchange for gaining longer protection for its most successful commercial works.

Because most of this Article has been focused on demonstrating how Big Copyright will deem such a proposal attractive, it seems appropriate to briefly touch on a less immediate concern. Dangle a large enough carrot in front of business interests and they will not resist because their *raison d'être* is profit. Yet the same does not work for activists, given the nature of their beliefs.

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108. *Id*.

109. *Id*. at 62.

110. *Id*. at 63.

111. *Id*. at 193.

112. *See generally* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997).

113. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (rev. ed., Harvard Univ. Press 1971) (1965).

Activists do not have to love this proposal's trade-off, nor should they give up their efforts to build, over the long term, society-wide support for their positions; in the short term, however, they must compromise to stay true to their stated goals. Some communist intellectuals undermined socialism because they felt that temporary measures slowed progress and sullied their purity of purpose. Oscar Wilde wrote of denying the poor charity so that society would more quickly open its eyes to the horrors of capitalism and hence more readily embrace communism.[114] His twisted logic infantilized the poor—as if they did not already know how hard their lives were or forgot such hardship when it was temporarily relieved by a private charity, and as if they could not understand the effects of capitalism or charity's relationship to different economic systems. Copyright activists have the high moral ground. A tiered revenue-based copyright system will quickly get them significantly closer to their desired goal. They should not be co-opted by copyright abolitionists or by their own ideal vision of copyright into keeping the chains around Richelieu's Monster, especially given that partial freedom now will strengthen the movement for the arduous long-term fight ahead.

114. *See generally* OSCAR WILDE, THE SOUL OF MAN UNDER SOCIALISM AND SELECTED CRITICAL PROSE (Linda Dowling ed., Penguin Classics 2001) (1885-1891). Marx advocated a similar argument in his critique of petty-bourgeois socialism. KARL MARX, THE COMMUNIST MANIFESTO 81-82 (Frederic L. Bender ed., Samuel Moore trans., Norton 1988) (1848).