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Copyright Term Extensions, the Public Domain and Intertextuality Intertwined

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ARTICLES

COPYRIGHT TERM EXTENSIONS, THE
PUBLIC DOMAIN AND INTERTEXTUALITY
INTERTWINED*Ashley Packard* *

I. INTRODUCTION

In its current term, the Supreme Court is addressing a much-debated question among legal scholars—whether copyright law encroaches upon freedom of expression.¹ The justices will review a controversial decision issued by the District of Columbia Circuit Court of Appeals. The appeals court held that copyright is immune from First Amendment challenges.² Furthermore, it concluded that in crafting copyright legislation Congress is not bound by the introductory language in the Constitution's Copyright Clause,³ which states that copyright's purpose is "to promote the Progress of Science and useful Arts."⁴

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¹ *Eldred v. Reno*, 239 F.3d 372, 57 U.S.P.Q.2d (BNA) 1842 (D.C. Cir. 2001), *reh'g denied sub nom.*, *Eldred v. Ashcroft*, 255 F.3d 849, 59 U.S.P.Q.2d (BNA) 1606 (D.C. Cir. 2001) (en banc), *cert. granted*, 122 S. Ct. 1062 (U.S. Feb. 19, 2002) (No. 01-618). The case was argued before the Supreme Court on Oct. 9, 2002. The Court had not yet issued an opinion as of this Article's print time. The Supreme Court's docket is posted on its Web site, at <http://www.supremecourtus.gov/docket/docket.html> (enter docket number 01-618 in search field) (last visited Dec. 1, 2002).

² *Eldred*, 239 F.3d at 375.

³ *Id.* at 378.

⁴ U.S. CONST. art. I, § 8, cl. 8.

Petitioners in *Eldred v. Ashcroft*,⁵ the case under consideration, are involved in enterprises that reproduce, restore or add value to works in the public domain.⁶ They argue that the Sonny Bono Copyright Term Extension Act (CTEA),⁷ which prospectively and retrospectively extends copyright terms, impinges upon their First Amendment freedoms of speech and press⁸ by denying them access to millions of works that will now be kept out of the public domain for another twenty years.⁹ They also argue that the Act's retrospective extensions violate both the Constitution's Copyright Clause,¹⁰ which grants Congress the power to protect a work for limited times, and the Copyright Act's requirement of originality.¹¹

The case is significant because its outcome has the potential to determine the constitutionality of term extensions and the value that our legal system places on the public domain. Even more importantly, it may determine whether the First Amendment can be considered applicable to copyright law at all.

Many legal scholars believe the court of appeals' conclusion that there can be no First Amendment challenge to a copyright statute sets an astounding precedent with implications that go beyond the realm of term extensions to other laws that also have the potential to harm freedom of expression and the public domain.¹²

⁵ *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *reh'g denied sub nom.*, *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001) (en banc), *cert. granted*, 122 S. Ct. 1062 (U.S. Feb. 19, 2002) (No. 01-618). The Supreme Court's docket is posted on its Web site, at <http://www.supremecourtus.gov/docket/docket.html> (enter docket number 01-618 in search field) (last visited Dec. 1, 2002).

⁶ Lead petitioner is Eric Eldred, the publisher of Eldritch Press, a free Internet library of public domain works, at <http://www.eldritchpress.org/> (last modified Nov. 25, 2002). Other petitioners are Higginson Book Co.; Jill A. Crandall; Tri-Horn Int'l; Luck's Music Library, Inc.; Edwin F. Kalmus & Co., Inc.; American Film Heritage Ass'n; Moviecraft, Inc.; Dover Publications, Inc.; and Copyright's Commons. See Appellant's Petition, *infra* note 9, at ii.

⁷ Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 101, 108, 203(a)(2), 301(c), 302, 303 and 304).

⁸ U.S. CONST. amend. I (the First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . .").

⁹ See Appellant's Petition for Writ of Certiorari at 17-24, *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001) (No. 01-618), available at LEXIS No. 01-618, 2001 U.S. Briefs 618 (Oct. 11, 2001) [hereinafter Appellant's Petition] (arguing that the CTEA's retroactive aspect violates the "limited times" requirement of the copyright clause).

¹⁰ U.S. CONST. art. I, § 8, cl. 8 (granting Congress the 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").

¹¹ See Appellant's Petition, *supra* note 9, at 10-17.

¹² See Brief of Amici Curiae Copyright Law Professors at 3-7, *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001) (No. 01-618), available at LEXIS No. 01-618, 2001 U.S. Briefs 618 (Nov. 26, 2001). See also Brief of Amici Curiae Jack M. Balkin, Yochai Benkler, Bert Neuborne, and Jed Rubenfeld at 1-3, *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001) (No. 01-618), available at http://supreme.lp.findlaw.com/supreme_court/docket/2002/october.html (last visited Oct. 20, 2002) (offering

Despite the court's dismissal of First Amendment arguments regarding copyright law, there is a growing body of legal scholarship arguing that copyright can and does abridge freedom of expression on occasion.¹³ Moreover, the Eleventh Circuit Court of Appeals recently made a strong case for First Amendment rights in relation to copyright law when it recognized the need to protect a defendant's fair use to parody a copyrighted work.¹⁴

CTEA supporters counter that far from inhibiting First Amendment concerns, term extensions will encourage creative expression.¹⁵ This argument alludes to the Supreme Court's assertion in *Harper & Row, Publishers, Inc. v. Nation Enterprises* that copyright serves as an "engine of free expression."¹⁶ The Court theorized that without limited monopoly protection for authors, fewer works would be produced, thus lessening the availability of original works that promote progress.¹⁷ Proponents of the CTEA also observe that the legislation serves the rational

perspectives of constitutional law professors in support of petitioner).

¹³ See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (arguing that copyright's speech-burdening effects should be subject to more exacting First Amendment scrutiny than the courts have accorded thus far); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001) (discussing the history of copyright and the role of the First Amendment in that history); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (asserting that the Digital Millennium Copyright Act, the proposed Article 2B of the Uniform Commercial Code, and the Collections of Information Antipiracy Act present troubling challenges to First Amendment principles); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (noting that intellectual property rights, unlike other property rights, are a form of government-imposed, content-based speech restriction); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998) (examining the relationship between copyright's purposes and the First Amendment, and the impact of the Internet on that relationship); and Ann Brill & Ashley Packard, *Silencing Scientology's Critics on the Internet: A Mission Impossible?*, 19 COMM. & L. 1 (1997) (discussing the First Amendment and copyright law implications of the Church of Scientology's efforts to halt dissemination of its doctrines via the Internet).

¹⁴ See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 58 U.S.P.Q.2d (BNA) 1652 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257, 1276, 60 U.S.P.Q.2d (BNA) 1225, 1240 (11th Cir. 2001), *reh'g denied*, 275 F.3d 58 (11th Cir. 2001) (en banc) (recognizing Alice Randall's "The Wind Done Gone" as a parody of "Gone With the Wind" written from the viewpoint of a slave with the specific intention of refuting the stereotypes in Margaret Mitchell's original novel. When Mitchell's heirs sued Randall's publisher for copyright infringement, a Georgia district court preliminarily enjoined the book's publication under the theory that it was likely to interfere with the market for the original work. The Eleventh Circuit reversed, describing the injunction as "at odds with the shared principles of the First Amendment and the copyright law [and] acting as a prior restraint on speech."). *Id.*

¹⁵ See S. REP. NO. 104-315, at 10 (1996) (statement of the Committee of the Judiciary concluding that copyright extensions would serve as an intergenerational incentive to produce more work).

¹⁶ 471 U.S. 539, 558, 225 U.S.P.Q. (BNA) 1073, 1080 (1985).

¹⁷ *Id.*

purpose of bringing U.S. term limits for copyright protection in line with proposed European Union term limits, facilitating trade.¹⁸

Opponents of the Act believe it not only violates the spirit of the Constitution's Copyright Clause but also the original intent of the framers, many of whom passed the first copyright statute that protected creative works for only 14 years.¹⁹ Considering that this is the eleventh term extension in forty years,²⁰ opponents point out that Congress seems to be pursuing a course of extension by degrees until works are protected in perpetuity.²¹ They note that if the purpose of limited protection of works is to provide authors with an incentive to create, an additional twenty years is unlikely to provide much added incentive prospectively and absolutely none retrospectively.²² They also argue that copyright's First Amendment justification as an engine of free expression is valid only so long as it serves that purpose, and that by keeping works out of the public domain for longer periods, Congress is denying the public access to the very building blocks upon which progress in arts and science is supposed to be based.²³

¹⁸ See, e.g., Arthur R. Miller, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 690-92 (2000).

¹⁹ See Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 813-15 (2000).

²⁰ 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, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). In contrast, during copyright's first 150-year period, there were only two term extensions. Act of Feb. 2, 1831, §§ 1-2, 4 Stat. 36, and Act of Mar. 4, 1909, § 4, 35 Stat. 1075, 1076.

²¹ See *Extending Copyright Protections: Hearings on S. 4839, The Copyright Term Extension Act of 1995, Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) (statement of Prof. Peter Jaszi, Washington College of Law, American University), available at 1995 WL 1052-4355 (commenting that Congress, using the practice of extending the term of subsisting copyrights without limits, could achieve perpetual copyright protection "on the installment plan"). See also Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 398 (2000) ("If history repeats itself, the owners of these copyrights will lobby Congress for a third term extension in 2018, just as they did for the first time in the 1970s and again in the 1990s."); *Eldred v. Reno*, 239 F.3d at 382 (Sentenelle, J. dissenting in part).

²² See Gifford, *supra* note 21, at 383 ("Due to the enactment of the CTEA, no new works will fall into the public domain until the year 2018. This fact is of great concern to many institutions such as libraries and archives that depend on works in the public domain for a large part of their collections.").

²³ See Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"*, 23 COLUM.-VLA J.L. & ARTS 137, 171 (1999) (extending protection of existing works "cannot enhance the quantum of creativity from the past, but it can compromise the creativity of the future, by delaying for twenty years the time at which subsequent authors may freely build on these works").

This Article considers whether the petitioners in the case have raised a legitimate First Amendment issue, and if so, what a valid First Amendment argument for protecting the public domain might be. Part I of this Article describes the CTEA and the case that challenges it; Part II considers whether First Amendment analysis is warranted; Part III sketches the contours of the public domain; and Part IV examines the public domain's intertextual relationship to freedom of expression.

II. THE COPYRIGHT TERM EXTENSION ACT AND *ELDRED V. ASHCROFT*

Congress passed the Sonny Bono Copyright Term Extension Act and the president signed it into law in October of 1998.²⁴ The Act was named for its original sponsor who died in a skiing accident that year. The CTEA's primary purpose was to amend the 1976 Copyright Act, extending terms for copyright protection by an additional twenty years.²⁵

Under the 1976 Copyright Act, copyrighted works were protected for the extent of their creators' lifetimes plus fifty years.²⁶ Congress enacted the 1976 Copyright Act to bring the United States into compliance with the Berne Convention International Copyright Agreement.²⁷ The treaty mandates that all member nations protect copyrights for a minimum period of life plus fifty years. To comply with the treaty, the United States lengthened domestic copyright term limits and eliminated requirements for registration or official copyright notice on protected works.²⁸

The CTEA amended section 302 of the Copyright Act to extend the duration of copyright in a work created on or after January 1, 1978, to a term equal to the lifespan of the author plus seventy years.²⁹ In the case of jointly created works, the term now extends seventy years beyond the death of the last surviving author.³⁰ The CTEA extended the duration of copyright in anonymous or pseudonymous works or works made for hire from the original seventy-five-year

²⁴ Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 108, 203(a)(2), 301(c), 302, 303 and 304).

²⁵ In addition to term extensions, the CTEA also amended or added to the 1976 Copyright Act in three other respects by altering transfer rights, providing a new infringement exception, and clarifying congressional recommendations for division of fees related to audiovisual works.

²⁶ 17 U.S.C. § 105, 302(a) (Supp. 1977).

²⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised Paris, July 24, 1971, 25 U.S.T. 1341. The Berne Convention is the oldest international agreement protecting copyrighted works. The United States joined the Berne Convention in 1989.

²⁸ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. §§ 101-04, 116, 301, 401-02, 404-08, 801 (1988)) [hereinafter *Berne*].

²⁹ Sonny Bono Copyright Term Extension Act § 102(b)(1).

³⁰ *Id.* § 102(b)(2).

term of protection to ninety-five years from the date of first publication, or 120 years from the year of creation, whichever expires first.³¹

Under Section 303 of the 1976 Act, works that were not published or registered before January 1, 1978 were destined to fall into the public domain on or before December 31, 2002.³² But if such a work were published before the 2002 deadline, then it would receive protection until 2027.³³ The CTEA extended that term of protection until 2047.³⁴ The CTEA also amended Section 304 of the Copyright Act to lengthen the renewal term for works created before 1978, extending the total length of protection for such works from seventy-five to ninety-five years from the date the original copyright was secured.³⁵

Several justifications have been put forward for the legislation, suggesting that it provides additional encouragement to create, adjusts copyright protection to correspond to increased life expectancy and encourages the preservation of older works. But the primary reason sponsors gave for supporting the bill was to ensure that U.S. intellectual property remained competitive abroad, particularly in terms of trade within the European Economic Union. Arguing for term extensions, Senator Orrin Hatch said, "[A]t a time when we face trade deficits in many other areas, we cannot afford to abandon twenty years' worth of valuable overseas protection now available to our creators and copyright owners."³⁶

Hatch and other proponents of the legislation were responding to pressures to alter U.S. copyright term limits to conform to those set by the European Union. In 1993, the EU's Council of Ministers issued a directive, requiring members of the Union to harmonize their individual laws for copyright protection.³⁷ The directive specified that the duration of copyright protection within the European Union would be equal to the life of the author plus seventy years.³⁸ Because the Berne Convention's standard of protection is considered a minimum requirement, some European Union countries had adopted longer terms of protection.³⁹ The directive also altered the standard of protection European Union nations could offer nonmember works, including those from the United States. Up until that point, EU nations had two options regarding the length of protection they could offer U.S. works in their countries. They could

³¹ *Id.* § 102(b)(3).

³² 17 U.S.C. § 303 (Supp. 1977).

³³ *Id.*

³⁴ Sonny Bono Copyright Term Extension Act § 102(c).

³⁵ *See id.* § 102(d)(1)(B).

³⁶ 141 CONG. REC. S3391 (daily ed. Mar. 2, 1995) (statement of Sen. Hatch).

³⁷ *See* Jenny Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. ENT. L.J. 945, 968 (1996) (citing Council Directive 93/98, 1993 O.J. (L 290)).

³⁸ *Id.*

³⁹ *Id.* at 969.

offer U.S. works the same duration of protection they gave to their own works and those of other EU nations; or, they could protect U.S. works for the length of time specified by U.S. copyright law. The Council of Ministers' directive announced that, with respect to non-EU works, member nations would now follow the rule of the shorter term.⁴⁰

Applying the rule of the shorter term meant that European Union nations would protect member nations' works for the life of the author plus seventy years, but U.S. works would only be protected for the life of the author plus fifty years, the term length established by the 1976 Copyright Act. Intellectual property is one of the United States' main exports.⁴¹ Fear of losing twenty years of returns on intellectual property became the driving impetus to enact the Copyright Term Extension Act.⁴²

Professor Arthur Miller has pointed out that Congress undoubtedly had a rational reason to extend term limits—harmonization of our laws with those of European Union nations that are large consumers of American intellectual property.⁴³ However, opponents to term extensions argue that the United States does not need to revamp its copyright system to meet the demands of other nations.⁴⁴ The United States has traditionally resisted international rules that would alter the domestic balance between author and societal rights to intellectual property.⁴⁵ A prime example of this is U.S. refusal to comply with the Berne

⁴⁰ *Id.* at 970-71.

⁴¹ See S. Rep. No. 105-190, at 10 (1998) (statement of the Committee on the Judiciary; in the report, relating to the Digital Millennium Copyright Act of 1998, the Senate noted that according to International Intellectual Property Alliance, in 1996 U.S. copyright industries achieved foreign sales and exports of \$60 billion, for the first time leading all major industry sectors. U.S. creative industries accounted for 3.65% of the U.S. gross domestic product—\$278.4 billion).

⁴² See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (statement of the Committee on the Judiciary that "U.S. works will generally be protected for the same amount of time as works created by European Union authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States."); *The Copyright Term Extension Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. 4 (1995) (serial number J-104-46) (statement of Sen. Feinstein observing that "[p]erhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms").

⁴³ Miller, *supra* note 18, at 700.

⁴⁴ See *Copyright Term, Film Labeling and Film Preservation Legislation: The Copyright Term Extension Act*, Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong., 1st Sess., 290-94 (statement of Professor Dennis Karjala) [hereinafter *House Subcomm. Hearings*].

⁴⁵ For example, the first copyright statute gave no protection to foreign works. Act of May 31, 1790, ch. 15, 1 Stat. 124. The policy continued for more than a century. See Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106, 1110 (extending copyright protection to foreigners if the same protection was extended to the United States). Also, it was not until the United States became a member of the Berne Convention in 1988—102 years after it was originally implemented, that the United States

Convention's mandate that member nations recognize authors' moral rights in intellectual property. Under a moral rights theory, authors' rights are primary. Under this theory "copyright is a natural property right that the author obtains by virtue of the labor he or she has expended to create the artistic or literary work."⁴⁶ Even after selling the economic rights in a work, the author preserves the moral rights to protect the work from "any distortion, mutilation, or any other modification which would be prejudicial to his or her honor or reputation."⁴⁷ As a signatory to the Berne Convention, the United States is obligated to protect authors' moral rights (something U.S. copyright has traditionally not done), but has skirted the issue by concluding that current domestic laws, such as unfair competition, defamation, privacy and contract law, adequately protect authors' work.⁴⁸ A moral rights system arguably would interfere with our own copyright system's basic tenet that copyrights are not a natural property right but a monopoly right secured for limited times to promote progress. CTEA opponents note that a similar argument could be made about the twenty-year term extension—that while it might be suitable for countries that view copyright as a natural property right, it is not appropriate for one that views copyright as a limited monopoly that ultimately serves the public welfare.⁴⁹

From an economic perspective, the Act's opponents also argue that the market for U.S. intellectual property traded abroad is likely to be at its height during the early stage of a work's lifetime, not after a span the length of the life of the author plus seventy years.⁵⁰ Their assumption is that the social costs of depriving the public domain of any new works until the year 2018 are unlikely to justify the potential benefit to copyright holders who profit from term extensions.

Of course, as more than one commentator on this issue has observed, there is no empirical data to show that creators would strongly benefit from term extensions; nor is there any data regarding the impact that closing off the public domain for twenty years would have on the development of creative works.⁵¹ The conclusion one draws depends on the theoretical perspective one takes when approaching the issue.

The Supreme Court will consider the constitutionality of the CTEA this fall, when it reviews *Eldred v. Ashcroft*. The case comes to the Court on appeal from

agreed to eliminate the requirement for registration to protect copyrights. (See Berne, *supra* note 28.)

⁴⁶ Dixon, *supra* note 37, at 965.

⁴⁷ *Id.* at 967.

⁴⁸ See *id.* at 967.

⁴⁹ See House Subcomm. Hearings, *supra* note 44, at 290-94 (statement of Professor Dennis Karjala).

⁵⁰ See Gifford, *supra* note 21, at 392 (noting that, in reality, term extension has no effect on the demand for U.S. works).

⁵¹ See Dixon, *supra* note 37, at 979; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 997-98 (1990).

the District of Columbia Circuit Court of Appeals. In upholding the CTEA, the appeals court formed two conclusions: 1) that Congress is not bound by the introductory language in the Constitution's Copyright Clause⁵² and 2) that the Copyright Clause is immune from First Amendment challenges.⁵³

Petitioners in the case had argued that Congress overstepped the bounds of the Copyright Clause, which grants Congress the 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,"⁵⁴ by enacting term extensions that were not limited and therefore did not promote progress.⁵⁵ But the appeals court refused to acknowledge that Congress is bound by the clause's "promote progress" preamble.⁵⁶ Referring to its earlier ruling in *Schnapper v. Foley*,⁵⁷ the appeals court restated its position that the introductory language places *no limits* on congressional power to enact copyright legislation.⁵⁸ Relying on a more literal interpretation of the clause, the court pointed out that the new term is limited in the sense that protection does not carry on in perpetuity and therefore is within Congress's power to set.⁵⁹

The court of appeals also rejected petitioners' argument that the CTEA should fail because originality is a requirement of copyright protection under the Copyright Act, and extending the term lengths of already protected works does not meet that requirement. The court said "originality is by its nature a threshold inquiry relevant to copyrightability, not a continuing concern relevant to the authority of the Congress to extend the term of a copyright."⁶⁰ The question of originality in relation to copyrighted texts, or any text for that matter, is one that is debated in both literary and legal scholarship and one that has larger implications for the public domain to be discussed later in this Article.⁶¹

What is particularly significant about the case in terms of communication law, however, is the appeals court's treatment of the petitioners' First Amendment challenge. More than simply dismissing the value of the petitioners' arguments about the effect of term extensions on free expression, the court made the surprising statement that "copyrights are categorically immune from challenges

⁵² See *Eldred*, 239 F.3d 372, 378 (D.C. Cir. 2001).

⁵³ See *id.* at 375.

⁵⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵⁵ See *Eldred*, 239 F.3d at 377-78.

⁵⁶ See *id.* at 378.

⁵⁷ 667 F.2d 102, 112, 212 U.S.P.Q. (BNA) 235 (D.C. Cir. 1981).

⁵⁸ But see *Eldred*, 239 F.3d at 383 (Sentelle, J., dissenting in part) (arguing that the language in *Schnapper* was not a holding the Circuit Court need follow, but "simply dicta").

⁵⁹ See *Eldred*, 239 F.3d at 377-78.

⁶⁰ *Id.* at 380.

⁶¹ See *infra* notes 139-93 and accompanying text.

under the First Amendment.”⁶² The D.C. Circuit Court based this conclusion on its own earlier opinion in *United Video, Inc. v. F.C.C.*⁶³ and the Supreme Court’s holding in *Harper & Row Publishers, Inc. v. Nation Enterprises*,⁶⁴ which the court of appeals interpreted to provide First Amendment “immunity” for copyright legislation.⁶⁵

III. IS A FIRST AMENDMENT REVIEW WARRANTED?

In a recent copyright case, the Eleventh Circuit stated that “the public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment.”⁶⁶ While a few courts have appeared to recognize the potentially negative implications that aspects of copyright law have had on freedom of expression,⁶⁷ historically most courts have been reluctant to acknowledge a conflict between copyright law and the First Amendment. Many have found that copyright’s capacity to restrict speech is ameliorated by the doctrine of fair use, which gives secondary writers and artists the right to use limited portions of a work for the purposes of comment, criticism, reporting and scholarship.⁶⁸ Others have found that copyright’s idea/expression dichotomy protects First Amendment concerns by allowing secondary writers to use the facts

⁶² *Eldred*, 239 F.3d at 375.

⁶³ 890 F.2d 1173, 12 U.S.P.Q.2d (BNA) 964 (D.C. Cir. 1989).

⁶⁴ 471 U.S. 539 (1985).

⁶⁵ See *Eldred*, 239 F.3d at 375 (describing the two cases as “insuperable bars to plaintiffs’ first amendment theory”).

⁶⁶ *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev’d*, 252 F.3d 1165, 268 F.3d 1257, 1276 (11th Cir. 2001).

⁶⁷ See *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 198 U.S.P.Q. (BNA) 28 (S.D. Fla. 1978), *aff’d on other grounds*, 626 F.2d 1171 (5th Cir. 1980); *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 588, 10 U.S.P.Q.2d (BNA) 1561 (2d Cir. 1989) (Oakes, C.J., concurring) (stating that imposing a permanent injunction in the copyright case would “diminish public knowledge” creating first amendment concerns); and *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 327-33, 55 U.S.P.Q.2d (BNA) 1873 (S.D.N.Y. 2000) (applying first amendment analysis to provisions of the Digital Millennium Copyright Act of 1998, but finding no conflict).

⁶⁸ See, e.g., *Roy Exp. Co. v. CBS, Inc.*, 672 F.2d 1095, 1099, 215 U.S.P.Q. (BNA) 289 (2d Cir. 1982) (“No circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the ‘fair use’ doctrine.”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028, 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. 2001) (“First Amendment concerns in copyright are allayed by the presence of the fair use doctrine.”); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) (stating that the Copyright Act balances First Amendment concerns with the rights of copyright holders); *Chi. Sch. Reform Bd. of Tr. v. Substance, Inc.*, 79 F. Supp. 2d 919, 53 U.S.P.Q.2d (BNA) 1623 (N.D. Ill. 2000) (refusing to let a paper print copies of standardized tests to raise public debate on the subject).

and ideas of a primary writer without appropriating the exact wording used to express the facts and ideas.⁶⁹

In fact, in reaching the conclusion that copyright law cannot implicate the First Amendment, the D.C. Circuit Court of Appeals based its analysis, in part, on the idea/expression dichotomy.⁷⁰ It cited the Supreme Court's opinion in *Harper & Row* to conclude that copyright law was immune from First Amendment challenges, but the court of appeals seems to have misread that decision. In *Harper & Row*, Nation Enterprises asked the Court to craft a public figure exception to copyright to shield *The Nation* magazine, which quoted from former President Gerald Ford's unpublished memoirs. Refusing to do so, the Court explained that copyright has built-in First Amendment protections—fair use and the idea expression dichotomy—that normally preserve the First Amendment interests of secondary writers.⁷¹ The Court never said, however, that copyright was immune from First Amendment challenges.

The theory behind the idea/expression dichotomy is generally credited to Melville Nimmer who in 1970 wrote an influential law review article about the potential conflict between the First Amendment's dictate that "Congress shall make no law . . . abridging the freedom of speech" and the Copyright Act's regulation of speech.⁷² Nimmer theorized that conflicting interests could be accommodated with definitional balancing.⁷³ Under this balancing approach, ideas would fall on the free speech side of the line, while the specific statement of the idea—its form—would fall on the copyright side of the line. While acknowledging the existence of some speech interest in the actual expression of an idea,

⁶⁹ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (stating that First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas"); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170, 196 U.S.P.Q. (BNA) 97 (9th Cir. 1977) (concluding "the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment. The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression."); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191, 12 U.S.P.Q.2d (BNA) 1964 (D.C. Cir. 1989) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression."); and *Iowa State Univ. Research Found. v. ABC*, 621 F.2d 57, 61, 207 U.S.P.Q. (BNA) 97 (2d Cir. 1980) ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts.").

⁷⁰ *Eldred*, 239 F.3d at 375-76.

⁷¹ *Harper & Row Publishers*, 471 U.S. at 556 ("[C]opyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'") (citations omitted).

⁷² Melville Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. REV. 1180, 1181-86 (1970).

⁷³ See *id.* at 1188-89.

Nimmer theorized that the speech interest did not supercede copyright's interest in encouraging creativity as long as ideas remained accessible to everyone.⁷⁴ But Nimmer also balanced this approach by stating that after a certain period of time, the copyright interest in a work would decline while the speech interest remained constant.⁷⁵ At that point, the speech interest should prevail.⁷⁶

Nimmer recognized that under certain circumstances copyright could pose constraints on freedom of expression that were not mitigated by the idea-expression dichotomy, such as when the particular form of expression might be crucial to convey a message.⁷⁷ This, he said, is particularly true where visual works, such as photographs and films, are concerned. He used as an example the Zapruder film of President John F. Kennedy's assassination.⁷⁸ Two years after Nimmer wrote his article, another image captured the world's attention and arguably altered American sentiment for the Vietnam War—Nick Ut's Pulitzer Prize winning photo of nine-year-old Kim Phuc covered with napalm. Nimmer proposed an exception to copyright in cases in which newsworthiness was an issue.⁷⁹ Similar exceptions exist in the areas of defamation and privacy law, but courts have accepted no such exception for copyright.⁸⁰ Fair use is intended to fulfill that purpose. But scholars have lamented its efficacy in that area and pointed to its chilling effects.⁸¹ Nimmer also pointed to insufficient protection for speech that may ensue from over-reliance on the fair use doctrine. He noted that "The scope and extent of fair use falls within the discretion of the Congress. The limitations of the First Amendment are imposed upon Congress itself."⁸²

Nimmer also expressed concern over then pending legislation that would lengthen the term of copyright on works already protected under the law.⁸³ He argued that retrospective term extensions burdened free speech without providing

⁷⁴ See *id.* at 1193.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.* at 1197.

⁷⁸ See *id.* at 1197-98.

⁷⁹ See *id.* at 1198-99.

⁸⁰ In fact, in *Harper & Row*, the defendants tried to persuade the Court that such an exception was warranted without success. See *Harper*, 471 U.S. at 556 ("Respondents advance the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use.").

⁸¹ See, e.g., Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1 (2002); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM-VLA J.L. & ARTS 1 (Part 1) (1993).

⁸² Nimmer, *supra* note 72, at 1200 ("I would suggest that a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment.").

⁸³ See *id.* at 1194-95.

additional incentives to create because the works were already in existence.⁸⁴ He added, "I can but conclude that a serious question exists as to the constitutional validity of the proposed extension, given the countervailing interests in free speech."⁸⁵ He also suggested that the Constitution's mandate to "promote the progress of science and the useful arts" might render retrospective term extensions beyond Congress' power.⁸⁶

Several commentators have noted similarities between Nimmer's warning against retrospective term extensions and the potential impact of the Sonny Bono Copyright Term Extension Act.⁸⁷ But in *Eldred v. Reno*, the D.C. Circuit Court of Appeal appeared oblivious to Nimmer's concern as it cited Justice Brennan in *Harper & Row*, citing Nimmer, to conclude that copyright's idea-expression dichotomy rendered the statute invulnerable to First Amendment challenges.⁸⁸

However, while Nimmer warned against perpetual copyrights and retrospective extensions, he did not oppose prospective extensions.⁸⁹ In fact, when he wrote his article, Congress was contemplating a copyright term extension from fifty-six years to life plus fifty years to comply with the Berne Convention. The prospective extension granted by the CTEA is not so different from the Berne Convention extension in that it also attempts to align U.S. copyright terms with copyright protection offered by other nations. Viewed in terms of global trade, copyright term extensions appear to make economic sense.

Without a larger issue, such as freedom of speech, to trigger heightened scrutiny, the Supreme Court is likely to defer to congressional reasoning rather than question whether the means Congress employed to serve trade will actually lead to the ends desired. It is precisely for this reason that the question of whether copyright term extensions violate the First Amendment is important to the Supreme Court's analysis of this legislation. The CTEA is a content-neutral law; it was not imposed for the purpose of restricting speech based on its communicative impact. If the Supreme Court opts to apply First Amendment analysis to the CTEA, it will likely examine the law using the heightened scrutiny test for content-neutral legislation. The Court will have to determine whether the CTEA furthers an important government interest and, if so, whether the

⁸⁴ See *id.* at 1195 ("It can hardly be argued that an author's creativity is encouraged by such an extension, since the work for which the term is extended has already been created.").

⁸⁵ *Id.* at 1195.

⁸⁶ See *id.* at 1195 ("Though the language is not conclusive, it strongly suggests that the proposed extension of existing copyrights . . . is beyond the Congress' copyright power, quite apart from its possible invalidity by reason of the first amendment.").

⁸⁷ See, e.g., Benkler, *supra* note 13, at 386-87; and Netanel, *supra* note 13, at 71.

⁸⁸ *Eldred v. Reno*, 239 F.3d at 375 (citing *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 556 (Brennan, J., concurring) (citations omitted)).

⁸⁹ Nimmer, *supra* note 72, at 1195.

legislation is narrowly tailored to further that interest.⁹⁰ In other words, heightened scrutiny would demand that the Court determine whether the government's goal of extending term limits prospectively and retrospectively to bring U.S. laws in line with European law warrants the legislation's attendant impact on expression.

In performing this analysis, the Court need not reach a final determination on the legislation's constitutionality. It may simply remand the case with instructions to the court below to review the case under heightened scrutiny. But in either case, it will be difficult to determine what the balance should be without a better understanding of what the public domain is, how it functions and what its relationship is to free expression. The rest of this Article focuses on these questions.

IV. WHAT IS THE PUBLIC DOMAIN?

A. DRAWING ITS BOUNDARIES

The public domain sits at the opposite end of the intellectual property scale. It is the counterweight to intellectual property, the body of work and knowledge that is characterized by "rights held in common over information, as opposed to the individual rights granted in a positive and defined form by the different branches of intellectual property law."⁹¹ The term intellectual property encompasses three separate areas of law with different theories: copyright, patent and trademark law. In assigning protection to various expressive works, processes and inventions, and distinctive terms and symbols, each area of law places information into a proprietary realm. Information that falls outside of this proprietary realm is assumed to be in the public domain.

While trademark law finds its origins in common law, intended to prevent consumer confusion in the marketplace, copyright and patent law draw their force from the Constitution, which grants Congress the power to protect intellectual property "to promote progress."⁹² The common understanding of the copyright and patent clause is that protection of intellectual property will serve as an economic incentive to encourage individuals to produce more work, thereby contributing to the progress of science and the arts, which in turn benefits the

⁹⁰ See *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.") (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

⁹¹ John Frow, *Public Domain and Collective Rights in Culture*, 13 INTELL. PROP. J. 39, 39-40 (1998).

⁹² U.S. CONST. art. I, § 8, cl. 8.

general public welfare.⁹³ Thus, copyright law is intended to balance the interests of two competing parties—the creators, who have an economic interest in the preservation of the work, and the general public, which has an interest in access to those works.⁹⁴ In fact, between the two competing parties, it could even be argued that the rights of the public are the stronger, or at least should be.⁹⁵ In *United States v. Paramount Pictures*, the Supreme Court said “copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”⁹⁶

While there is no legal definition for public domain in any statute and courts have been reluctant to pin down its borders, the public domain has been recognized as worthy of protection. In *SunTrust Bank v. Houghton Mifflin Co.*, the Eleventh Circuit said: “The Copyright Clause was intended ‘to be the engine of free expression.’ To that end, copyright laws have been enacted to achieve three main goals: the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.”⁹⁷

In terms of copyright, legal theorists generally agree on three categories of works that belong to the public domain: 1) works that were previously protected by copyright, but whose copyright protection has expired; 2) works that were never protected by copyright, such as those produced by the federal government⁹⁸ and those that lack the criteria for copyright such as fixation or originality,⁹⁹ and 3) and works that, although deserving of copyright protection, have fallen into the public domain because their creators have allowed them to, either purposely or by accident.

To this description of the public domain, three other categories also can be attributed. These are not categories of creative works, per se, but rather building

⁹³ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 186 U.S.P.Q. (BNA) 65 (1975) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

⁹⁴ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 220 U.S.P.Q. (BNA) 665 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

⁹⁵ See *United States v. Paramount Pictures, Inc. et al.*, 334 U.S. 131, 158, 77 U.S.P.Q. (BNA) 243 (1948).

⁹⁶ *Id.*

⁹⁷ 268 F.3d 1257, 1261 (citations omitted).

⁹⁸ 17 U.S.C. § 105 (2000).

⁹⁹ 17 U.S.C. § 102(a) (2000).

blocks for creative works. The first, and most important, is made up of facts, which are not copyrightable. In *Feist Publications v. Rural Telephone Service Co.*, Justice Sandra O'Connor explained that facts cannot be copyrighted "because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."¹⁰⁰ Also included in this category are ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in such work.¹⁰¹

The second category includes scenes a faire. Judge Leon Yankwich, who sat on the federal district court for the Southern District of California, introduced the French literary term, meaning a scene "which 'must' be done," into U.S. copyright case law in the early 1940s.¹⁰² Judge Yankwich explained that scenes a faire "are the common stock of literary composition—'cliches'—to which no one can claim literary ownership."¹⁰³ Using the example of a couple seeking shelter from a storm in a church, he said, "[c]ourts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists."¹⁰⁴

The third category, which is somewhat more controversial, is that area of copyrighted work that is protected but would fall under the privilege of fair use. The fair use doctrine entitles individuals who ordinarily would not have the right to use copyrighted material without the permission of the owner to use small portions of a copyrighted work for the purpose of "criticism, comment, news reporting, teaching . . . , scholarship, or research."¹⁰⁵ Some commentators argue that because it is generally permissible to make fair use of small portions of a work, those uses fall into the public domain.¹⁰⁶

¹⁰⁰ 499 U.S. 340, 347, 18 U.S.P.Q.2d 1275 (1991) (citing 1 M. & D. Nimmer, NIMMER ON COPYRIGHT § 2.11(A), at 2-157 (1990)).

¹⁰¹ 17 U.S.C. § 102(b) (2000).

¹⁰² *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275, 83 U.S.P.Q. (BNA) 153, 157 (S.D. Cal. 1945).

¹⁰³ *Id.* at 278.

¹⁰⁴ *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017, 56 U.S.P.Q. (BNA) 8, 11 (S.D. Cal. 1942). *See also* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91, 190 U.S.P.Q. (BNA) 387, 391 (2d Cir. 1976) (concluding the use of stereotypical settings is non-infringing), *cert. denied*, 429 U.S. 980, 191 U.S.P.Q. (BNA) 64 (1976); *Bradbury v. Columbia Broad. Sys., Inc.*, 174 F. Supp. 733, 745, 123 U.S.P.Q. (BNA) 10, 19 (S.D. Cal. 1959), *rev'd*, 287 F.2d 478, 128 U.S.P.Q. (BNA) 376 (9th Cir. 1961), *cert. dismissed*, 368 U.S. 801 (1961).

¹⁰⁵ 17 U.S.C. § 107 (2000).

¹⁰⁶ *See* Benkler, *supra* note 13, at 363 ("Uses of information commonly perceived as permissible absent special circumstances, such as a brief quotation in a critical review or lending a book to a friend, fall within the functional definition of the public domain."); Bunker, *supra* note 81, at 22

B. A POSITIVE OR NEGATIVE CREATION?

Some legal theorists have refuted the proposition that the public domain is a positive creation at all. In his discussion of the public domain, Edward Samuels describes the public domain as “the ‘negative’ of whatever may be protected.”¹⁰⁷ It is the sum total of what is leftover after protected works are accounted for and therefore not really capable of serving as a public policy or legal principle with a life of its own.¹⁰⁸ Moreover, Samuels argues that many of the limitations on the scope of copyright protection attributed to the growth of the public domain were really “created in response to major copyright expansions, and are therefore ultimately part of copyright’s expanding scope.”¹⁰⁹

At the other end of the spectrum there are legal scholars who not only see the public domain as a positive entity, but who have attempted to map it and its adjacent terrain.¹¹⁰ Pamela Samuelson suggests that the public domain is akin to its own nation-state and that various categories of public domain information are regions of that nation.¹¹¹ In her visual diagram, one state is allocated for “ideas, concepts, discoveries, theories, [and] hypotheses” and another for “facts, information, data, know-how, [and] knowledge.”¹¹² Others are established for government materials, innovations involving intellectual property protection in which no rights were claimed or rights have expired, and innovations not qualifying for intellectual property protection.¹¹³ Some of the residents in these states have more than one home,¹¹⁴ and property lines are subject to change.¹¹⁵ As Samuelson points out, the public domain varies in size and scope, changing with the passage of new laws, legal interpretations of established law, and

(“The fair use of any work is always and already in the public domain.”).

¹⁰⁷ Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y 137, 137 (1993).

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at 144. See also M. William Krasilovsky, *Observations on Public Domain*, 14 BULL. COPYRIGHT SOC’Y 205, 205 (1967) (observing that the public domain “is best defined in negative terms”).

¹¹⁰ Pamela Samuelson, *Digital Information, Digital Networks, and The Public Domain*, 68 J.L. & CONTEMP. PROBS. (forthcoming Autumn 2002) (manuscript at 84, presented Nov. 10, 2001 at the Conference of the Public Domain), at <http://www.law.duke.edu/pd/papers.html> (last visited Oct. 7, 2002).

¹¹¹ *Id.* (manuscript at 83).

¹¹² *Id.* (manuscript at 84).

¹¹³ See *id.* (manuscript at 84).

¹¹⁴ *Id.* (manuscript at 83).

¹¹⁵ Pamela Samuelson, *Digital Information, Digital Networks, and the Public Domain*, 68 J.L. & CONTEMP. PROBS. (forthcoming Autumn 2002) (manuscript 81-82, presented Nov. 10, 2001 at the Conference of the Public Domain), at <http://www.law.duke.edu/pd/papers.html> (last visited Oct. 7, 2002).

additions to the public domain over time.¹¹⁶ So, although a visual interpretation of the public domain is conceptually helpful, it is still only an approximation that is readily subject to change.

But if indistinct boundaries are a characteristic of the public domain, they are also a quality of the protected domain. While there is no complete compilation of public domain works—no database with a listing of all works freely accessible to the public, the same statement could be made about copyrighted works. Although the Patent and Trademark Office records copyrights that individuals register, the listing is nowhere near complete. When the United States became a signatory to the Berne Convention agreement, the obligation to register works for copyright protection was removed.¹¹⁷ Now that copyright notice, deposit and registration are no longer required, millions of copyrighted works exist outside the government's database of protected works.¹¹⁸

In fact, David Lange, one of the first legal scholars to write about the public domain, observes "that intellectual property theory must always accept something akin to a 'no-man's land' at the boundaries."¹¹⁹ Thus, recognition of an exclusive interest in intellectual property ought to imply an affirmative recognition of its conceptual opposite—the public domain.¹²⁰ Lange compared the public domain's value with public lands subject to over grazing or the Alaskan tundra's fragile ecosystem, suggesting that it might be prudent to require an environmental impact statement of some kind before we permit the territory to be appropriated.¹²¹

C. AN INTELLECTUAL COMMONS?

Lange is not the only theorist to analogize the public domain to real property.¹²² The public domain is sometimes called our intellectual commons, a

¹¹⁶ *Id.* (manuscript at 81-82).

¹¹⁷ One of the effects of the Berne agreement is that citizens of all its member nations enjoy full copyright protection on their intellectual works in each of the member nations, whether or not their works are officially registered or display an official copyright notice. See 17 U.S.C. § 408(a) ("Registration [p]ermissive. . . . Such registration is not a condition of copyright protection.").

¹¹⁸ See Appellant's Petition, *supra* note 9, at 9 n.5 ("Because protection is automatic and there is no longer any requirement of renewal, . . . an extraordinary range of creative work now falls into a regulatory black hole—unusable because the 'owners' of this property are unknown . . .").

¹¹⁹ David Lange, *Recognizing the Public Forum*, 44 LAW & CONT. PROB. 147, 150 (1981).

¹²⁰ See *id.*

¹²¹ See *id.* at 176.

¹²² See, e.g., James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 94 (1997); Benkler, *supra* note 13, at 354; Travis, *supra* note 19, at 780; and Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134, available at <http://www.wired.com/current/html> (last visited Oct. 20, 2002).

term that alludes to the English Enclosure Movement and the history of propertization that is part of our inherited Western European culture.¹²³

Economic historians suggest that the enclosure movement, which fenced off public property in fifteenth through nineteenth century England for private use, remedied the tragedy of the commons.¹²⁴ The theory assumes that public lands used for common consumption are generally mismanaged and underdeveloped, and that transferring that land into the hands of a single owner provides incentives for large-scale investment, protects the resource from over exploitation, and generally encourages more efficient management.¹²⁵ A similar argument has been applied to copyrighted materials about to enter the public domain, suggesting that allowing copyright holders to have exclusive control over those works for longer periods of time encourages progress, because without exclusive control, there would be no incentive to invest in the work, market it broadly or preserve it from deterioration.¹²⁶

While the tragedy of the commons theory may be applicable to shared land, it is not applicable to the public domain because information is not a limited resource. As literature scholar John Frow notes, "Rather than being exhausted by use, knowledge actually increases when it is shared."¹²⁷ Where copyright is concerned, the primary economic issue is really one of nonexclusion, meaning that because information is not exhausted by use, the same unit can satisfy an

¹²³ See Travis, *supra* note 19, at 828 ("The ongoing copyright grab, which is being carried out on many fronts and which will set the ground rules for speech in the Information Age, shares the conceptual and tactical structure of the Great Enclosure of English common lands and of the efforts of the Stationers and others to revoke public rights in the intellectual commons."); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 68 J. L. & CONTEMP. PROBS. (forthcoming Autumn 2002) (manuscript at 1, presented Nov. 10, 2001 at the Conference of the Public Domain), available at <http://www.law.duke.edu/pd/papers.html> (last visited Oct. 7, 2002) (describing the enclosure movement and the fencing off of public property, as actual series of enclosures of public lands that started in the 15th century and lasted until the 19th); and Lawrence Lessig, *The Architecture of Innovation* 84 (Nov. 10, 2001) (unpublished manuscript presented at the Conference of the Public Domain, available at <http://www.law.duke.edu/pd/papers.html> (last visited Oct. 20, 2002)).

¹²⁴ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹²⁵ See *id.* at 1244-45; Boyle, *supra* note 123, at 3.

¹²⁶ See Miller, *supra* note 18, at 692 ("We have enormous industries that invest millions of dollars into works of expression—from books to phonograph records, television shows, motion pictures, and Internet systems. That is the way we disseminate copyrighted works, and thank goodness—because that enables us to disseminate not simply on Fifth Avenue and Forty-Second Street, but to the four corners of the globe through the Internet. That takes money. It takes capital. You must attract capital into the copyright industries or you will not achieve the purposes of the Copyright Clause.").

¹²⁷ John Frow, *Public Domain and the New World Order*, 10 SOCIAL SEMIOTICS, 173, 182 (2000).

infinite number of users at a marginal cost.¹²⁸ The challenge for copyright law then is to provide an incentive to create the work in the first place. The law responds to that challenge by creating a limited monopoly called an intellectual property right.¹²⁹

But the key word here, of course, is *limited*. Copyright is a statutory right, not a natural right in property.¹³⁰ Although our founding fathers were heavily influenced by the natural rights theory, they recognized perpetual copyright to be a monopoly that they opposed.¹³¹ They justified granting limited exclusive rights to copyright holders on the theory that the public would eventually have access to a greater body of knowledge, now generally understood to be the public domain.¹³²

The comparison of the public domain to an intellectual commons is a double-edged sword that can be used for varying purposes depending on who wields it. In one sense, it reinforces the conception of copyrighted material as real property.

¹²⁸ See Boyle, *supra* note 123, at 8.

¹²⁹ See *id.*

¹³⁰ See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 13 U.S.P.Q. (BNA) 243 (1932) ("As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one.") (citations omitted).

¹³¹ See Travis, *supra* note 19, at 814 ("While the Founding Fathers generally supported a copyright law premised on natural rights and instrumental arguments, this support was accompanied by a historical mistrust of monopoly, thought to be a source of innumerable inefficiencies and oppressions. . . . Madison sought to balance the rights of authors, and the encouragement of writing, with the principle, widespread by that time, that 'perpetual monopolies of every sort are forbidden . . . by the genius of free governments.' Even those limited monopolies granted to authors and inventors must be 'guarded with strictness against abuse.'") (citing James Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, in Aspects of Monopoly One Hundred Years Ago*, HARPER'S MAG., Mar. 1914, at 490 (published posthumously)); but see Ginsburg, *infra* note 192, at 696 ("To promote the Progress of Science and useful Arts" could be considered to be an instrumental objective. But Congress has also said 'by securing for limited Times to Authors.' I do not understand the term 'by securing' to mean to grant something that wasn't there before, but rather, to reinforce a pre-existing right. Indeed, that pre-existing right was acknowledged by Madison's justification for the Copyright Clause in Federalist 43, when—referring not to *Donaldson v. Beckett* but to *Millar v. Taylor*—Madison said that copyright had been adjudged in England as a right at common law. It is true that *Donaldson v. Beckett* [which overruled *Millar v. Taylor*] had, I think, already been decided when Madison made this declaration, but it seems that the news did not make it across the Atlantic by the time that Madison wrote his contribution to the Federalist papers. Thus, he was referring to the other traditional view of copyright law.").

¹³² See Travis, *supra* note 19, at 813-14 ("The Copyright Clause effectively constitutionalized the rule announced in [the English case] *Donaldson* that perpetual common-law copyright does not exist. Later, the Copyright Act of 1790 provided for a 14 year term from the time of prepublication filing of a copy with the local United States District Court, and gave the author (and apparently only the author) the right to renew the right for an additional 14 years. Thus, the work 'fell' into the public domain after 14 years if the author died or failed to renew in time, and after 28 years if he or she lived and renewed the right.").

Real property carries with it the notion of perpetual ownership and restrictions of use based on scarcity of resources. In another sense, characterizing the public domain as an intellectual commons may also allow individuals to conceptualize the public domain as a common resource that is worthy of protection.

Recognizing a conceptual difficulty in coming to grips with the concept of public domain as an entity entitled to protection, James Boyle posits the need for a new vocabulary to deal with identification of the public domain. He analogizes the public domain to the natural environment, a concept that had to be invented in the mind of the public before people became interested in protecting it for the common good.¹³³ Boyle observes that the environmental movement gained power by highlighting two structural reasons our society has traditionally made poor choices regarding its preservation—"a legal system based on a particular notion of what 'private property' entailed, and an engineering or scientific system that treated the world as a simple, linearly related set of causes and effects."¹³⁴ He notes that in both of these conceptual systems, there was no place for analysis of environmental impacts.¹³⁵ The environment simply disappeared. Likewise, Boyle argues, similar structural issues impair our ability to preserve the public domain:

The fundamental tensions in the economic analysis of information issues, the source-blindness of an 'original author' centered model of property rights, and the political blindness to the importance of the public domain as a whole . . . disappear, first in concept and then, increasingly, as a reality.¹³⁶

In their effort to reify the environment, naturalists focused attention on the idea of ecology—a fragile system with unpredictable interconnections, and "welfare economics—the ways in which markets can fail to make activities internalise [sic] their full costs."¹³⁷ These issues are also present in analyses of the impact of term extensions on the public domain among those who argue that a rich public domain is integral to the system of creative production and that supporting authors' rights to the detriment of "authorship" may yield unexpected social costs.¹³⁸

¹³³ Boyle, *supra* note 123, at 39.

¹³⁴ *Id.* at 40.

¹³⁵ *Id.* at 40-41.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Litman, *supra* note 51, at 969 ("Nurturing authorship is not necessarily the same thing as nurturing authors. When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship."); Wendy L. Gordon, *An Inquiry into the Merits*

Looking at the public domain using a systems theory perspective, as Boyle and other scholars have done, may make it easier to see how the addition of new intellectual property laws that alter the balance between the protected and the public domain may have an impact on the future creation of expressive works.

V. A SYSTEM APPROACH: INTERTEXTUALITY AND THE PUBLIC DOMAIN

Our Western European conception of authorship relies on the assumption that authors create original works. In certain respects, copyright law adopts this view as well.¹³⁹ In fact, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, Justice Sandra O'Connor explained that originality is "[t]he *sine qua non* of copyright" and "the very 'premise of copyright law.'"¹⁴⁰ However, numerous philosophers,¹⁴¹ legal scholars,¹⁴² and professors of communication and literature¹⁴³ have pointed

of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 STAN. L. REV. 1343, 1460-61 (1989) ("A strong public domain makes important contributions to a nation's cultural and scientific health. An intellectual property system must therefore be sensitive to the needs and claims of the nonowning public as well as those of authors. . . . Since authors are part of the public—and in fact may constitute the part of the public most in need of using prior works as bricks when building new works—it is likely that some privileges to copy will aid authors more than harm them.").

¹³⁹ See Litman, *supra* note 51, at 965 ("Our copyright law is based on the charming notion that authors create something from nothing. . . ."); Boyle, *supra* note 123, at 98-99 (observing that our current copyright scheme lauds and encourages "the great creator"); and Travis, *supra* note 19, at 827.

Romantic authorship should be understood . . . as a crucial buttress to natural rights arguments for expanded copyright. By effacing the moment of collectivity in cultural production, it makes the labor of authors seem all the more arduous and awe-inspiring. By casting transformative users in the role of talentless hacks, it mobilizes the taboo against plagiarism in support of exclusive authorial rights.

But see Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882-84 (1997) (criticizing this argument, pointing out that the work for hire doctrine favors corporate authors over starving artists).

¹⁴⁰ 499 U.S. 340, 345, 347 (1991). Fixation and a moderate amount of creativity are the other two characteristics of a work required for copyright protection. But see *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845), *cited in* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (quoting Justice Story saying that "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.").

¹⁴¹ See, e.g., Michel Foucault, *What Is An Author?*, in THE FOUCAULT READER 101, 118-19 (Josue V. Harari trans., 1979) (Paul Rainbow ed., 1984); Roland Barthes, *The Death of the Author*, in IMAGE/MUSIC/TEXT 142, 146 (Stephen Heath trans., 1977); JACQUES DERRIDA, OF GRAMMATOLOGY 8 (Gayatri Chakravorty Spivak trans., 1976).

¹⁴² See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 463 (1991) (arguing that our "full-blown Romantic conception of 'authorship,'" devalues

out that the concept of originality is elusive, considering that what all authors "create" is actually predicated upon earlier works and influences, many of which are found in the public domain.

Rejecting the concept of the romantic author who creates in a vacuum, some legal scholars are employing an interdisciplinary approach to textual analysis. They are looking beyond traditional legal reasoning and methodologies employed by courts, to embrace theories and techniques used by post-structural literary critics, who study intertextual relationships in their search for the social construction of meaning.¹⁴⁴ Intertextuality, viewed in a copyright context, appears to suggest that the public domain has a powerful impact on expression.

The theory of intertextuality assumes that linguistic signs are differential—that their meanings can be understood only in relation to other linguistic signs. Likewise, the meaning of texts can be understood only in relation to other texts. "Text," as this theory uses the term, refers to literary, visual and aural works.¹⁴⁵ Intertextual theorists assume that texts influence one another in numerous ways, not just through direct references to other works, but through indirect references of which the writer may or may not be aware. Julia Kristeva, who first coined the term "intertextuality" in the 1960s, explains that the theory is based on the presumption that "any text builds itself as a mosaic of quotations, any text is an absorption and transformation of another text."¹⁴⁶ Viewed from this perspective, literary theorist Graham Allen suggests that literary works are "[n]o longer the product of an author's original thoughts . . . the literary work is viewed not as the container of meaning but as a space in which a potentially vast number of relations coalesce."¹⁴⁷

Intertextuality is both an outgrowth and a rejection of Ferdinand de Saussure's structural view of semiotics.¹⁴⁸ Saussure, who is considered the father of modern linguistics, developed a theory of linguistic signs in which he separated the signifier (used to name a concept) from the signified (the concept named). His

collective contributions and hides the inevitable reliance of writers on past sources and common cultural knowledge); Litman, *supra* note 51; Lange, *supra* note 119; and Aoki, *supra* note 81.

¹⁴³ KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY LAW 25 (2001); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 128 (1993); Frow, *supra* note 127, at 183.

¹⁴⁴ See, e.g., Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993); Litman, *supra* note 51; Jaszi, *supra* note 142; and MCLEOD, *supra* note 143.

¹⁴⁵ See Jaszi, *supra* note 142, at 458 n.9; Rotstein, *supra* note 144, at 727.

¹⁴⁶ JULIA KRISTEVA, DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART 66 (Leon S. Roudiez ed. & Thomas Gora et al. trans., Columbia Univ. Press 1980).

¹⁴⁷ GRAHAM ALLEN, INTERTEXTUALITY 12 (2000).

¹⁴⁸ See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds. & Wade Baskin, trans., 1974).

intent was to emphasize that “a sign is not a word’s reference to some object in the world but the combination, conveniently sanctioned, between a signifier and a signified.”¹⁴⁹ Noting that the signifier changes from language to language and culture to culture, Saussure observed that the signs are relational and arbitrary, “possessing meaning not because of referential function but because of their function within a linguistic system as it exists at any one moment of time.”¹⁵⁰ Saussure rejected the notion that signs had an independent, positive meaning of their own, postulating instead that signs draw their meaning from their associations with other signs in a linguistic system.

Saussure’s theory was revolutionary in its implication for social scientific research on the construction of meaning. As Graham Allen explains, “[i]f traditional notions present us with a vision of a human speaker originating the meanings contained in his or her chosen words, then Saussure’s linguistics replaces that vision with the recognition that all acts of communication stem from choices made within a system which pre-exists any speaker.”¹⁵¹

Like Saussure, intertextual theorists reject the notion that meanings are inherent in the words we speak, but unlike Saussure, they do not assume that meaning making is divorced from human action. M.M. Bakhtin, a Russian literary theorist, whose work heavily influenced Kristeva, was particularly concerned with the social contexts in which individuals used language to create meaning.¹⁵² While Saussure viewed the relational nature of words as stemming from a generalized and abstract system that was almost scientific in nature, Bakhtin, whose work was influenced by Marxism, considered linguistic relationships to be inherent to specific social sites, moments of utterance and reception.¹⁵³ For Bakhtin, language was a living thing, always in a state of becoming.¹⁵⁴

Kristeva superimposes the fluctuating nature of linguistics onto texts, viewing them as always in a state of production. Referring to the “intersection of textual surfaces,” she argues that the literary word (and by extension, text) has no fixed meaning, but is a dialogue among the writer, the addressee, and the contemporary or earlier cultural context.¹⁵⁵ She locates texts along horizontal and vertical axes, in which the horizontal dimension serves as a communication between the writer and the addressee, and the vertical dimension serves as a communication between

¹⁴⁹ ALLEN, *supra* note 147, at 8.

¹⁵⁰ *Id.* at 8-9.

¹⁵¹ *Id.* at 9.

¹⁵² *See id.* at 17 (discussing his theory of meaning).

¹⁵³ *See id.* at 11.

¹⁵⁴ *See id.* at 18.

¹⁵⁵ KRISTEVA, *supra* note 146, at 65.

earlier and later texts.¹⁵⁶ Thus, the meaning of a text is constantly changing, depending on its audience and its spatial and temporal locale.

Employed as a literary device, intertextuality operates in a number of ways. Some texts, for example, are simply informed by others. Consciously or subconsciously, writers incorporate references, allusions and stories from other texts. These borrowed elements may come from the public domain or other protected works. They may be facts, ideas, expressive passages or scenes *a faire*. Other texts are adaptations and reinterpretations of earlier works. Adaptations may move a creative form forward by improving its quality, reinterpreting a work to heighten its relevance to a broader audience, or modernizing a piece that has value but for whatever reason may have fallen out of popularity.¹⁵⁷

Our cultural history is filled with examples of transformative works and adaptations. One of literature's most respected writers, William Shakespeare, was known for his adaptations of earlier writers' tales.¹⁵⁸ Mark Twain, a well-known advocate of perpetual copyright, based his "A Connecticut Yankee in King Arthur's Court" on a public domain work.¹⁵⁹ In music, Johann Sebastian Bach based his Concerto for Four Harpsichords on Antonio Vivaldi's Concerto for Four Violins in B Minor; Wolfgang Mozart adapted Joseph Haydn's work for his Jupiter Symphony; and Ludwig van Beethoven borrowed from French composers Francois-Joseph Gossec and Etienne Mehul.¹⁶⁰ Vaudeville performer Groucho Marx admitted that he and his brothers evolved their personalities by first borrowing the works of others as they sought to establish their own personas.¹⁶¹ Warner Brothers' Wile E. Coyote was adapted from Hopi Indian stories about a coyote who kept falling victim to his own schemes.¹⁶² In film, "West Side Story" reinterpreted Shakespeare's "Romeo and Juliet,"¹⁶³ and Disney, the primary

¹⁵⁶ See *id.*

¹⁵⁷ See MCLEOD, *supra* note 143, at 39-40 (discussing the folk music tradition).

¹⁵⁸ Rotstein, *supra* note 144, at 789 ("[P]lagiarism did not exist before the Renaissance. Thus, Shakespeare could borrow nearly verbatim from Plutarch without raising in the minds of his audience thoughts of plagiarism . . .").

¹⁵⁹ Wendy J. Gordon, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 682 (2000) ("Twain is sometimes referred to as an advocate of extreme and perpetual copyright. But really, he could not have been. After all, in writing *A Connecticut Yankee in King Arthur's Court*, he borrowed from the many bards who had told King Arthur's tales in prior years.") (citing Mark Twain, *A Connecticut Yankee in King Arthur's Court* (Bantam Classic ed. 1981)).

¹⁶⁰ MCLEOD, *supra* note 143, at 23.

¹⁶¹ See G. MARX, GROUCHO AND ME 88 (1959), as cited in Lange, *supra* note 119, at 162.

¹⁶² See Ramson Lomatewama, *Traditional Hopi Storytelling* (National Public Radio broadcast, Jan. 10, 2002).

¹⁶³ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 13.03A at 13-29 to 13-31 (1992).

lobbyist for the Copyright Term Extension Act, has made millions reinterpreting Victor Hugo's *Hunchback of Notre Dame* and other tales from the public domain, including Pocahontas, Cinderella, and Snow White and the Seven Dwarves.¹⁶⁴

Intertextuality, a factor in the production of texts, is also a factor in the reception of texts.¹⁶⁵ Just as a multitude of influences bear on the writer as he or she produces a work, the reader's or viewer's interpretation of a text will necessarily be informed and influenced by exposure to earlier works.¹⁶⁶ In fact, Roland Barthes, one of Kristeva's contemporaries who was also very influential in the construction of intertextual theory, argued that audiences, not authors, write texts. In his famous essay, "The Death of the Author," Barthes wrote:

We know now that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multidimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centers of culture. . . . [A text] is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, and contestation, but there is one place where this multiplicity is focused and that place is the reader, not as was hitherto said, the author.¹⁶⁷

Barthes assumes, as most intertextual theorists do, that readers bring their own histories to the table when they interact with a text. Thus a text's meaning to a particular audience member is determined by that person's previous exposure to other texts. Likewise, if the reader or viewer comes back to the text after many years and exposure to other texts, the meaning will have changed. "However, to the extent that audiences share cultures, which is another way of saying they share texts, they bring some common textual knowledges to bear upon text construction."¹⁶⁸

¹⁶⁴ See Christina Gifford, *supra* note 21, at 385-86 (noting that Disney's copyrights on Mickey Mouse, Goofy, Pluto and Donald Duck were scheduled to expire as early as 2003 and that ten out of thirteen sponsors for the bill in the House and eight out of twelve sponsors in the Senate received contributions from Disney).

¹⁶⁵ MCLEOD, *supra* note 143, at 17.

¹⁶⁶ See J. FISKE, *TELEVISION CULTURE* 108 (1987) ("The theory of intertextuality proposes that any one text is necessarily read in relationship to others and that a range of textual knowledges is brought to bear upon it.").

¹⁶⁷ Barthes, *supra* note 141, at 146, 148.

¹⁶⁸ Brian Ott & Cameron Walter, *Intertextuality: Interpretive Practice and Textual Strategy*, 17 *CRITICAL STUD. IN MEDIA COMM.* 429, 432 n.4 (2000).

Intertextuality is a theory that not only applies to texts in the form of books, plays, films and musical compositions, but to culture in general.¹⁶⁹ Our cultural fabric is woven of all the stories, music, food, pictures and traditions that have been passed down, appropriated and reinterpreted throughout our history. Media theorists Brian Ott and Cameron Walter argue that “intertextual allusions found in postmodern texts allow viewers to exercise specialized knowledge and to mark their membership in particular cultures.”¹⁷⁰ Using the example of viewers watching television shows with intertextual references and visiting fan Web sites during the show or immediately after to discuss those references, Ott and Walker observe that “[i]ntertextual media encourage[s] viewers to identify with others in a manner that less consciously intertextual media do not.”¹⁷¹ These researchers also see intertextuality as becoming more important in the management of information and meaning in our society. They write that “The collage-like, participatory nature of intertextual media fosters an aggregative rather than sequential way of seeing and knowing. Instead of processing data as a finite set of causal relations, audiences favor a spatial orientation in which everything is related to everything else.”¹⁷²

Viewed even more broadly, it is clear that intertextuality also applies to human beings. We are the sum total of our experiences, our connections to others, and our exposure or lack of exposure to particular ideas and concepts. We are defined not only by who we are, but also by who and what we know and do not know. We are texts written by a multitude of authors—essentially derivative works.

Viewed from this perspective, it is difficult to divorce the creation of texts, culture or ourselves from the appropriation of others’ expression or the public domain. The idea/expression dichotomy, which divorces facts from their expression, appears inadequate for analysis of such a system.¹⁷³ If all expression comes from the past, the public domain—the pool of past expression—becomes exceptionally important.

¹⁶⁹ See *id.* (noting that from a cultural studies perspective, one can go further and define “text” as a system of signs, whether those signs be a literary work, motion pictures, television shows, or the very things that structure “real life”).

¹⁷⁰ *Id.* at 440.

¹⁷¹ *Id.* at 441.

¹⁷² *Id.*

¹⁷³ See Rotstein, *supra* note 144, at 759 (“Despite these attempts to define ‘idea’ and ‘expression,’ scholars generally agree that the distinction is elusive. The dichotomy has been called ad hoc, mythological and false.”) (citations omitted).

A. LITMAN'S THEORY OF THE PUBLIC DOMAIN

Noting the ingrained author conception in traditional legal copyright analysis, Jessica Litman has attempted to articulate a theory of the public domain that embraces the theory of intertextuality within our legal system.

Litman begins with the legal premise that the core requirement for copyright protection is originality,¹⁷⁴ and the practical observation that very little of what is copyrighted is truly original.¹⁷⁵ She observes that from a legal perspective the incorporation of others' works into a new work should weaken a potential copyright holder's claim to originality, but that this is rarely a problem for the potential copyright holder because copyright law does not require that originality be demonstrated before copyright is established.¹⁷⁶ She also observes that while the intertextual relationships that influence the new work may come from the public domain, fair uses of other copyrighted works, or even undiscovered theft of others' protected work, these relationships may never be realized as outside of the new author's own creation.¹⁷⁷ In fact, if put to the wall, the new author may not even be able to recognize the source of the influences in his or her work. The influences may be subconscious. Nevertheless, once these intertextual influences are subsumed by the new work that gains copyright protection, the new author has the exclusive right to use them, along with the right to deny their uses to others.¹⁷⁸ The rest of society loses the right of access to these same influences that the writer borrowed. If those influences were part of the public domain, then part of the public domain has been fenced off.¹⁷⁹

¹⁷⁴ See Litman, *supra* note 51, at 965. See also 17 U.S.C. § 102(a) (1994) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

¹⁷⁵ See Litman, *supra* note 51, at 966-67 ("But the very act of authorship in any medium is more akin to translation and recombination than it is to creating. . . . This is not parasitism: it is the essence of authorship.").

¹⁷⁶ See *id.* at 974, 1003.

¹⁷⁷ See *id.* at 1010-11.

¹⁷⁸ Litman, *supra* note 51, at 1002-03 (noting that in an infringement action, a plaintiff may prove that the defendant copied her work by introducing evidence that the defendant had access to it, but if a defendant tries to disprove that the plaintiff's work was original to begin with, the plaintiff can simply wave her certificate of copyright registration (a prerequisite to suit), which is *prima facie* evidence of the validity of her copyright and the originality of her work); Lange, *supra* note 119, at 163 n.66 ("In general, the question of originality is ignored or taken for granted . . . treated as though it were an existential quality presumptively evidenced by the fact of the defendant's borrowing."); Frow, *supra* note 127, at 183 ("The paradox of the relation between first and second authors resides in the fact that all first authors are themselves always second authors, indebted to their predecessors in an endless chain.").

¹⁷⁹ See Litman, *supra* note 51, at 1015 ("Giving an author a copyright in something that is a basic

Technically copyright law protects what is original in a work, not what is borrowed from someone else.¹⁸⁰ But copyright protection is generally applied to the entire work because the Copyright Office has no way to determine which aspects of the work are original, and for that matter, neither do the courts.¹⁸¹ Copyright holders, unlike applicants for patent protection, are never asked to first delineate what is actually theirs and what is actually borrowed from others before receiving copyright protection for a work.¹⁸² Furthermore, a system that forced copyright holders to go through this process would be unworkable under our present copyright scheme, which enables writers to copyright their work without official registration.¹⁸³ Litman observes that in order to preserve the system as it is we must maintain the legal fallacy of originality.

She postulates that the public domain is the tool that makes this legal fallacy workable.¹⁸⁴ She writes, "[w]ere we to take the legal concept of originality seriously, we would need to ensure that authors' copyrights encompassed only those aspects of their works that were actually original . . . such a dissection would be impossible. . . . If it were possible, I am confident that authors would not welcome it."¹⁸⁵ Litman suggests that the public domain permits authors to "avoid the harsh light of a genuine search for provenance," preserving the illusion of originality.¹⁸⁶ It is, in essence, the solution to fuzzy logic.

Litman observes that we often view the public domain as a realm of material either undeserving of protection or as a public toll paid in exchange for a limited monopoly on copyrighted works.¹⁸⁷ She argues that the public domain should instead be understood as a "device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."¹⁸⁸

building block of her art thus risks denying that basic building block to all other authors who come into even fleeting contact with the first author's work").

¹⁸⁰ 17 U.S.C. § 103(b) (2001) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.").

¹⁸¹ See Litman, *supra* note 51, at 1004 ("Prominent commentators discuss originality as if it were an actual legal condition that a court could ascertain. Judicial decisions similarly invoke the concept of originality. They do not, however, essay the task of determining whether and to what extent a plaintiff's work is original.").

¹⁸² See *id.* at 972-74 (describing when patent and copyright protections for owners attach).

¹⁸³ See *id.* at 974-75. See also 17 U.S.C. § 408(a) (2002) ("[R]egistration is not a condition of copyright protection.").

¹⁸⁴ Litman, *supra* note 51, at 967.

¹⁸⁵ *Id.* at 1011-12.

¹⁸⁶ *Id.* at 1012.

¹⁸⁷ *Id.* at 1012-13.

¹⁸⁸ *Id.* at 968.

B. FACTS AND ORIGINALITY

To Litman's theory I would also point out that denial of a concept of originality in copyright law is a dangerous business because the refusal to protect facts in our copyright system is predicated upon the belief that facts are nonoriginal.¹⁸⁹ The theory assumes that a discoverer of a fact cannot claim copyright to it because he is not the author of that fact; he may only claim expression of that fact.¹⁹⁰ Once we deny the concept of originality of expression, we drop the barrier between facts and expression. If the two concepts are lumped together, then facts may lose their place of honor and become subject to proprietary use.¹⁹¹

And, as professor Jane Ginsburg has pointed out, that barrier is already porous. Ginsburg observes that contrary to the Platonic view of fact discovery, facts do not exist independently of individual perception.¹⁹² Researchers work from a variety of theoretical, methodological and perceptual perspectives that color their interpretation of facts.¹⁹³ When broken down, every scientific study has one or more qualitative aspects—the design of the study, the choice of research question, the sample selection, the evidence gathered, the data manipulation. All are based on researcher choices. Consequently, all data are open to interpretation and contain some expressive elements.

In a circular fashion, the concept of originality protects what is nonoriginal—both in expression and in fact. But it is a concept in need of an opposing force, which is the public domain. Protecting the public domain as a wellspring of creativity not only preserves the illusion of originality for authorial

¹⁸⁹ Melville B. Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 UCLA L. REV. 978, 1015-16 (1977).

¹⁹⁰ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 ("No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery.") (citing Melville B. Nimmer & David Nimmer, 1 Nimmer on Copyright, § 2.11[A], at 2-157).

¹⁹¹ This idea is not as farfetched as it may seem. Before *Feist*, 499 U.S. at 340, courts held that reproductions of factual information from copyrighted directories could constitute infringement (see, e.g., *Jeweler's Circular Publ'g Co.*, 281 F. 83 (2d Cir. 1922); *Leon v. Pac. Tel. & Tel. Co.*, 91 F.2d 484, 34 U.S.P.Q. 237 (9th Cir. 1937); and *Adventures in Good Eating v. Best Places to Eat*, 131 F.2d 809, 56 U.S.P.Q. 242 (7th Cir. 1942)). Moreover, recently Congress has considered and the House of Representatives has on three occasions approved legislation that would extend intellectual property protection to the factual content of collections of factual information in computer databases. (See H.R. 354, 106th Cong. (1999); H.R. 2281, §§ 501-502, 105th Cong. (Engrossed House Bill 1998); H.R. 2652, 105th Cong. (1998)).

¹⁹² Jane Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoebling v. Universal City Studios*, 29 BULL. COPYRIGHT SOC'Y U.S.A. 647, 658 (1982).

¹⁹³ *Id.* at 658-60.

integrity and legal purposes, but also serves the utilitarian purpose of protecting expression and the pursuit of knowledge.

VI. CONCLUSION

In its brief to the Court, the government essentially challenges the petitioners to show why the idea/expression dichotomy does not resolve their First Amendment concerns regarding the public domain.¹⁹⁴ This Article has attempted to answer that challenge by pointing out that authorship is systematic, and that while the idea/expression dichotomy may be an appropriate analysis for the use of one work, it is not appropriate for an entire system. The CTEA does not just burden one work; it burdens the system by delaying access to work already protected for extensive periods by another twenty years.

Legal scholars who believe Congress has gone too far by extending copyright term limits argue that an additional twenty years is unnecessary to encourage creators to produce new works, and possibly counter-productive to creativity that relies on the public domain.¹⁹⁵ Meanwhile, proponents of the extension counter that even if copyright is not serving as an incentive to produce new works, it is arguably serving as an incentive to market established works to their fullest capacity, and in doing so, contributing to the economy.¹⁹⁶ Under this theory, copyright's purpose is served when protectionism encourages greater marketing of works, which in turn leads to greater consumption of these cultural products and increased profits that may be reinvested in the creation of more works.

This is ultimately a trade-based argument that in order to compete internationally the United States has to comply with terms set by other countries. But even after changing the term of copyright protection, the United States does not comply with the copyright philosophies of most of its European trading partners.¹⁹⁷ We do not observe the continental tradition of recognizing moral rights. While offering the minimum amount of protection allowable under the Berne Convention, the United States has become one of the largest producers (if not the largest producer) of intellectual property in the world.¹⁹⁸ Perhaps that is because we have followed our own path where intellectual property is concerned. While other countries protected moral rights, we encouraged derivative and fair

¹⁹⁴ Brief for the Respondent in Opposition at 20, *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), LEXIS No. 01-618, 2001 U.S. Briefs 618 (Oct. 11, 2001) [hereinafter Respondent in Opposition].

¹⁹⁵ See *supra* note 12 and accompanying text.

¹⁹⁶ See Miller, *supra* note 18, at 692-93.

¹⁹⁷ See Dixon, *supra* note 37, at 964.

¹⁹⁸ See McLEOD, *supra* note 143, at 6 (noting that by the mid-1990s, intellectual property accounted for more than twenty percent of world trade, amounting to \$240 billion U.S. dollars).

use. When other countries signed the Berne Convention Agreement in 1886, we held out until 1988.¹⁹⁹

Under critical examination, the argument to extend protection to the European standard of life plus seventy years really comes down to the need to protect American works whose protection will lapse in foreign countries after they are probably more than 100 years old. Will the demand for 100-year-old American works in foreign countries be so great that the profits are worth putting a twenty-year freeze on the public domain? Who will incur these profits, and is the balance in the interest of society?

Twice in its brief, the government points out that the petitioners' argument that Congress is restricted by the "promote progress" language in the Copyright Clause is purely academic.²⁰⁰ I suppose that the argument presented here for freedom of expression is also purely academic. But it is one that is gaining steam. Numerous legal scholars believe that Congress has already pushed copyright protection too far, that we are on a sliding slope, and to go any further not only risks permanently damaging the system upon which cultural developments thrive, but also eliminating any constitutionally grounded discourse in copyright law.²⁰¹ If this addition of twenty years is constitutionally permissible, will another twenty be added after that, and then again after that? At what point do we say "too much"? At what point do we acknowledge that the public domain is worth protection?

¹⁹⁹ See Berne, *supra* note 28.

²⁰⁰ Respondent in Opposition, *supra* note 194, at 13a, 14.

²⁰¹ See Peter A. 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, 599-600 (1996).