IN AMBIGUOUS BATTLE: THE PROMISE (AND PATHOS) OF PUBLIC DOMAIN DAY, 2014

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ABSTRACT

On the first day of each year, Public Domain Day celebrates the moment when copyrights expire, and books, films, songs, and other creative works enter the public domain, where they become, in Justice Brandeis's words, "free as the air to common use." Educators, students, artists, and fans can use them with neither permission nor payment. Online archives can digitize and make them fully available without the threat of lawsuits or licensing demands. Sadly, in the United States, as a result of copyright term extensions, not a single published work will enter the public domain in 2014. In fact, almost no works created during most readers' lifetimes will become completely free for them to redistribute and reuse, unless the rights holders affirmatively decide otherwise.

In this Article, I will briefly trace the history and consequences of this legally imposed impoverishment of the public domain. But, I argue, this is only part of the story. Increasingly, private initiatives are trying to build zones of legal freedom that simulate some attributes of the public domain. At the same time, there are global copyright reform efforts to limit the negative effects of term extension, at least with regard to "orphan works"—those that have no identifiable or locatable copyright holder. Although these efforts are no substitute for a more complete reform of copyright, collectively, they do transform the legal situation substantially. Thus, while Public Domain Day in the United States may seem like an empty celebration, it is also a reminder of this newfound complexity in our copyright landscape.

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INTRODUCTION: WHAT STREAMS FEED THE PUBLIC DOMAIN?

In Europe, January 1st, 2014 will be the day when the works of Fats Waller, Nikola Tesla, Sergei Rachmaninoff, Elinor Glyn, and hundreds of other authors emerge into the public domain.[1] In Canada, where the copyright term is shorter, a wealth of material—including works from W.E.B. Du Bois, Robert Frost, Aldous Huxley, C.S. Lewis, and Sylvia Plath—will join the realm of free culture.[2]

What is entering the public domain in the United States on January 1? Not a single published work.[3] Why? In 1998, Congress added twenty years to the copyright term.[4] But this term extension was not only granted to future works; it was retroactively applied to existing works.[5] For works created after 1977, the term was extended to life plus 70 years for natural authors, and to 95 years after publication for works of corporate authorship.[6] For works published between 1923 and 1977 that were still in copyright, the terms were extended to 95 years from publication, keeping them out of the public domain for an additional 20 years.[7] The public

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[1] The European Union has a term of life plus 70 years, so the creations of authors who died in 1943 will enter the public domain on January 1, 2014: the beginning of the year after copyright expiration. Council Directive 2006/116, art. 1, 2006 O.J. (L 372) (EC).

[2] Canada's term is life plus 50 years, so the works of authors who died in 1963 will enter the public domain in 2014. Canada Copyright Act, R.S.C., 1985, c. C-42, s. 6.

[3] There is one subset of works that will enter the United States public domain on January 1, 2014: unpublished works that were created by authors who died in 1943 and were not registered with the Copyright Office before 1978. 17 U.S.C. § 303 (2012). However, this is a limited category—it can be difficult to determine whether works were "unpublished" for copyright purposes, and, in general, users are less likely to encounter these works because they were never published. Therefore, this Article focuses on the millions of published works that are being kept from the public domain. (Copyright's publication rules can also mean that some works published before 1923 are still under copyright, if their initial publication was not authorized, because the current 95-year term only begins on the date of authorized publication. So, for example, a work from 1800 that was not properly published until 1957 could, if its copyright was renewed, be in-copyright until 2053. 17 U.S.C. § 304(b).)

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

[5] Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 381 (2000) ("The overall effect of section 102 of the CTEA is to extend the term of most existing copyrights, whether in the original term or the renewal term, by a period of twenty years.").

[6] 17 U.S.C. § 302.

[7] 17 U.S.C. § 304.

domain was frozen in time, and artifacts from 1923 won't enter it until 2019.

The Supreme Court rejected a challenge to this retroactive term extension in 2003.[8] Deferring substantially to Congress,[9] the Court held that the law did not violate the constitutional requirement that copyrights last for "limited Times."[10] In addition, the Court declined to apply heightened First Amendment scrutiny, rejecting the petitioners' argument that term extension unconstitutionally restricted the public's ability to make speech-related uses of older works.[11] Then, in 2012, the Court went a step further, and ruled that Congress may constitutionally *remove* works from the public domain, even though citizens—including orchestra conductors, educators, librarians, and film archivists—were already legally using them.[12] According to the majority opinion, while copyright owners had legally protected rights during the copyright term, the public had no First Amendment rights to use material in the public domain: "Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works."[13] The dissenting Justices' disagreement was forceful: "By removing material from the public domain, the statute, in literal terms, 'abridges' a preexisting freedom to speak."[14]

This impoverishment of the public domain stands in stark contrast to the original purpose and history of our copyright laws. As Justice Story explained, the Constitutional purpose of copyright is to "promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and

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[8] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[9] *Id*. at 222 ("The wisdom of Congress' action . . . is not within our province to second guess.").

[10] *Id.* at 209–10; *see* U.S. CONST. art. I, § 8, cl. 8.

[11] *See id.* at 221 ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.").

[12] Golan v. Holder, 132 S. Ct. 873 (2012).

[13] *Id*. at 892. By this logic, the copyright system is asymmetric by design: it is concerned only with "ownership rights," not speech rights, and there can be no "ownership rights" in the public domain.

[14] *Id*. at 907 (Breyer, J., dissenting). In their dissent, Justices Breyer and Alito framed the question thus: "[D]oes the [Constitution] empower Congress to enact a statute that withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes—all *without providing any additional incentive* for the production of new material? . . . [T]he answer is no." *Id*. at 903 (emphasis in original).

inventions without restraint."[15] Accordingly, the original copyright term lasted for 14 years, with the option to renew for another 14 years.[16] Until 1978, the maximum copyright term was 56 years: 28 years from the date of publication, renewable for another 28 years.[17]

Under that relatively recent term, works published in 1957 would enter the public domain on January 1, 2014. These include books ranging from Jack Kerouac's *On The Road*[18] to Ayn Rand's *Atlas Shrugged*[19] to Dr. Seuss's *The Cat in the Hat*.[20] (A variety of constituencies would have cause for celebration.) Joining those books would be the classic films *The Bridge on the River Kwai*,[21] *Funny Face*,[22] and *A Farewell to Arms*,[23] as well as the first episodes of *Leave It to Beaver*.[24] Under current law, they will remain under copyright until 2053. And famous creations like these are only the beginning. Most works from 1957 are out of circulation—a Congressional Research Service study suggested that only 2 percent of works between 55 and 75 years old continue to retain commercial value.[25]

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[15] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1147 (1833). The Copyright Clause provides that Congress shall have Power to "promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. CONST. art. I, § 8, cl. 8. Copyright "promotes the progress" in part by ensuring that creative works pass into the public domain. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

[16] Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

[17] Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075 [hereinafter 1909 Copyright Act].

[18] JACK KEROUAC, ON THE ROAD (1957).

[19] AYN RAND, ATLAS SHRUGGED (1957).

[20] DR. SEUSS, THE CAT IN THE HAT (1957).

[21] THE BRIDGE ON THE RIVER KWAI (Columbia Pictures 1957).

[22] FUNNY FACE (Paramount Pictures 1957).

[23] A FAREWELL TO ARMS (Selznick Studio 1957).

[24] *E.g.*, *Leave It To Beaver: The Perfume Salesmen* (CBS television broadcast Dec. 27, 1957); *Leave It To Beaver: It's a Small World* (CBS television broadcast Apr. 23, 1957).

[25] *Eldred*, 537 U.S. at 248 (Breyer, J., dissenting (citing Brief for Petitioners at 7)). The petitioners, citing a Congressional Research Service report, concluded that "[u]nder current law, 3.35 million works would be blocked to protect 77,000," or about 2 percent. *See* Brief for Petitioners at 7 (citing EDWARD RAPPAPORT, CONG. RESEARCH SERV., REPORT NO. 98-144 E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998), *available at* http://ipmall.info/hosted_resources/crs/98-144.pdf).

Those who wish to use such works legally face a series of potential roadblocks. Finding the rights holders of commercially unavailable works can be especially difficult, as the relevant documentation is often lost or buried. These challenges are compounded by the abandonment of "formalities," which coincided with the term extension.[26] Until 1978, the law required copyright owners either to affix a simple notice to their works showing their name and the year of publication, or to register unpublished works with the Copyright Office, in order to receive copyright protection.[27] To maintain copyright, they needed to renew claims with the Copyright Office after an initial term.[28] These requirements produced an evidentiary trail that, in practice, provided the public with basic information about copyright ownership and status—a predicate to efficiently obtaining permission or a license. Without this information, the initial "search costs" can themselves be insurmountable—those who wish to negotiate terms of use cannot find the rights holders in the first place—giving rise to "orphan works."[29] Productive uses are foregone, and forgotten works remain off limits. This legal gridlock entrenches the dividing line between copyright and the public domain, but its costs fall on both sides of that line; in the absence of information *neither* works under copyright, nor those in the public domain, will be efficiently used.[30]

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[26] The United States began to repeal formalities with the Copyright Act of 1976, which took effect in 1978. Pub. L. No. 94-553, 90 Stat. 2541. Between 1978 and March 1, 1989, copyright owners who published without notice were required to register their works within 5 years to maintain protection. *Id*. After March 1989, no notice or subsequent fix was required. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

[27] 1909 Copyright Act, *supra* note 17, §§ 9, 11, 18. In addition to notice and registration, the copyright proprietor was required to "promptly deposit" copies of the work with the Copyright Office. *Id*. at § 12.

[28] 1909 Copyright Act, *supra* note 17, § 23.

[29] *See* U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 165 (May 1999), http://www.copyright.gov/reports/de_rprt.pdf. This is especially true for older works, because their copyrights have often been transferred numerous times, without a clear chain of title. Publishing industry consolidation has exacerbated these challenges.

[30] Recently, copyright formalities have been the subject of renewed interest. *See, e.g.*, *17th Annual BCLT/BTLJ Symposium: Reform(aliz)ing Copyright for the Internet Age?*, BERKELEY LAW SCHOOL, http://www.law.berkeley.edu/formalities.htm (Apr. 18–19, 2013). This is because technology has upended the traditional wisdom about formalities. The downside of formalities—the danger that creators who were unfamiliar or unable to comply with them might unnecessarily forfeit protection—has been minimized by technology that allows compliance without great difficulty or expense. The upside of formalities—providing the information necessary for efficient use—has become more important than ever, because of the unprecedented availability of creative material online. Both

The removal of the renewal requirement further diminished the public domain, by creating copyrights that persisted over works that had exhausted their commercial potential. With renewal, if works were still valuable at the end of their first term, that would provide the incentive to renew; but if not, then the work could pass into the public domain, where it might prove valuable to others.[31] A 1961 study showed that 85 percent of all copyrights were not renewed, and some 93 percent of copyrights in books were not renewed.[32] All of those works went immediately into the public domain. Under current law, however, for the majority of older works, no one is reaping the benefits from continued protection, yet they remain presumptively copyrighted.

The general elimination of formalities had an additional effect. It meant that for the first time the realm of "informal culture"—diaries, home movies, personal photographs—entered the realm of copyright, whether the creators wished it or not. These amateur works, invaluable in detailing our cultural history, are even more likely to be "orphan works" and thus, barring assertions of fair use, effectively off limits to those who would digitize them or use them to chronicle our past. Because these works, too, were subject to the twenty-year term extension, a large swath of informal history became practically unavailable.

These costs in terms of speech and accessibility are high, but what about the countervailing benefits? Copyright's central economic rationale is that exclusive rights spur creativity. However, the incentive effect from prospective term extension is negligible, and from *retrospective* term extension, nonexistent. The 1998 law lengthened the term from life plus 50 to life plus 70 years for natural authors, and from 75 years to 95 years after publication for corporate "works made for hire." Could this extra 20 years of protection, decades in the future, provide additional incentives to authors? The economic evidence suggests that the answer is *no*. Only a minuscule percentage of works retain commercial value by this time.[33] For the term extension to stimulate new creation, authors would have to be incentivized by the remote possibility that their heirs or successors-in-

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developments weigh in favor of reintroducing formalities. *See generally* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

[31] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 210–12 (2009) ("[F]ewer than 11% of the copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight year term, even though the cost of renewal was small.").

[32] Barbara A. Ringer, *Renewal of Copyright*, *in* STUDIES PREPARED FOR THE S. COMM. ON THE JUDICIARY, SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., COPYRIGHT LAW REVISION 187, 220–221 (Comm. Print 1961).

[33] *See supra* note 25 and accompanying text.

interest would continue to receive revenue beyond the previous terms of life plus 50 years or 75 years after publication. A team of eminent economists estimated that "a 1% likelihood of earning $100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today"[34]—hardly a compelling economic incentive. And, of course, lengthening the term for works that have already been produced provides no new incentives at all.

Incentives aside, another purported benefit of term extension was that the additional twenty years would encourage rights holders to restore and redistribute their older works. Empirical studies show otherwise:[35] it is not rights holders who wish to digitize and redistribute their older catalogues. It is non-owners who are waiting to do so. When books fall out of copyright, they are more likely to be in print, and available in more editions and formats.[36] Preservationists, not copyright holders, are digitizing deteriorating films and sound recordings, and term extension is inhibiting their efforts.[37] Therefore, keeping older works under copyright frequently frustrates, rather than promotes, their maintenance and dissemination. In the end, while reasonable minds can disagree about the constitutionality of

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[34] Eldred v. Ashcroft, 537 U.S. 186, 255 (2003) (Breyer, J., dissenting) (emphasis in original) (citing Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at App. 3a (No. 01-618), at 2002 WL 1041846, at *1AA). *See also* I.P.L. Png & Qiu-hong Wang, *Copyright Law and the Supply of Creative Work: Evidence from the Movies* 3–4 (April 2009), http://www.comp.nus.edu.sg/~ipng/research/copyrt.pdf (empirical study of OECD countries showing no statistically significant correlation between copyright term extension and higher movie production).

[35] *See generally* Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers*, 92 MINN. L. REV. 1031 (2008).

[36] *See generally id*. (empirical comparison of "durable" public domain and copyrighted bestsellers showing that the public domain works were available in more editions and at lower prices, and more likely to be in print); Christopher Buccafusco and Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1 (2013) (empirical comparison showing that audio books made from public domain bestsellers were "significantly more available" than those of copyrighted bestsellers).

[37] Brief for Hal Roach Studios et al. as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041856, at *10–*11; TIM BROOKS, NATIONAL RECORDING PRESERVATION BOARD, SURVEY OF REISSUES OF U.S. RECORDINGS vi (2005), *available at* http://www.loc.gov/rr/record/nrpb/pub133.pdf.

retrospective term extension, it is difficult to argue that the benefits outweigh the costs.[38] The available evidence strongly suggests otherwise.

So, one answer to "What will enter the public domain in 2014?" is simple, and distressing: "Nothing." The counterfactual above provides some sense of what we have lost by showing what *could* have enriched the public domain, under the law in effect until 1978. But this is only part of the picture. As recent scholarship on intellectual property points out, the public domain—with its promise of meaningful access to copyrighted works—is not a single, static concept.[39] After all, expiration of the term of protection has never been the only avenue for ensuring access. At its core, the public domain is the realm of material that is entirely free because copyright has lapsed. But even as the length of today's copyright term erects a stubborn barrier around this core, other zones of freedom are developing around it.

This Article will map a series of efforts to secure freedoms that mimic key features of the public domain. These efforts include: 1) promoting broad public access through the fair use doctrine, 2) making material available under open access licenses, 3) enacting orphan works reform, and 4) identifying works already within the public domain. As I will discuss, each of these capitalizes on the opportunities available in the absence of the gridlock that dominates other aspects of the copyright system. Fair uses by definition do not require permission, and are evaluated in court according to a set of rules designed to balance competing interests. While fair use empowers users, open licenses can empower authors by giving them a tool to affirmatively articulate the freedoms they wish to associate with their creations. Orphan works reform steps in to facilitate projects that are prevented for no good reason—there is no downside to allowing uses of orphan works, because no rights holder can be found to benefit from their exploitation. Finally, identifying and tagging public domain works employs specialized expertise in order to overcome transaction costs.

These developments are promising and in some cases transformative. On the one hand, they present a necessary caution against sweeping conclusions about the cultural costs of the changes that have

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[38] Another justification for term extension was harmonization with the European Union, where the term was life plus seventy years. However, the Copyright Term Extension Act did not actually harmonize the United States and European Union copyright terms—it created different terms for all "works made for hire" and for all pre-1978 works. *See Eldred*, 537 U.S. at 257–58 (2003) (Breyer, J., dissenting).

[39] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 62 (Winter/Spring 2003) ("The public domain will change its shape according to the hopes it embodies, the fears it tries to lay to rest, and the implicit vision of creativity on which it rests. There is not one public domain, but many.")

expanded copyright's term and reach, and diminished the formalities and evidentiary requirements to receive a copyright in the first place. Yet, on the other hand, the developments I will chart out are also limited in their reach, given the phenomena they try to address. Thus, my hope is that this Article will offer a greater understanding of not only the complexities of "the public domain problem" but also of its sheer scale.

I. HARNESSING FAIR USE'S FREEDOMS

The "fair use" exception in Section 107 of the Copyright Act is flexible by design, and has adapted to meet new challenges posed by legal and technological change. Over time, fair use has safeguarded copying over-the-air broadcasts for purposes of time-shifting,[40] reverse engineering software for purposes of interoperability,[41] making commercial parodies of copyrighted works,[42] and displaying thumbnails in image search engines.[43] In developing this doctrine, the courts over the last twenty years have particularly stressed the need to safeguard "transformative" uses. According to the Supreme Court, transformative uses "lie at the heart of the fair use doctrine's guarantee of breathing space."[44] A transformative use is one that does not "supersede[] the objects of the original creation," but rather "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[45] In April 2013, in a case involving appropriation art,[46] the Second Circuit granted an especially wide berth to transformative works, holding that "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news

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[40] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
[41] Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
[42] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[43] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).
[44] *Campbell*, 510 U.S. at 579.
[45] *Id*.
[46] William Landes provides a useful definition of appropriation art:

> Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art. Often, the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning.

William Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach* 1, (University of Chicago Law Sch. John M. Olin Law & Economics Working Paper No. 113, 2001) (citations omitted), *available at* http://www.law.uchicago.edu/files/files/113.WML_.Copyright.pdf.

reporting, teaching, scholarship, and research) identified in the preamble to the statute."[47]

This evolution provides the backdrop for two cases determining whether fair use can facilitate access to the wealth of knowledge contained within books. Both address uses stemming from Google's Mass Digitization Project. Since 2004, Google has created digital scans of more than twenty million books from libraries around the country, for use by both Google and the libraries.[48] The vast majority of these titles—93 percent—are nonfiction.[49]

Not surprisingly, Google used these scans to build a search engine for books ("Google Books"). It did not obtain the permission of copyright holders because doing so would have made the project impossible—there were millions of copyrighted books and the majority of these were out-of-print, meaning that many rights holders could not be traced.[50] On November 14, 2013, the Southern District of New York issued an opinion holding that Google's activities—including scanning copyrighted books and displaying snippets from them in response to search queries—were protected by the fair use doctrine.[51] Among other things, the court found that Google Books was "highly transformative": it transformed the expressive text within books into a new and valuable search tool.[52] "Words" were transformed into "pointers."[53]

Notably, the decision's fair use analysis was bookended by parallel discussions of the "significant public benefits" of Google Books.[54] These benefits were wide-ranging: 1) helping people to efficiently find books that were "once buried in research library archives," 2) allowing scholars to track the evolution of language through text-mining, 3) facilitating access to books for print-disabled individuals and underserved populations, 4) preserving books through digitization—particularly older, fragile titles, and 5) benefiting the authors and publishers themselves by generating new audiences and revenue streams.[55] In the words of the court: "Indeed, all

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[47] Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).
[48] Authors Guild, Inc. v. Google, Inc., No. 05 Civ. 8136(DC), 2013 WL 6017130, at *1 (S.D.N.Y. Nov. 14, 2013).
[49] *Id*. at *2.
[50] *Id*.
[51] *Id.* The publishers have settled with Google, so the remaining case only involves authors. This decision marked the culmination of eight years of litigation, including a settlement agreement rejected by the court and interim decisions about procedural issues.
[52] *Id*. at *8.
[53] *Id*.
[54] *Id*. at *10.
[55] *Id*. at *4–*5, *10.

society benefits."[56] Moreover, these benefits were coextensive with copyright's objective of promoting widespread access to creative works.[57]

By emphasizing the public benefits provided by Google Books, the court declined to entangle itself in the formalistic question of whether Google's intermediate activities—including scanning entire books[58]—were themselves infringing. Instead, it focused on Google's overriding purpose and end result: building a tool that allowed users, for the first time, to search the text within millions of books. One could argue that in doing so, the court implicitly followed a principle of "technological neutrality" recently endorsed by the Canadian Supreme Court,[59] and avoided dooming a valuable activity merely because of the technological method used to achieve it. Creating an analog index—through, say, transcribing the relevant terms—would not require the large-scale copying of entire books. Creating a digital index *does* require such copying. In fact, it is the full-text scans that enable a far more efficient and comprehensive index than was possible in the analog world. Dwelling on the *process* rather than the *outcome* would, perversely, "impose a gratuitous cost for the use of more efficient, Internet-based technologies."[60]

The court's finding of fair use was premised on both Google Books' public benefits and its accommodation for private rights: As the judge explained, "[Google Books] advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders."[61] To avoid interfering with copyright owners' markets, Google Books did not display the full text of in-copyright books; instead, it displayed no more than three short snippets (about an eighth of a page) showing the pertinent term, with no advertising.[62] Added security measures

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[56] *Id*. at *10.
[57] *Id*.
[58] The copyright owner has the exclusive right to "reproduce the copyrighted work in copies." 17 U.S.C. § 106(1) (2012).
[59] *See* Entm't Software Ass'n v. Soc'y of Composers, Authors and Music Publishers of Canada, 2012 S.C.C. 34 ¶¶ 2, 5.
[60] *Id*. at ¶ 9. This is not a minor point: our current Copyright Act dates from 1976, when unlicensed "copies" were more likely to represent infringements. Now, copies are routinely implicated in any activity that uses digital technology, and many of these activities are non-infringing. Isolating intermediate copies, rather than focusing on the overall use, could lead to counterintuitive results. *See, e.g.*, MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir.1993) (holding that repairing a computer created an infringing "copy" by temporarily loading the copyrighted operating system software into the computer's random access memory).
[61] *Authors Guild*, 2013 WL 6017130 at *10.
[62] *Id*. at *3.

made it impossible for an unscrupulous user to patch together any substantial portion of the book.[63] For those who wanted to read the entire book, an "About the Book" page provided links to booksellers and libraries where the book could be obtained.[64] As a result, Google Books potentially created, rather than displaced, book sales—both by helping readers locate books they otherwise would not have found and by linking them to retailers. Future projects that do not implement reasonable measures safeguarding rights holders' interests may not pass fair use muster.

As part of its agreement with participating libraries, Google allowed them to download digital copies of the titles scanned from their collections.[65] (Two of the beneficial uses highlighted by the Google Books decision were related to this library partnership: preserving books and providing better access.) An earlier court decision from 2012 independently vindicated the libraries' own rights to use their digital scans.[66] There, HathiTrust—a partnership of major research institutions and libraries—had used its digital repository for the purposes of full-text searching, preservation, and access for people with print disabilities.[67] The court held that these uses were transformative, and protected by the fair use doctrine, in unequivocal language: "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' MDP [Mass Digitization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts."[68]

If upheld on appeal, these two cases offer an important guideline: fair use determinations should be informed by copyright's purpose. As the HathiTrust court explained: "The ultimate focus is the goal of copyright itself, whether 'promoting the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it.'"[69] As a corollary, when technology is involved, courts should adopt the principle of technological neutrality, and focus on the end result of a beneficial activity, rather than whether its technological process happens to entail copying (or

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[63] *Id*. In addition, one snippet per page and at least 10% of pages in each book were "black-listed," meaning they would not be displayed. Also, the system would not offer different snippets for the same search query, and the snippets were presented as an image, so that a user could not copy and paste the text. *Id*.
[64] *Id*.
[65] Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 448 (N.D. Ga. 2012).
[66] *Id*.
[67] *Id*. at 448. These uses by libraries are sanctioned both by the fair use doctrine and other provisions of the Copyright Act. *See* 17 U.S.C. §§ 108, 121 (2012).
[68] *Id*. at 464.
[69] *Id*. at 458 (citing Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 861 F. Supp. 2d 336, 339–40 (S.D.N.Y. 2012)).

other incidental, copyright-significant acts). Thus understood, the adaptive fair use doctrine can provide a viable legal mechanism for securing digital access to our collective culture.

Fair use protection is especially important for mass digitization projects—particularly those that preserve historical collections—because the transaction costs would otherwise be exponential.[70] Many rights holders cannot be found, and for the remainder, the expense and logistical hurdles associated with scores of discrete negotiations would derail even a modest project. Fair use provides an alternative to the gridlock resulting from the term extensions detailed earlier. Endeavors such as Google Books and HathiTrust's Digital Library are possible precisely because no permission is required. If the project is challenged, then the use is evaluated in an impartial court according to specific rules, rather than through piecemeal bargaining subject to the manifold preferences of private parties. To be sure, fair use is not a risk-free proposition—litigation has its own challenges. But—as these cases show—this built-in exception to copyright offers one partial solution for providing access to commercially unavailable and orphan works.

II. OPEN ACCESS TO SCHOLARSHIP

Like the projects discussed above, the open-access movement leverages a technological transformation to further the goal of "promoting the progress." The possibility of worldwide access to scholarship and culture over the Internet makes it more pressing than ever to mark out zones of freedom that ensure meaningful access to copyrighted works. Thomas Jefferson, shown the technology of the Internet, might well have agreed. Consider his words:

> He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point,

[70] *See* INTERNET POLICY TASK FORCE, DEPARTMENT OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 33 (2013), http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf ("[M]ass digitization presents significant economic opportunities in addition to cultural and societal benefits. But given the large numbers of works involved, many of which are protected by copyright, individual licensing negotiations will not always be feasible.").

> and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.[71]

While fair use's flexibilities—discussed in the previous section—empower users, the open-access movement starts with choices made by authors. Its infrastructure relies on standardized, simple, and machine-readable licenses that allow authors to choose and connect a range of freedoms with their works. These licenses, introduced by the non-profit Creative Commons ("CC") just over a decade ago, provide a streamlined way to grant permissions to the public. They are widely used by copyright holders to specify usage rights, and are utilized within—and well beyond—the open access movement; there are currently over 500 million works available under CC licenses.[72]

The open-access movement discussed here uses such licenses to promote the "free availability and unrestricted use" of *scholarly literature*, such as academic and research articles.[73] The goal of open access is to maximize the dissemination and impact of knowledge, consistent with copyright's intent. At the same time, it benefits authors themselves by reducing publication delays and increasing citation counts.[74] Providing unfettered access is especially appropriate in the context of scholarly communications because their raison d'être is the advancement of knowledge and discovery. Furthermore, scholars do not rely on traditional copyright incentives: academics and scientists are generally remunerated by their institutions or funders, not by the market.[75] As Professor Michael Carroll explained: "Authors write for impact. As scientific publishing has migrated to digital networks, full open access better achieves scientific authors' goals than does the traditional publishing model . . . ."[76]

Recent years have seen a flourishing of open access. The Public Library of Science ("PLoS")—a nonprofit publisher of open-access scientific journals—has been especially successful, and its experience suggests that open access publishing can be "viable, scalable, and

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[71] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 326, 333–34 (Albert Ellery Bergh ed., 1907).

[72] *See Creative Commons Wiki – 4.0*, CREATIVE COMMONS, http://wiki.creativecommons.org/4.0 (last visited December 22, 2013).

[73] Peter Suber, *Open Access Overview*, SPARC OPEN ACCESS NEWSLETTER, http://legacy.earlham.edu/~peters/fos/overview.htm (last revised Dec. 16, 2013).

[74] Gunther Eysenbach, *Citation Advantage of Open Access Articles*, PLOS BIOLOGY 4(5): e157 (2006), http://www.plosbiology.org/article/info:doi/10.1371/journal.pbio.0040157.

[75] Michael W. Carroll, *Why Full Open Access Matters*, PLOS BIOLOGY 9(11): e1001210 (2011), http://www.plosbiology.org/article/info:doi/10.1371/journal.pbio.1001210.

[76] *Id*. at 2.

sustainable."[77] PLoS publishes seven influential journals, including PLoS ONE, the largest journal in the world.[78] In 2012, PLoS published over 26,000 articles—a 62 percent increase over 2011—with over 5.3 million monthly article views.[79] This trajectory may signal a pivotal moment: In the words of PLoS co-founder Michael Eisen, "We are close to a tipping point with most members of the scientific community believing that Open Access is the future."[80]

This may also be a tipping point for open access to government-funded research. Back in 2008, the National Institutes of Health ("NIH") launched its Public Access Policy requiring that scientists submit all NIH-funded articles to the digital repository PubMed Central "immediately upon acceptance for publication."[81] The manuscripts must then be accessible to the public no later than one year after publication. To bolster this policy, the NIH announced in 2012 that it would block further funding if publications are not in compliance.[82] In February 2013, the White House issued its own memorandum directing federal agencies with over $100 million in annual research and development expenditures to take steps toward making federally-funded research "freely available to the public within one year of publication."[83] Currently, there are at least 2,900,000 full-text articles archived in PubMed Central, and the aggregate number of open-access publications is multiplying both domestically and internationally.[84]

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[77] PLOS TENTH ANNIVERSARY PROGRESS UPDATE 2012–2013, at 3, http://www.plos.org/wp-content/uploads/2013/09/Progress-Update_FINAL_hyperlinked-091813.pdf (last visited Dec. 24, 2013).
[78] *Id*.
[79] *Id*. at 5.
[80] *Id.* at 2.
[81] *Public Access Policy*, NAT'L INSTS. OF HEALTH, http://publicaccess.nih.gov/index.htm (last visited Dec. 22, 2013).
[82] Sally Rockey, *Improving Public Access to Research Results*, NAT'L INSTS. OF HEALTH EXTRAMURAL NEXUS (Nov. 16, 2012), http://nexus.od.nih.gov/all/2012/11/16/improving-public-access-to-research-results/.
[83] Michael Stebbins, *Expanding Public Access to the Results of Federally Funded Research*, WHITE HOUSE OFF. OF SCI. & TECH. POL'Y BLOG (Feb. 22, 2013, 12:04 PM), http://www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research.
[84] PUBMED CENTRAL, http://www.ncbi.nlm.nih.gov/pmc/ (last visited Dec. 22, 2013); *see also* Eric Archambault et al., *Proportion of Open Access Peer-Reviewed Papers at the European and World Levels — 2004–2011*, SCIENCE-METRIX i (Aug. 2013), http://www.science-metrix.com/pdf/SM_EC_OA_Availability_2004-2011.pdf (measuring the growth of open-access for "22 fields of knowledge," across "the European Research Area countries, Brazil, Canada, Japan, and the US").

Also in 2013, both houses of Congress introduced identical Fair Access to Science and Technology Research ("FASTR") bills.[85] FASTR would broaden NIH's policy by shortening the embargo period for manuscripts to six months and applying the open access mandate to any federal agency with over $100 million in extramural research expenditures. Notably, FASTR seeks not only to enable access, but also "productive reuse, including computational analysis by state-of-the-art technologies."[86] This would allow tools such as text-mining, data-mining, and linking to truly revolutionize scientific discovery. Nonetheless, prognosticators give FASTR only a 4 or 5 percent chance of enactment.[87]

Alongside the hobbled public domain, the burgeoning open access movement creates a sister realm of freedom through a privately constructed *commons*. Transaction costs on both sides are mitigated: Users do not need to laboriously clear rights because permission has already been granted, and the standardized licenses allow rights holders to efficiently specify the freedoms they want to accompany their creations. These commons are no less a part of the copyright scheme than the rights themselves. In fact, it is the underlying rights that make the relevant licenses enforceable. Copyright and commons—and rights and freedoms—are synergistic, not antagonistic.

III. ORPHAN WORKS REFORM

Orphan works present a particularly compelling case for reform. Because the current copyright term far outlasts the commercial lifespan of most creative output,[88] there is a growing limbo of "orphan works" that are still presumably under copyright, but for which the copyright owner cannot be traced, making it impossible to ask for permission or negotiate licensing terms.[89] The public cannot use them without legal risk because copyright is a "strict liability" system, meaning that a diligent effort to find the owner is no defense.[90] Libraries, historians, educators, writers, and filmmakers must assume they are off limits. There is no downside to allowing uses of these

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[85] Fair Access to Science and Technology Research Act of 2013, H.R. 708, 113th Cong. (2013); Fair Access to Science and Technology Research Act of 2013, S. 350, 113th Cong. (2013).

[86] *Id*.

[87] *Prognosis for H.R. 708*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr708 (last visited December 22, 2013); *Prognosis for S. 350*, GOVTRACK.US, https://www.govtrack.us/congress/ bills/113/s350 (last visited December 22, 2013).

[88] *See supra* note 25 and accompanying text.

[89] *See supra* notes 29–30 and accompanying text.

[90] *See* King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 852 (M.D. Tenn. 2006) ("Liability for copyright infringement does not turn on the infringer's mental state because a general claim for copyright infringement is fundamentally one founded on strict liability." (internal quotation marks omitted)).

works, because there is no one to benefit from their exploitation. At the same time, there is considerable downside to stalling reform: works are literally disintegrating because of thwarted preservation projects, and educational and creative pursuits are needlessly abandoned.[91]

This frustrates copyright's intent of promoting progress: in the words of the Copyright Office, "For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace . . . . This outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public."[92] A government report from the United Kingdom explained the problem in even stronger terms:

> The copyright system is locking away millions of works in this category . . . . As long as this state of affairs continues, archives in old formats (for instance celluloid film and audio tape) continue to decay, and further delay to digitisation means some will be lost for good. Beyond this cultural negligence, the unnecessary restriction on access involved in orphan works can, when applied to scientific papers, even affect life saving research . . . . Action on this issue cannot be deferred any longer.[93]

Policymakers around the world have begun to respond. In 2012, the European Union passed a new Directive that allows qualifying public institutions to digitize, preserve, and make available the orphan works in their collections, in accordance with their public-interest missions.[94] However, it does not cover other groups who might make productive uses of orphan works, such as artists, researchers, educators, or for-profit initiatives. While this Directive is limited, it represents an important step toward salvaging and guaranteeing access to these works.[95]

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[91] *See* BROOKS, *supra* note 37, at vi ("[H]istorical recordings are at risk of physical loss as well as of passing, unnoticed, from the nation's aural memory.").

[92] Orphan Works and Mass Digitization, 77 Fed. Reg. 64555, 64555 (Oct. 22, 2012).

[93] IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, U.K. INTELLECTUAL PROPERTY OFFICE 38 (May 2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf.

[94] Directive 2012/28, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5.

[95] National legislatures have also taken steps to enable uses of orphan works. Canada, Denmark, Finland, France, Hungary, India, Japan, Korea, and the United Kingdom have enacted a variety of orphan works solutions. *See* INTERNET POLICY TASK FORCE, *supra* note 70, at 31–32. China is also considering orphan works reform. *Id*. at 32.

Efforts in the United States to pass orphan works legislation have so far failed. The Copyright Office, concerned that "the uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system," is currently in the midst of a renewed effort to assess "the state of play for orphan works" and advise Congress on possible solutions.[96] In a July 2013 report, the Commerce Department's Internet Policy Task Force signaled strong support for the Copyright Office's push: "[T]he time is ripe to address the orphan works issue, and to ensure that the United States can play a leadership role in shaping international thinking."[97] Nonetheless, some stakeholders are pessimistic about the potential for consensus among the many interested parties.[98] (Certainly, if the Copyright Office cannot find consensus, Congress is unlikely to do so.)

Ironically, then, orphan works reform in the United States—something that should in theory encounter less friction than fair use or open licensing because no one is benefitting from the current system—has thus far been thwarted by a different kind of gridlock. If domestic reform does not succeed, then projects that enable access to orphan works—such as Google Books and the HathiTrust Digital Library—become all the more vital.

IV. CHARTING WHAT *IS* IN THE PUBLIC DOMAIN

As with orphan works reform, identifying and tagging older works that are *already* in the public domain might seem relatively straightforward; after all, it merely reaffirms the legal status quo. However, any generalized efforts to do this are beset by two related problems. First, they face the transaction costs described earlier—tracking down the relevant copyright information (for example, the original authors, the chain of title, and details about notices and renewals) can be difficult. Second, these hurdles produce asymmetries and collective action problems. It is less burdensome for users to pay individual licensing fees for out-of-copyright works, even if they are legally unwarranted, than to collectively undertake the research or litigation necessary to establish a work's public domain status. In addition, an entity gathering licensing fees for public domain works has strong incentives to continue doing so, while the payees lack the incentives to mount an

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[96] *Orphan Works*, COPYRIGHT OFFICE, http://www.copyright.gov/orphan/ (last visited December 22, 2013).

[97] INTERNET POLICY TASK FORCE, *supra* note 70, at 33.

[98] LIBRARY COPYRIGHT ALLIANCE, REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE TO THE COPYRIGHT OFFICE'S NOTICE OF INQUIRY CONCERNING ORPHAN WORKS AND MASS DIGITIZATION 1 (March 5, 2013), http://www.copyright.gov/orphan/comments/noi_11302012/Library-Copyright-Alliance.pdf.

expensive and time-consuming challenge. Nevertheless, some current initiatives are overcoming these impediments.

The first involves books in the HathiTrust Digital Library.[99] For in-copyright titles, the libraries rely on fair use to enable searching, preservation, and access for print-disabled patrons. For public domain books, the libraries can go much further: they are free to make the full text available to the general public, fulfilling copyright's aim of allowing "full possession and enjoyment . . . without restraint."[100] Accordingly, the University of Michigan Library's Copyright Review Management System ("CRMS") is working to certify public domain titles in the HathiTrust corpus.[101]

While works published before 1923 are conclusively in the public domain, a substantial number of works published between 1923 and 1963 are also in the public domain because the copyright holder did not comply with notice and renewal formalities.[102] But in many cases, this freedom is theoretical, not actual, because general users lack the tools to determine the relevant facts. CRMS is tackling this problem by concentrating the necessary research. It selects older books likely to be out of copyright, and steadily gathers information relevant to determining public domain status. Since 2008, it has identified almost 153,000 public domain titles published between 1923 and 1963 in the United States.[103] Its international project, begun in 2012, has identified 40,000 public domain titles.[104]

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[99] *See supra* notes 65–69 and accompanying text.

[100] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1147 (1833).

[101] *See Copyright Review Management System*, UNIVERSITY OF MICHIGAN LIBRARY, http://www.lib.umich.edu/copyright-review-management-system-imls-national-leadership-grant (last visited December 22, 2013).

[102] 1909 Copyright Act, *supra* note 17, §§ 9, 18, 23; 17 U.S.C. § 304 (2012). For works published between 1923 and 1963, the copyright term was only extended for copyrights that already had been renewed. 17 U.S.C. § 304(b). Since only an estimated 15 percent of copyrights were renewed, *see* Ringer, *Renewal of Copyright*, *supra* note 32, at 187, 85 percent of works from that period had already passed into the public domain. For works published between 1964 and 1977, the law granted both a term extension and automatic renewal to all of the copyrights still in their initial term. 17 U.S.C. § 304(a). This means that the 85 percent of works that might have entered the public domain because their copyrights were not renewed nevertheless remain under copyright. All works from 1923 to 1977 that were published without a copyright notice are in the public domain, but this information can be difficult to find.

[103] E-mail from Kevin Smith, Scholarly Communications Officer at Duke University, to author (November 16, 2013, 8:23 EST) (on file with author).

[104] *Id*.

Alongside such larger-scale endeavors are individual lawsuits seeking judgments that particular works are actually in the public domain. Two cases from 2013 illustrate the high transaction costs involved in determining public domain status, as they do not deal with obscure works but with famous pieces of culture: the song "Happy Birthday to You," and the characters Sherlock Holmes and Dr. Watson.

"Happy Birthday to You" has been anointed the most popular song of the twentieth century, and the most frequently sung song in the English language.[105] Warner/Chappell Music, Inc. claims copyright in the song until 2030, and collects an estimated $2 million in annual licensing fees.[106] In June 2013, a documentary film company—one of many that have faced demands for licensing fees when people sing "Happy Birthday" in their films—filed a lawsuit seeking a declaratory judgment that "Happy Birthday to You" is in the public domain.[107] It cites evidence that the melody was first published in 1893 (for a different song called "Good Morning to All"), and the lyrics were first published in 1911, although it is unclear who (or whom) actually married the melody and lyrics.[108] Regardless of who the rightful authors were, any copyright claims over the full song appear to have long since expired.

This lawsuit draws from a 2009 article by law professor Robert Brauneis that, through exhaustive research, unearthed historical documents showing multiple defects in the "Happy Birthday" copyright claim.[109] The details are exceedingly technical, but the gravamen is as follows. Warner/Chappell's copyright is premised on registrations from 1935, when copyright ownership was conditioned on proper notice and renewal. The evidence suggests that the 1935 registrations may themselves be invalid either because they did not cover the first authorized publication of the song or because the copyright notices were otherwise defective.[110] Even assuming their initial validity, the only registrations from 1935 that were properly renewed cover musical additions specific to new *piano arrangements* of the song, not the familiar melody and lyrics that are still

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[105] Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y USA 335, 356 (2009).
[106] *Id*. at 359, 365.
[107] Complaint, Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc., No. 13-4040 (S.D.N.Y. June 13, 2013).
[108] *Id*. at 3–16. The complaint contains a wealth of additional historical information.
[109] Brauneis, *supra* note 105. Many of the copyright claim's problems are related to a lack of evidence about authorship. Professor Brauneis also found that Warner/Chappell may not be a rightful owner because it cannot trace its title to the original authors of the song. *Id*. at 339.
[110] *Id*. at 369–395.

generating licensing revenue.[111] As the complexity of Professor Brauneis' full analysis demonstrates, the challenges associated with determining copyright status present a daunting task even for legal experts.

The case involving Sherlock Holmes and Dr. Watson also deals with material from the 19th century. The characters were first introduced in 1887, and featured in fifty pre-1923 works (four novels and forty-six stories).[112] Under rudimentary copyright law, all of the material within those stories, including Sherlock Holmes' penchant for disguise, uncanny reasoning skills, and friendship with Watson, is in the public domain.[113] Any new character traits added in the ten post-1923 stories (for example, Holmes' retirement and Dr. Watson's second wife) would be copyrighted, but the original characters are in the public domain. Nevertheless, the Conan Doyle estate has continued to collect licensing fees for them. Leslie Klinger, a Holmes scholar, declined to pay these fees and asked for a judgment that Holmes and Watson are in the public domain.[114]

While the questions in the "Happy Birthday" case turned on a series of copyright technicalities, the Holmes case presents a novel legal argument. The Conan Doyle estate claims that while all of the dialogue, artifacts, and story lines from the pre-1923 stories are indeed in the public domain, a "character is a work of authorship separate from the stories," and the copyright term does not commence for characters until "the creation of the characters [is] complete."[115] Thus, they maintain, because Holmes' character development continued in a handful of post-1923 stories, his entire character—including all of the core aspects fully developed in the earlier stories—remains copyrighted.

This remarkable theory would create a special—and unknowable—term of copyright for characters. Long after the stories in which they appear enter the public domain, literary characters could remain copyrighted as long as their owners keep tweaking them in subsequent books. Future creators would find it impossible to determine when characters enter the public domain, because any incremental change would keep the copyright

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[111] *Id*. at 395–409.

[112] Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1, 5, Klinger v. Conan Doyle Estate, Ltd., No. 13-1226, 2013 WL 6824923 (N.D. Ill. Dec. 23, 2013).

[113] *Id*. at 5–8. *See also* 17 U.S.C. § 304 (2012).

[114] Plaintiff's Motion for Summary Judgment, *Klinger*, No. 13-1226. Mr. Klinger was co-editing a collection of stories inspired by the Holmes tales and contends that "Holmes and Watson belong to the world, not to some distant relatives of Arthur Conan Doyle." FREE SHERLOCK! (February 14, 2013), http://free-sherlock.com/2013/02/14/free-sherlock/.

[115] Response in Opposition to Plaintiff's Motion for Summary Judgment at 3, *Klinger*, No. 13-1226.

clock ticking.[116] Ironically, though, writers such as Conan Doyle could also be harmed: If copyright over characters doesn't begin until they are "completely created," then the logical extension is that those characters are not copyrighted at all *before* then (in the case of Conan Doyle, during the decades between 1887 and 1927). Perhaps the public can make free use of Harry Potter now, if there is a chance that J.K. Rowling might resurrect him in a later book. (At any rate, this legal theory is so bizarre that it would take a Sherlock Holmes to make sense of it.)

As this Article went to print, the court issued its decision: As of December 23, 2013, the original Holmes and Watson characters are, in fact, free for all to build upon. In the court's words: "It is a bedrock principle of copyright that once work enters the public domain it cannot be appropriated as private (intellectual) property, and even the most creative of legal theories cannot trump this tenet. Having established that all but the Ten [post-1923] Stories have passed into the public domain, this Court concludes that the Pre-1923 Story Elements are free for public use."[117] The Sherlock Holmes character introduced in 1887 is officially in the public domain. But it took the expense and transaction costs associated with a court case to confirm this relatively straightforward proposition.

The CRMS project and these two lawsuits represent isolated attempts to amass the evidence necessary to certify that certain older works are in fact free for public use. They have managed to overcome transaction costs and collective action problems through relatively idiosyncratic means. CRMS benefits from grant funding and the tireless contribution of a distributed network of research librarians. The two lawsuits rely on the persistence of the plaintiffs and their lawyers. The "Happy Birthday" challenge builds upon the years of research that went into Professor Brauneis' article, and the lawyers in the Sherlock Holmes case were tasked with defeating novel legal theories. All of these efforts simultaneously point to the problems caused by the long copyright term and related transaction costs, and offer intriguing solutions. However, their prevalence and efficiency are limited by the absence of a more streamlined method for establishing copyright validity. Unlike the other efforts discussed in this Article (capitalizing on fair use, open licenses, or orphan works legislation), these instances may not suggest scalable solutions.[118]

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[116] Does copyright get extended for James Bond every time he develops a new romantic interest or martini preference? For Superman if he gains a new superpower or gets married? Who knows when a character is "complete"?

[117] *Klinger*, No. 13-1226, 2013 WL 6824923 at *7 (internal quotations and citations omitted).

[118] Of course, reinstating the requirement that copyright owners provide notice of their claims would help to alleviate the lack of legal certainty about copyright status going forward.

CONCLUSION

From one perspective, the outlook for the public domain is rather bleak. As I pointed out in the Introduction, no published works are entering the U.S. public domain until 2019, and, remarkably, the Supreme Court ruled in 2012 that Congress may even remove material from the public domain,[119] despite previous Supreme Court cases that suggested this was impermissible.[120] And this suppression is happening just as the Internet and digital technologies offer unprecedented opportunities to preserve, catalog, and share our culture, or at least those parts of it not currently being economically exploited. Despite these developments, the situation is in fact more complex. This Article has described an array of initiatives helping to realize copyright law's vision of "promoting broad public availability of literature, music, and the other arts."[121]

To be sure, these breathing spaces are only a partial solution. Shortening the copyright term would more directly restore the public domain's role in "promoting the progress." Economists modeling the copyright term have estimated that its optimal length is closer to the original term of 14 years in our first copyright law—many decades shorter than the current term.[122] After such "limited times," economists tell us, continued protection offers increasingly negligible incentives to most authors, while unnecessarily keeping works from the public.[123] In addition to recalibrating the copyright term, reintroducing formalities that require claimants to furnish basic copyright information would greatly reduce the transaction costs associated with licensing and use, particularly if accompanied by centralized copyright registries and better-maintained records. These proposals are especially timely, as the United States is currently exploring a wide-ranging update to our copyright laws.[124] Hopefully, lawmakers will seriously consider such measures.

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[119] *See supra* notes 8–14 and accompanying text.
[120] Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966).
[121] *See* Twentieth Century Music Corp. v. Aiken, 422 U. S. 151, 156 (1975).
[122] *See*, *e.g.*, Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term*, 6 REV. ECON. RES. ON COPYRIGHT ISSUES 35 (2009) (estimating the economically optimal copyright term at approximately 15 years).
[123] *Id*. *See also* LANDES & POSNER, *supra* note 31, at 213–222 (2009).
[124] There are a number of efforts underway to reconcile copyright law with the digital age. Congress, the Department of Commerce (in conjunction with the Patent and Trademark Office), and the Copyright Office are in the midst of investigating options. *See*, *e.g.*, INTERNET POLICY TASK FORCE, *supra* note 70, at 33.; Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013). Proposals include exempting incidental copies, bolstering library exceptions, enabling remixes, reforming statutory damages, building registries to streamline

As long as the current gridlock remains in place, however, initiatives that exploit neighboring flexibilities become an essential means for achieving copyright's objectives. This Article examines a range of examples. Projects that harness fair use's freedoms work within one of copyright's especially adaptive exceptions. Open access to scholarship relies on a privately constructed commons, built upon authors' rights. Orphan works reforms respond to a stark dysfunction where the law is "blocking the progress" and impeding productive access to millions of works without benefitting any rights holders. Finally, charting what is already in the public domain uncovers its existing riches through particular diligence. From this author's perspective at least, all of these efforts are bringing us closer to what we *should* be celebrating on Public Domain Day.

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licensing, improving Copyright Office deposits and record keeping, and fostering opt-out systems such as extended collective licensing.