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**PANEL I**

**NOTICE FAILURES ARISING FROM COPYRIGHT  
DURATION RULES**

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INTRODUCTION ..... 667

    I. THE PRE-1978 NOTICE-FRIENDLY COPYRIGHT DURATION RULES ..... 669

    II. LIFE-PLUS MODEL PREVAILED IN THE 1976 ACT ..... 675

    III. NOTICE FAILURES RELATED TO COPYRIGHT DURATION RULES  
        AND POSSIBLE SOLUTIONS ..... 680

CONCLUSION..... 689

INTRODUCTION

For the first 188 years of U.S. history, copyright terms were measured by a set term of years, dating from the work’s first registration or publication, and were renewable for another set term if the owner of the rights complied with the formalities necessary to accomplish this.<sup>1</sup> Because the law required owners to give notice of their claims of copyright on published copies of their works,<sup>2</sup>

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<sup>1</sup> JAMES J. GUINAN, JR., STUDY NO. 30: DURATION OF COPYRIGHT 53, 57-58 (1957), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 29-31 (Comm. Print 1961) [hereinafter DURATION STUDY] (explaining that if the author survived until the end of the first fourteen-year term he could obtain another fourteen-year term); *see also* BARBARA A. RINGER, STUDY NO. 31: RENEWAL OF COPYRIGHT 105, 110-11 (1960), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 29-31 (Comm. Print 1961) [hereinafter RENEWAL STUDY] (“As a condition of renewal it was necessary to observe again the requirements connected with the original term of copyright—recording the title in the district court and publishing a notice in newspapers—within certain time limits.”).

<sup>2</sup> *See* VINCENT A. DOYLE ET AL., STUDY NO. 7: NOTICE OF COPYRIGHT 1, 5-9 (1957), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 7-10 (Comm.

it was possible to know with reasonable certainty when those copyrights would expire, as well as when the work was published and who claimed to own those rights.<sup>3</sup> Because most copyright owners did not renew their copyrights, the overwhelming majority of published works went into the public domain within a few decades.<sup>4</sup>

Since 1978, copyright terms for individual authors have commenced at the moment of first fixation of their works in a tangible medium and lasted for the authors' lives plus fifty (now seventy) years.<sup>5</sup> Since 1989, copyright owners have been relieved of the obligation to put notices on published copies of their works.<sup>6</sup> Because the life-plus model was not applied retroactively, it is still possible, barring future copyright term extensions, to know when pre-1978 works will enter the public domain because those works remain subject to set terms.<sup>7</sup> Works for hire, along with anonymous and pseudonymous works, also have set terms, although these terms are now so long—ninety-five years from publication or 120 years from creation<sup>8</sup>—that, practically speaking, they might as well be infinite.<sup>9</sup>

Congress had its reasons for making these changes to copyright duration and notice rules in 1976 and 1989, but it gave little thought to the costs that these changes would impose on future creators and prospective users.<sup>10</sup> Since then, it has become apparent that the combination of lengthened copyright terms and lessened incentives to use copyright notices has produced some significant

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Print 1960) [hereinafter NOTICE STUDY] (discussing the legislative history of notice provisions in U.S. copyright law).

<sup>3</sup> Standardized copyright notices have changed over time. *Id.* The notices on published copies may sometimes be inaccurate because of ownership transfers after publication of copies of the work. Molly Shaffer Van Houweling, *Land Recording and Copyright Reform*, 28 BERKELEY TECH. L.J. 1497, 1499 (2013) (citing 17 U.S.C. § 205 (2012)) (explaining that the statute allows, but does not require, recordation of transfers).

<sup>4</sup> RENEWAL STUDY, *supra* note 1, at 112.

<sup>5</sup> 17 U.S.C. §§ 102(a), 302(a). Works created but not published before 1978 have the same term as works created in 1978 or thereafter. *Id.* § 303. The 1976 Act copyright terms were extended by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b)-(d), 112 Stat. 2827, 2827-28 (1998) (codified at 17 U.S.C. § 302(a)).

<sup>6</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-58 (codified as amended at 17 U.S.C. § 401).

<sup>7</sup> 17 U.S.C. § 304.

<sup>8</sup> *Id.* § 302(c) (ending the term at whichever is earlier).

<sup>9</sup> *See, e.g.*, Molly Shaffer Van Houweling, *The Dead Hand of Copyright I* (Oct. 7, 2014) (unpublished manuscript) (on file with author).

<sup>10</sup> *See* Van Houweling, *supra* note 3, at 1498 (“The call to reformalize [copyright law] reflects the fact that some of the information costs associated with copyright are attributable to relatively recent policy choices . . . that have eroded copyright’s information infrastructure . . .”).

notice failures.<sup>11</sup> Many who want to license uses of protected works encounter difficulties in finding out who owns what rights (if any) in which works, how long those rights will last, and on what terms licenses may be available.<sup>12</sup> Cultural heritage institutions, such as libraries, archives, and museums, are often inhibited from making some socially valuable uses of works in their collections because of copyright restrictions.<sup>13</sup> Many of these works have little or no commercial value; yet they may have historical or cultural heritage significance and may be valued by scholars and other researchers.<sup>14</sup> If copyright is to achieve its constitutional purpose of “promot[ing] the progress of science,”<sup>15</sup> solutions need to be found to overcome the notice failures that Congress created with changes to duration and notice rules.

Part I of this Article discusses the societal benefits of the pre-1978 copyright duration and notice regime. This era was not without some notice problems, but by comparison with the present copyright regime, it was a notice-friendly system.<sup>16</sup> Part II considers reasons for the shift to the life-plus model, along with one long set term for works for hire, to replace the renewable term model. There was some awareness that the life-plus model would pose notice difficulties, but those difficulties were underappreciated.<sup>17</sup> Part III offers numerous suggestions for how to overcome the notice problems that now beset copyright arising from its duration regime.

#### I. THE PRE-1978 NOTICE-FRIENDLY COPYRIGHT DURATION RULES

For almost two hundred years, U.S. copyright law measured the duration of exclusive rights granted to authors based on a set period of years (assuming compliance with notice formalities), which could be extended for another set number of years (by complying with a formality in the last year of the first

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<sup>11</sup> See, e.g., Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1418-19 (2013) (“[T]he benefits of a lengthy term are meaningless if the current owner of the work cannot be identified or cannot be located. Oftentimes, this is complicated by the fact that the current owner is not the author or even the author’s children or grandchildren.”).

<sup>12</sup> See, e.g., WILLIAM PATRY, *HOW TO FIX COPYRIGHT 189-90* (2011) (arguing that these difficulties increase as the length of the term increases); see also *infra* notes 106-07 and accompanying text.

<sup>13</sup> See, e.g., PATRY, *supra* note 12, at 190-92.

<sup>14</sup> See RENEWAL STUDY, *supra* note 1, app. C at 231 (“Many modern writings, particularly in technological fields, have a limited commercial life of only eight to twelve years, but research in these fields would be considerably facilitated if these works were freely accessible in the public domain after that period.”).

<sup>15</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>16</sup> See *infra* notes 23-29 and accompanying text.

<sup>17</sup> See *infra* notes 91-92 and accompanying text.

term).<sup>18</sup> Renewal was initially dependent on the author being alive in the last year of the first copyright term, but in 1831, Congress allowed surviving spouses to renew in the final year of the first term.<sup>19</sup> Assignees of second-term copyrights could also renew.<sup>20</sup>

The pre-1978 copyright duration rules were consistent with the utilitarian purpose of U.S. copyright law, which was enshrined in the U.S. Constitution. Article I, Section 8, Clause 8 authorized Congress to grant exclusive rights to “authors” in their “writings” in order to “promote the progress of science,” but only for “limited times.”<sup>21</sup> The grant of exclusive rights provided an incentive to authors to create and disseminate new works that contributed to knowledge (“science”), but the rights were limited in duration so that the public would have full use of the works after the author (and her assigns) had a certain number of years to obtain a fair return for that contribution.<sup>22</sup> Set term limits on duration, coupled with standardized notices on published copies (which included information on the date of publication), ensured that the public would be on notice of which works were in copyright and which were not.<sup>23</sup> Anyone who could do the math could figure out when those rights would expire.

Following the precedent set by the English Statute of Anne earlier that century, the “limited time” set for the first and second terms of copyright under the 1790 Act were fourteen years each.<sup>24</sup> The first term was lengthened to

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<sup>18</sup> See, e.g., DURATION STUDY, *supra* note 1, at 57-58 (describing the initial term as starting from recording of title with the Copyright Act of 1790, then changing to date of publication with the Copyright Act of 1909); RENEWAL STUDY, *supra* note 1, at 109-11. The Copyright Act of 1909 allowed authors of certain unpublished works the opportunity to register their claims with the U.S. Copyright Office. See Act of Mar. 4, 1909, ch. 320, § 11, 35 Stat. 1075, 1078 (repealed 1978). This Article refers to that statute as the 1909 Act. The duration of copyright in these works ran from the date of registration. See, e.g., DURATION STUDY, *supra* note 1, at 70.

<sup>19</sup> RENEWAL STUDY, *supra* note 1, at 111 n.13 (noting that Congress changed this to benefit the author’s family who presumably needed the income from his work even more after his death).

<sup>20</sup> *Id.* at 160-63 (discussing Supreme Court decisions ruling in favor of assignability of second term rights).

<sup>21</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>22</sup> See, e.g., DURATION STUDY, *supra* note 1, at 74-75 (discussing the length of term of copyright protection in relation to its purpose).

<sup>23</sup> See, e.g., Christopher Sprigman, *Reform(alizing) Copyright*, 47 STAN. L. REV. 485, 501 (2004) (explaining the signaling value of copyright formalities).

<sup>24</sup> Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831); see also Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1456 (2010) (discussing the different renewal requirements in the Statute of Anne and the 1790 Act, which 1790 Act “conditioned the second term upon a procedure of re-registration that was performed within the six months prior to expiration”).

twenty-eight years in 1831.<sup>25</sup> Both terms were set at twenty-eight years in 1909.<sup>26</sup> All published works had the same duration of copyright protection. Because renewals required formalities (e.g., registration of claims),<sup>27</sup> it was possible to check with the officials who maintained registration records to find out if copyright renewal requirements had been satisfied. If not, the work could be reliably understood to be in the public domain.

The renewable term model for copyright duration was not wholly without notice problems. Some difficulties arose because of uncertainties about who had the right to renew, owing to differences in state inheritance laws.<sup>28</sup> Renewals were sometimes complicated in cases involving joint works.<sup>29</sup>

In anticipation of a major revision of U.S. copyright law, the Copyright Office in the 1950s commissioned a series of studies on topics that the Register of Copyrights thought needed attention.<sup>30</sup> One of the thirty-four studies focused on copyright duration.<sup>31</sup> Another focused on renewal of copyright terms.<sup>32</sup>

In 1961, after reviewing these studies and comments on them, Register of Copyrights Abraham Kaminstein recommended retention of a twenty-eight year initial term, but proposed a longer (forty-eight-year) renewal term.<sup>33</sup> The first copyright term would commence upon first public dissemination of the work.<sup>34</sup> Renewals could be accomplished within five years of the end of the first term, rather than just in the last year.<sup>35</sup> Terms would run to the end of the calendar year rather than from the actual date of first publication.<sup>36</sup> Anyone

<sup>25</sup> Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1909).

<sup>26</sup> Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1978).

<sup>27</sup> See Sprigman, *supra* note 23, at 519.

<sup>28</sup> See RENEWAL STUDY, *supra* note 1, at 179-80.

<sup>29</sup> *Id.* at 172-77.

<sup>30</sup> A total of thirty-four studies were issued in congressional committee prints and later collected in a separate publication. 1 & 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976). The studies are also available on the U.S. Copyright Office website, <http://copyright.gov/history/studies.html> [<https://perma.cc/4P67-KGHB>].

<sup>31</sup> DURATION STUDY, *supra* note 1. Sixteen written comments were published at the end of the Duration Study; some favored a duration of life-plus-fifty years, a few recommended life-plus-twenty-five or -thirty years, and some supported a single fifty- or fifty-six-year term. *Id.* at 89-104.

<sup>32</sup> RENEWAL STUDY, *supra* note 1.

<sup>33</sup> REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 58, in COPYRIGHT LAW REVISION, 87TH CONG. (Comm. Print 1961) [hereinafter 1961 REGISTER'S REPORT].

<sup>34</sup> *Id.* at 49 ("A term based on dissemination . . . seems preferable from the standpoint of uniformity and simplicity.").

<sup>35</sup> *Id.* at 55.

<sup>36</sup> *Id.* at 56 ("This provision, found in most foreign laws, would simplify the computation of the term."). Of the numerous recommendations the Register made about duration, only

with a vested interest in a particular copyright could renew it, and renewal would be effective for all who held interests as well.<sup>37</sup>

Register Kaminstein gave two reasons for recommending a longer renewal term. One recognized that authors were living longer.<sup>38</sup> A longer term would enable authors to benefit from revenues generated by the continuing commercial success (if any) of their works. Second, this longer renewal term would approximate the outcome of a life-plus-fifty-year term that some copyright owners wanted in a revised copyright law.<sup>39</sup>

The Register recognized some advantages of a life-plus model.<sup>40</sup> It would bring the U.S. into closer conformity with the duration of copyright in most other countries.<sup>41</sup> The life-plus model also ensured that authors would benefit from their copyrights during their lifetimes and that their families could be supported after their demise.<sup>42</sup> Furthermore, the life-plus model meant that all of an author's works would go into the public domain on the same date.<sup>43</sup> There was, however, considerable variation in life-plus terms in other countries.<sup>44</sup>

However, fixed-term models had some key advantages. For one thing, all copyrights in all works would last the same number of years, which contributed to uniformity and simplicity in the law.<sup>45</sup> For another, fixed terms were consistent with established practices in the U.S.<sup>46</sup> But the "most important factor" weighing against the life-plus model, in the Register's view, was the difficulty that model posed for "the ability of the public to determine the date" when the copyrights would expire.<sup>47</sup> He acknowledged this difficulty could be overcome by requiring heirs to record authorial death dates within a certain period of time after the authors' demise.<sup>48</sup> But what if the heirs did not do this? Then the choice would be between terminating the heirs' rights to

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the recommendation concerning expirations at the end of the calendar year was eventually adopted in the 1976 Act. *See* 17 U.S.C. § 305 (2012).

<sup>37</sup> 1961 REGISTER'S REPORT, *supra* note 33, at 54 (explaining that an "author, executor, heir, employer, assignee, [or] licensee . . . could make renewal registration [and] extend all rights under the copyright to the full [seventy-six] year term").

<sup>38</sup> *Id.* at 50.

<sup>39</sup> *Id.* at 51.

<sup>40</sup> *Id.* at 48.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 51.

<sup>43</sup> *Id.* at 48.

<sup>44</sup> There was no uniformity in post-mortem terms in life-plus jurisdictions in the late 1950s. DURATION STUDY, *supra* note 1, at 59-60. Some countries adopted post-mortem terms of fifteen years, while others extended the terms to eighty years. *Id.* Some jurisdictions also qualified the availability of post-mortem terms. *Id.* at 60.

<sup>45</sup> 1961 REGISTER'S REPORT, *supra* note 33, at 48-49.

<sup>46</sup> *Id.* at 48.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 48-49.

post-mortem terms and denying the public reliable information on when the copyrights would expire.<sup>49</sup>

Although some copyright owners opposed the idea of a renewal term in a revised bill, the Register recommended retaining the renewal term.<sup>50</sup> He perceived an advantage of the renewal system in that it “tailors the term to the need felt by the copyright owner.”<sup>51</sup> A single term for all works would, in his view, be “unnecessarily long for some works.”<sup>52</sup> The Register characterized the argument that one long term would cause no harm as “fallacious” because “[m]any works that have ceased to have substantial commercial value in themselves are still useful to scholars, researchers, historians, and educators, as well as to authors of new works based on preexisting ones.”<sup>53</sup> Thus, “when authors or other copyright owners feel that they have no need for a longer term, the termination of copyright restrictions after [twenty-eight] years is in the public interest.”<sup>54</sup> The Register noted that fewer than fifteen percent of copyright owners took the trouble to renew, which suggested that the first twenty-eight year term sufficed for most authors.<sup>55</sup> Renewal, as opposed to one extended term, was also beneficial because it provided more up-to-date information about the copyright owner.<sup>56</sup>

The Register’s major concern about lengthening the renewal term was that authors should benefit from it.<sup>57</sup> He recognized that the reversionary nature of the renewal term under then-existing law “ha[d] largely failed to accomplish its primary purpose” of helping authors and their families.<sup>58</sup> Very often authors assigned their second term interests in their copyrights, as well as the first terms, to publishers in exchange for a lump sum.<sup>59</sup> One way to ensure that renewal terms would benefit authors would be to make renewal terms unassignable in advance, but it was “questionable” if this would benefit authors because the commercial value of their copyrights would be diminished if they could only contract for twenty-eight years of exploitations of their

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 49 (“We believe that a term based on dissemination has the greater advantages for the public, and that the principal purposes of a term based on the death of the author can be achieved by a sufficiently long term based on dissemination.”).

<sup>51</sup> *Id.* at 52.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 51. Renewal rates varied considerably among different types of works. 70% of motion picture copyrights were renewed, along with 35% of music copyrights, 7% of book copyrights, and only 1% of technical drawing copyrights. *Id.*

<sup>56</sup> *Id.* at 52.

<sup>57</sup> *Id.* at 53.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 93.

works, and assignees would likely underinvest in commercializing the works unless they could get a waiver.<sup>60</sup>

To effectuate the intent to benefit authors, the Register made two recommendations. The first was that assignments of copyrights should not be enforceable for more than a set number of years unless the author was getting an ongoing royalty from exploitations of her work.<sup>61</sup> The second was that only assignees who were paying ongoing royalties to authors should benefit from the extra twenty-year term that the Register's recommended approach would give to existing copyright owners.<sup>62</sup>

The Register also proposed retaining the requirement to provide notice on published copies.<sup>63</sup> The copyright notice was considered essential to ensuring that the public had notice that the work was in copyright and that its duration of protection would run from the public dissemination date in the standardized notice.<sup>64</sup>

Register Kaminstein's recommendations for revised copyright duration and renewal rules were carefully formulated in an effort to balance competing interests. Authors and their assignees would benefit from the longer terms of copyright that the Register proposed.<sup>65</sup> But the public's interest in having adequate notice about which works were in copyright and which were in the

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<sup>60</sup> *Id.* at 54. A variant on this proposal can be found in the termination of transfer rules adopted in the 1976 Act. *See* 17 U.S.C. §§ 203, 304(c) (2012). For a discussion about the incentives problem with this kind of solution, see generally Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 *BUFF. L. REV.* 147 (2015).

<sup>61</sup> 1961 REGISTER'S REPORT, *supra* note 33, at 92-93 (concluding that such a time limit "would afford a practical measure of assurance that authors or their heirs will be in a position to bargain for remuneration on the basis of the economic value of their works").

<sup>62</sup> *Id.* at 57-58.

<sup>63</sup> *Id.* at 63-64.

<sup>64</sup> *Id.* at 62-63. The Register recommended changes to the then existing law's notice requirements to enable an owner to cure an inadvertent omission of notice. *Id.* at 64-67. In addition to the Notice Study, *supra* note 2, three other studies the Copyright Office commissioned dealt with notice issues. *See* WILLIAM M. BLAISDELL, STUDY NO. 8: COMMERCIAL USE OF THE COPYRIGHT NOTICE 65, 86-87 (1959), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 7-10 (Comm. Print 1960) (reporting on results of survey about notice issues in different industry sectors); JOSEPH W. ROGERS, STUDY NO. 9: USE OF THE COPYRIGHT NOTICE BY LIBRARIES 91, 96-99 (1959), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 7-10 (Comm. Print 1960) (focusing on noncommercial sectors); CARUTHERS BERGER, STUDY NO. 10: FALSE USE OF COPYRIGHT NOTICE 109, 120 (1959), *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, S. JUDICIARY COMM., 86TH CONG., STUDIES 7-10 (Comm. Print 1960) (suggesting revisions to laws aimed at preventing the misuse of copyright notice).

<sup>65</sup> *See supra* notes 40, 58, 61 and accompanying text.



public domain would be respected as well.<sup>66</sup> The Register's willingness to protect the interests of follow-on creators who wanted to make creative reuses of works no longer being exploited by their authors or assigns and the interests of scholars, educators, and researchers to draw upon the vast majority of works that had enjoyed a relatively short commercial life was commendable, if perhaps naïve.

## II. LIFE-PLUS MODEL PREVAILED IN THE 1976 ACT

Although Register Kaminstein had rejected the life-plus model for copyright duration in his 1961 report, the idea had been simmering in Congress since the early 1900s. Thorvald Solberg, the first Register of Copyrights, proposed a life-plus-fifty-year copyright term for newly created works in early drafts of the revision that eventually yielded the 1909 Act.<sup>67</sup> Initial draft bills he prepared would have required heirs to record the death date of the author with the Copyright Office within a short period after that death, although it was unclear what consequence would follow from failure to comply with this requirement.<sup>68</sup> Opposition to the life-plus model, as being too long and indeterminate, arose during hearings on copyright revision bills in 1906.<sup>69</sup> Some in Congress regarded authors and their heirs as more likely to benefit from a renewable term regime than a life-plus model.<sup>70</sup> In the end, Congress adopted a renewal model in the 1909 Act with a maximum duration of fifty-six years.<sup>71</sup>

Proposals to adjust the duration of copyrights commenced again in the 1920s and 1930s.<sup>72</sup> In a 1930 hearing, for instance, a representative of the Authors' League (a predecessor to today's Authors Guild) testified in favor of a life-plus-fifty-year copyright term so that authors who produced their most commercially successful works at an early age would not be deprived of

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<sup>66</sup> 1961 REGISTER'S REPORT, *supra* note 33, at 48 (explaining that the public can more easily identify when works are in the public domain because "[a]ll of an author's works—except joint or anonymous works and works made for hire—would go into the public domain at the same time").

<sup>67</sup> RENEWAL STUDY, *supra* note 1, at 113-14.

<sup>68</sup> *Id.* at 114 (suggesting that if failure to record would terminate the post-mortem period of protection, it would serve as a "disguised renewal" device). A later draft bill dropped the recordation of author death date requirement. *Id.* at 116.

<sup>69</sup> *Id.* at 117. "The committee reports accompanying [the revision] bills indicate clearly that the purpose of adding the renewal device was to allow the large bulk of copyrighted works to fall into the public domain at the end of a short definite term." *Id.* at 117-18.

<sup>70</sup> *Id.* at 122-25.

<sup>71</sup> Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (repealed 1978) (allowing an initial twenty-eight-year term and an additional twenty-eight-year term upon renewal).

<sup>72</sup> DURATION STUDY, *supra* note 1, at 62-70 (describing the various bills introduced in Congress during this time to revise copyright duration rules).

income from those works in their old age.<sup>73</sup> But other witnesses opposed the life-plus duration model because “it would be difficult or impossible in many cases to determine the date of death of the author, and, consequently, the date at which the work would fall into the public domain.”<sup>74</sup> Other bills in the 1930s would have created one fixed, nonrenewable but longer copyright term.<sup>75</sup> In 1940 a bill was introduced that would have given individual authors protection for their lifetime plus fifty years, but also would have limited the enforceability of assignments of copyright to no more than twenty-five years unless the assignee of the rights was paying a continuing royalty to the author or her heirs.<sup>76</sup>

Momentum for adoption of a life-plus model built up again in the 1950s and early 1960s. As such, a majority of the written comments on the Duration Study commissioned by the Copyright Office endorsed a life-plus model.<sup>77</sup> Perhaps because the Register’s duration and renewal proposals were so well-balanced from a social policy perspective, the 1961 recommendations were not well-received by copyright industry representatives.<sup>78</sup> Only four years later, Register Kaminstein retreated from his duration and renewal recommendations, offering new arguments to counter the points he had previously made in favor of the renewable term model that had so long been part of the U.S. copyright tradition.<sup>79</sup>

The Register’s 1965 Report reiterated that the term of copyrights needed to be longer because of greater authorial longevity and out of fairness to authors and their families, but now expressed the view that “[w]ithin limits, a longer term is no disadvantage to the public, which pays the same for copyrighted works and works in the public domain.”<sup>80</sup> The Register now perceived copyright as having a stewardship role, saying that “the absence of copyright protection can actually restrain dissemination in some cases, since an entrepreneur might not be able to risk an investment in a work unless he can be

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<sup>73</sup> *Id.* at 64.

<sup>74</sup> *Id.* at 64-65.

<sup>75</sup> *Id.* at 65-68 (describing numerous bills with varying terms, none of which survived to become law).

<sup>76</sup> *Id.* at 68-69.

<sup>77</sup> *Id.* at 89-104. Professor Ralph Brown suggested a life-plus-twenty-five or thirty-year term which would take care of “normal widowhood, and the minority of the author’s children,” saying he had “never been able to understand either the theoretical or practical case for the European term of life plus 50 years.” *Id.* at 95. Interestingly, six of the eight initial comments on the Renewal Study commissioned by the Copyright Office were generally positive about retention of this model. RENEWAL STUDY, *supra* note 1, at 229-37.

<sup>78</sup> See, e.g., JESSICA LITMAN, DIGITAL COPYRIGHT 22-32 (2001) (discussing the art of making copyright laws in the U.S.).

<sup>79</sup> REGISTER OF COPYRIGHTS, SUPPLEMENTARY REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 87-88, in COPYRIGHT LAW REVISION: PART 6, 89TH CONG. (Comm. Print 1965) [hereinafter REGISTER’S SUPPLEMENTARY REPORT].

<sup>80</sup> *Id.* at 87.

assured of exclusive rights.”<sup>81</sup> Kaminstein now considered the fifteen percent renewal rate to be “not illuminating” since the other eighty-five percent “primarily represent ephemera which no one is interested in using in any case.”<sup>82</sup> The renewal term was now characterized as “extremely burdensome, not only as a needless formality and as an expense, but also as the cause for inadvertent and unjust loss of copyright in a number of cases.”<sup>83</sup> The Register asserted that his 1965 recommendation was a “change[] in approach and not in result”<sup>84</sup> without acknowledging that the 1961 report had expressed a substantially different view of the public domain.<sup>85</sup>

The Register now endorsed the life of the author plus fifty year model for works created by individual authors and a single non-renewable term of seventy-five years from publication or one hundred years from creation, whichever was shorter, for works for hire and anonymous and pseudonymous works.<sup>86</sup> The life-plus-fifty model had been adopted in most other countries, and because trade in copyrighted works crossed national boundaries, the Register thought it was desirable for U.S. copyright law to conform to the international durational norm.<sup>87</sup> American authors were, the Register noted, understandably resentful that their works were protected for a longer term outside the U.S. than in their home country.<sup>88</sup>

The Register asserted that the life-plus-fifty-year model would avoid “confusion and uncertainties” that often arose from the complexities of determining dates of publication or public dissemination, and had the further advantage that all copyrights in an author’s works would expire at exactly the same time.<sup>89</sup> Life-plus-fifty was “much simpler” and “more clearly understood” than any other system.<sup>90</sup>

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<sup>81</sup> *Id.* But see, e.g., Christopher Buccafusco & 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, 35 (2013).

<sup>82</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 87. In his 1961 report, the Register had found the fifteen-percent renewal rate to be more meaningful. See *supra* note 55 and accompanying text. But see, e.g., Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 832, 839 (2014) (describing studies showing that works no longer protected under copyright were more active and in demand than protected works).

<sup>83</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 88.

<sup>84</sup> *Id.* at 86. This claim was relatively accurate as to the maximum duration of rights for works for hire, but not as to works of individual authors.

<sup>85</sup> See 1961 REGISTER’S REPORT, *supra* note 33, at 52 (explaining the public interest benefits of the public domain).

<sup>86</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 87-91.

<sup>87</sup> *Id.* at 87.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (“[T]here would generally be only one date to worry about, and an elderly author would not be put in the unfair position of competing with his own early works, or those of his contemporaries, that have fallen into the public domain.”). Of course, the date of

Reviving an idea first proposed by Register Solberg in the early 1900s,<sup>91</sup> Register Kaminstein now suggested that “[t]he problems of determining when an obscure author died could be solved by maintaining a registry of death dates in the Copyright Office, and by establishing a system of presumptions.”<sup>92</sup>

The Register may have been right in assuming that death dates of famous authors could be determined without difficulty, insofar as there were encyclopedia entries about them or newspapers that published their obituaries, but relatively few authors’ deaths would be so publicized. Works by more obscure authors might nonetheless be valuable contributions to the fields of knowledge. The public would benefit from knowing when the copyrights in those works would expire. It is unfortunate that the Register had retreated so far from his recognition of the public interest in the vitality of the public domain.

As in the 1961 Report, in 1965 the Register expressed serious concerns that publishers should not be the only beneficiaries of the longer copyright terms now in contemplation.<sup>93</sup> The author- and family-protective goals of granting authors copyright for their lifetimes, plus another fifty year post-mortem term so that their widow(er)s and children could benefit from a work’s success, would be defeated insofar as authors, in effect, had no choice but to assign away their copyrights for a lump sum or on terms that, over time, would prove to be inadequate to provide authors and their families with a fair return.<sup>94</sup>

Characterizing the 1909 Act’s renewal terms as “complex and poorly drawn” and “extremely burdensome and in some cases self-defeating,” the Register in 1965 noted that the 1961 proposal to treat assignments as unenforceable after twenty years unless the assignee was paying the author a continuing royalty had “met with little favor.”<sup>95</sup> Authors opposed it because it could easily be evaded by nominal royalty payments and it did not provide authors with an opportunity to negotiate for more favorable terms.<sup>96</sup> Publishers and other copyright industry representatives objected to this intrusion on freedom to contract and asserted that twenty years would often be too short to recoup investments for the risks they undertook in exploiting the work.<sup>97</sup>

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publication would still matter a great deal for works for hire, as well as anonymous and pseudonymous works. *See supra* note 86 and accompanying text.

<sup>90</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 87-88.

<sup>91</sup> *See supra* note 68 and accompanying text.

<sup>92</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 88.

<sup>93</sup> *See, e.g., id.* at 95-96 (discussing a provision that would allow a termination of grants covering the extended term).

<sup>94</sup> *See, e.g., Darling, supra* note 60, at 147 (explaining that the creators of the Superman comic character sold their rights to a publisher for \$130, while those who acquired these rights subsequently made millions of dollars from exploiting this creation).

<sup>95</sup> REGISTER’S SUPPLEMENTARY REPORT, *supra* note 79, at 71.

<sup>96</sup> *Id.* at 71-72.

<sup>97</sup> *Id.* at 72.

The Register remained firm about the need to protect authors against unremunerated transfers which had proven to be the “the most explosive and difficult issue” of the copyright revision process.<sup>98</sup> The 1965 Report now proposed a “compromise” that had emerged after “protracted” discussions between author and publisher representatives.<sup>99</sup> It would grant authors a nonwaivable right to terminate transfers and licenses in a five-year window between the thirty-fifth and fortieth years after publication or execution of the grant, after giving between two and ten years’ notice to the assignees or licensees.<sup>100</sup> The 1965 Report thus outlined the main features of the termination of transfer rules that, with some tweaks, became a strikingly unique feature of the 1976 Act.<sup>101</sup> These rules would prove, in time, to be much more complex and burdensome than the renewal procedures that the Register denounced in his 1965 Report.<sup>102</sup>

Congress adopted in the Copyright Act of 1976 the duration rules recommended by the Register in 1965.<sup>103</sup> In addition, the 1976 Act tacked on an extra nineteen years of protection to copyright terms for works that had been created under the 1909 Act and were still in copyright.<sup>104</sup> Later, the Sonny Bono Copyright Term Extension Act of 1998 tacked on an additional twenty years to existing copyright terms, as well as providing a post-mortem seventy year term for works created after the effective date of that law.<sup>105</sup>

The 1976 Act also required the Copyright Office to establish a registry so that anyone with an interest in a particular copyright could record information about an author’s death date.<sup>106</sup> It further established a procedure by which a prospective user of a possibly protected work could obtain a certified report from the Copyright Office that the Office had no record that the work’s author was still alive ninety-five years after the work’s first publication or 120 years after its creation.<sup>107</sup> Such a report would create a presumption that that the work’s author had been dead for more than seventy years, and good faith

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<sup>98</sup> *Id.* at 71.

<sup>99</sup> *Id.* at 72.

<sup>100</sup> *Id.* at 72-76.

<sup>101</sup> 17 U.S.C. § 203 (2012).

<sup>102</sup> See *supra* notes 83-85 and accompanying text. For a discussion of the complexities and burdens imposed by the 1976 Act’s termination rules see generally R. Anthony Reese, *Termination Formalities & Notice*, 96 B.U. L. REV. 895 (2016).

<sup>103</sup> Pub. L. No. 94-553, § 302(a), (c), 90 Stat. 2541, 2572-73 (1976) (codified as amended at 17 U.S.C. § 302(a), (c)).

<sup>104</sup> *Id.* § 304(b), 90 Stat. at 2574 (codified as amended at 17 U.S.C. § 304(b)).

<sup>105</sup> Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. § 302).

<sup>106</sup> Pub. L. No. 94-553, § 302(d), 90 Stat. 2541, 2573 (1976) (codified as amended at 17 U.S.C. § 302(d)).

<sup>107</sup> *Id.* § 302(e), 90 Stat. at 2573 (codified as amended at 17 U.S.C. § 302(e)).

reliance on that report would be a complete defense to any claim of infringement that might thereafter be made.<sup>108</sup>

### III. NOTICE FAILURES RELATED TO COPYRIGHT DURATION RULES AND POSSIBLE SOLUTIONS

The most visible copyright notice failure caused, in no small part, by the 1976 Act's duration provisions is the so-called orphan work problem.<sup>109</sup> Works are said to be "orphans" when a prospective user has made a diligent, but unsuccessful, search to identify and locate the copyright owner.<sup>110</sup> Sometimes the problem arises because of insufficient information about the work and its owner; non-digital photographs that lack metadata to identify the photographer or date of creation or publication are examples.<sup>111</sup> Other times, the problem arises because there is not enough information available about the location of the owner of the rights because, for example, the publisher went out of business or the author moved to a remote place off the grid.<sup>112</sup> As Justice Breyer once noted, "[t]he older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright owner."<sup>113</sup>

During her tenure as Register of Copyrights, Marybeth Peters explained very well in testimony to Congress the social costs that arise from the orphan works problem:

[T]he most striking aspect of orphan works is that the frustrations are pervasive in a way that many copyright problems are not. When a

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<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., *Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 20-21 (2008) [hereinafter *Peters Testimony*] (statement of Marybeth Peters, Register of Copyrights), <http://www.copyright.gov/orphan/orphan-hearing-3-10-2008.pdf> [<https://perma.cc/4RV2-LDRH>] (recognizing that the orphan work problem has been caused in no small part by the much longer duration of copyrights under the 1976 Act).

<sup>110</sup> The Copyright Office has conducted two major studies of the orphan works problem. See U.S. COPYRIGHT OFFICE, *ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS 1* (2015) [hereinafter 2015 ORPHAN WORKS REPORT]; U.S. COPYRIGHT OFFICE, *REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 1-9* (2006) [hereinafter 2006 ORPHAN WORKS REPORT].

<sup>111</sup> Katharina de la Durantaye, *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 229, 234 (2011) ("Photographs, for instance, are more vulnerable to orphanage both because their authors often produce many works (too many to register them all) and because, as a rule, the actual copies of the work (the photographs) lack identifying information regarding their author or other rights holder.").

<sup>112</sup> *Id.* (discussing the dual problems of "the existence of books owned by unknown rights holders or by rights holders which cannot be located").

<sup>113</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 251 (2003) (Breyer, J., dissenting).

copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage. Scholars cannot use the important letters, images and manuscripts they search out in archives or private homes, other than in the limited manner permitted by fair use or the first sale doctrine. Publishers cannot recirculate works or publish obscure materials that have been all but lost to the world. Museums are stymied in their creation of exhibitions, books, websites and other educational programs, particularly when the project would include the use of multiple works. Archives cannot make rare footage available to wider audiences. Documentary filmmakers must exclude certain manuscripts, images, sound recordings and other important source material from their films. The Copyright Office finds such loss difficult to justify when the primary rationale behind the prohibition is to protect a copyright owner who is missing. If there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous potential waste. The outcome does not further the objectives of the copyright system.<sup>114</sup>

Both Peters and Maria Pallante, the current Register of Copyrights, have recommended that Congress enact legislation to address the orphan work problem.<sup>115</sup> They have proposed a limit on remedies available to copyright owners for infringement so that if a prospective user of a work—after being unable to locate the rights holder to ask for permission—made the desired use and the orphan’s “parent” later showed up, then the copyright owner could only get “reasonable compensation,” not the full panoply of remedies normally available.<sup>116</sup>

Legislation to limit liability for certain kinds of uses of orphan works may be a partial solution to the orphan work problem, especially for commercial firms that want to sell copies of the works or make derivative works (for example, movies from an orphaned short story). For many cultural heritage organizations, such as nonprofit libraries, museums, and archives, however, the highly formalistic process proposed by the Copyright Office that prospective users of orphan works would need to follow to qualify for the limited liability

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<sup>114</sup> *Peters Testimony*, *supra* note 109, at 19-20.

<sup>115</sup> Orphan works legislation passed in the Senate in 2008, but not in the House. 2015 ORPHAN WORKS REPORT, *supra* note 110, at 11-12. For a different approach to addressing this problem see, for example, Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1431 (2012) (proposing to immunize responsible parties that take the initiative to free up use of “hostage” works).

<sup>116</sup> See, e.g., 2015 ORPHAN WORKS REPORT, *supra* note 110, at 11-12 (“The proposed legislation in both cases would have . . . permitted the copyright owner or other rightsholder later to collect reasonable compensation from the user, but not statutory damages or attorneys’ fees.”); see also Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

is likely to prove unworkable.<sup>117</sup> Some commentators have suggested that fair use may be a better solution for the orphan work problems that these types of institutions face.<sup>118</sup>

Orphan works are, however, far from the only notice failures related to copyright's duration rules. Tens of millions of in-copyright books, for instance, exist in the collections of major research libraries,<sup>119</sup> only a small percentage of which are available full-text in digital form. The overwhelming majority of these books are no longer commercially active.<sup>120</sup> Google made arrangements with many libraries to digitize these books for its Google Book Search ("GBS") project and provided the libraries with access to digital copies made from their books.<sup>121</sup>

The names of the books' authors and publishers are discernible, of course, on their title pages, so they are generally not orphans. The notice failure for these works arises from the excessively high transaction costs that would be associated with tracking down each book's rights holder to negotiate for a license to scan the books for purposes of creating a full-text searchable database such as the HathiTrust digital library and, in the case of GBS,

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<sup>117</sup> LIBRARY COPYRIGHT ALL., RESPONSE OF THE LIBRARY COPYRIGHT ALLIANCE TO THE COPYRIGHT OFFICE'S ORPHAN WORK REPORT 4-6 (2015), <http://www.librarycopyrightalliance.org/storage/documents/Reflections-on-the-Copyright-Offices-Orphan-Works-Report.pdf> [<https://perma.cc/WN38-34EX>] (demonstrating that users will have difficulty proving exhaustion of efforts to locate original copyright owners).

<sup>118</sup> See, e.g., David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 23-24 (2013) ("[T]here is a strong argument that making orphan works available to the public for purposes such as teaching, scholarship and research would be fair use, especially when done by nonprofit libraries, archives and the like."); LIBRARY COPYRIGHT ALL., *supra* note 117, at 1-2; Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379, 1379 (2012) ("[F]air use has some significant advantages over other approaches through which libraries and archives could make publicly beneficial uses of orphan works.").

<sup>119</sup> Harvard University libraries, for example, hold more than sixteen million items in their collections. See HCL LIBRARIES, <http://hcl.harvard.edu/libraries/> [<https://perma.cc/U9T7-U9H6>]. Google once estimated that 129,864,880 different books had been published in the world. Joab Jackson, *Google: 129 Million Different Books Have Been Published*, PC WORLD (Aug. 6, 2012), [http://www.pcworld.com/article/202803/google\\_129\\_million\\_different\\_books\\_have\\_been\\_published.html](http://www.pcworld.com/article/202803/google_129_million_different_books_have_been_published.html) [<https://perma.cc/S3RQ-EYK9>]. Researchers at the School of Information at the University of California, Berkeley, once estimated the number at sixty-five million. Peter Lyman & Hal R. Varian, *How Much Information?*, U. CAL. BERKELEY, SCH. INFO. MGMT. & SYSTEMS (2000), <http://groups.ischool.berkeley.edu/archive/how-much-info/print.html> [<https://perma.cc/V6KY-89NH>].

<sup>120</sup> Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 228 n.14 (2009) (estimating that as few as four percent of books are commercially exploited).

<sup>121</sup> *Id.* at 233.



displaying a small number of snippets from the books so that users of Google's search engine can discern if the results are relevant to their queries.<sup>122</sup>

Litigation ensued over Google's scanning of these books.<sup>123</sup> Three years later, Google, the Authors Guild, and the Association of American Publishers announced a creative way to make the texts of millions of digitized books more accessible to the public through a proposed class action settlement of the lawsuits.<sup>124</sup> The core idea of the settlement proposal was to give Google authorization to commercialize all of the out-of-commerce works in the GBS repository in three ways: (1) to sell institutional subscriptions to a database of the books; (2) to sell individual copies of the books in the cloud; and (3) to display up to twenty percent of the books' contents in response to search queries and run ads along with the book contents.<sup>125</sup> Google would set prices and terms in consultation with a collecting society, the Book Rights Registry ("BRR"), which would be formed out of settlement funds (assuming the settlement was approved).<sup>126</sup> Google would pay the BRR sixty-three percent of the revenues it collected from these commercializations, and the BRR would be responsible for paying out appropriate amounts to registered rights holders.<sup>127</sup> BRR would also be responsible for locating unregistered rights holders who were owed money from uses being made of their works.<sup>128</sup>

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<sup>122</sup> Declaration of Professor Joel Waldfogel, Ph.D, in Support of Defendants' Motion for Summary Judgment at 3-4, *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012) (No. 11 Civ. 6351 (HB)), <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv06351/384619/108>.

<sup>123</sup> This project gave rise to two copyright lawsuits in which Google's fair use defense has thus far prevailed. See *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, No. 15-849, 2016 WL 1551263 (U.S. Apr. 18, 2016); *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

<sup>124</sup> Band, *supra* note 120, at 227.

<sup>125</sup> Amended Settlement Agreement §§ 4.1 to 4.3 at 50-67, *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (Civ. No. 05-CV-8136-DC), [http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/amended\\_settlement/amended\\_settlement.pdf](http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/amended_settlement/amended_settlement.pdf) [<https://perma.cc/5HEN-7JRF>]. See generally Band, *supra* note 120; see also Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1316-17 (2010). Public libraries would have been able to get one dedicated terminal to provide access to the institutional subscription database for free. Amended Settlement Agreement, *supra*, § 4.8 at 74-75.

<sup>126</sup> Amended Settlement Agreement, *supra* note 125, §§ 4.1, 4.2, 5.2 at 50-62, 76.

<sup>127</sup> *Id.* § 2.1(a) at 23-24.

<sup>128</sup> *Id.* § 2.1(c) at 24-25. Rights holders could opt-out of this arrangement. *Id.* § 17.33 at 165.

The settlement, in essence, proposed a kind of extended collective license (“ECL”) arrangement.<sup>129</sup> That is, Google would have the right to exploit works not only of those rights holders who had signed up with BRR, but also the works of all authors who had not opted out of the licensing and compensation regime.<sup>130</sup> For better or worse, a district court disapproved the settlement, largely because the scope of the settlement was so much broader than the issue being litigated.<sup>131</sup> To accomplish the bold goals that the settlement aimed to achieve would, the court opined, require legislation.<sup>132</sup>

After the Google Book settlement failed, the Copyright Office undertook a study to explore how copyright obstacles to mass digitization might be overcome.<sup>133</sup> In June of 2015, the Office issued its report on orphan works and mass digitization, which recommended legislation to create a pilot program for an ECL regime for literary works, pictorial illustrations in these works, and photographs.<sup>134</sup>

Mass digitization poses a different kind of notice failure issue than orphan works; the problem is not so much a lack of information about who the rights holders are and how to locate them, but rather the high costs of engaging in work-by-work rights clearances for hundreds, thousands, or possibly millions of works.<sup>135</sup> Creation of the GBS and HathiTrust repositories of digitized books may be fair use, but display of in-copyright book contents is probably not. An ECL could enable the public to gain access to these books.<sup>136</sup>

The legislative framework for an ECL that the Office recently proposed would include eleven principal elements: (1) authorization for the Office to issue ECL licenses to qualified Collective Management Organizations (“CMOs”); (2) identification of the types of works that would be eligible for

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<sup>129</sup> See Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J.L. & ARTS 697, 706-07 (2011) (comparing the Google Book settlement to an extended collective licensing regime).

<sup>130</sup> *Id.* at 707.

<sup>131</sup> *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666, 678-79 (S.D.N.Y. 2011). At issue in the lawsuits was only whether it was legal to scan books for purposes of creating an index and providing snippets. *Id.* The settlement would have allowed commercialization of the books, which Google never claimed would be fair use. *Id.*

<sup>132</sup> *Id.* at 677; see also Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WISC. L. REV. 479, 482 (“An intriguing way to view the GBS settlement is as a mechanism through which to achieve copyright reform that Congress has not yet been and may never be willing to do.”).

<sup>133</sup> Notice of Inquiry, Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555 (Oct. 22, 2012).

<sup>134</sup> 2015 ORPHAN WORKS REPORT, *supra* note 110, at 5-8, 82-105 (describing ECL and outlining an ECL pilot program in the U.S.).

<sup>135</sup> *Id.* at 5 (explaining that on such a scale, acquiring ex ante permissions from copyright owners will result in costs far exceeding the value of use).

<sup>136</sup> See *id.* at 5-6 (discussing the facility of a collective licensing mechanism, specifically ECL, to allow a broader use of digitized works).

ECL licensing; (3) a grant to affected authors giving them the right to opt out of the ECL regime; (4) a limitation on the availability of ECLs for nonprofit educational or research purposes only; (5) establishment of criteria for CMO eligibility for issuing ECL licenses; (6) a provision for CMO-user negotiations over rates and terms of ECLs, subject to a dispute resolution procedure if voluntary negotiations do not succeed; (7) a requirement that prospective licensees commit to reasonable security measures for digitized in-copyright materials under an ECL; (8) authorization of CMOs to collect funds from ECL licensees and to payout funds owed to rights holders within a reasonable time, along with a requirement that the CMO diligently search for non-member rights holders who are owed funds from the ECL; (9) a provision for how CMOs should dispose of unclaimed royalties; (10) recognition that the existence of the ECL should not undermine fair use; and (11) the creation of a five-year sunset period for the ECL pilot program.<sup>137</sup>

The ECL regime the Office has proposed may be one way to make the contents of books and photographs more broadly accessible to members of the public. But it is not the only way to provide broader public access to in-copyright, out-of-commerce works whose terms of protection have yet to expire.<sup>138</sup> A number of commentators have suggested that fair use could provide a way to enable public access to commercially inactive copyrighted works in the later years of their copyright terms.<sup>139</sup>

The Authors Alliance, a nonprofit organization that represents the interests of authors who want their works to be widely available to promote the public good, has published a guide to help authors figure out how to get some or all of their copyrights back from publishers so that they can make their works more widely available.<sup>140</sup> Some authors, such as Harvard historian and Authors

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<sup>137</sup> *Id.* at 8. The Copyright Office invited public comment on the efficacy of an ECL pilot program. See Mass Digitization Pilot Program, Request for Comments, 80 Fed. Reg. 32,614 (June 9, 2015). The Office received eighty-three submitted comments. *Archive of Comments on Mass Digitization*, COPYRIGHT.GOV, <http://copyright.gov/policy/massdigitization/comments/> [https://perma.cc/T4GX-9LS4].

<sup>138</sup> Other alternatives to the Copyright Office's ECL proposal are considered in Pamela Samuelson, *Extended Collective Licensing to Enable Mass Digitization: A Critique of the U.S. Copyright Office Proposal*, 38 EUR. INTELL. PROP. REV. 75, 79-82 (2016).

<sup>139</sup> See William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CALIF. L. REV. 1639, 1650-52 (2004) (suggesting that an older work's age and limited commercial value create high transaction costs and thus should weigh in favor of fair use); see also Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 412 (2002) ("By considering time in fair use analysis, courts can adjust the scope of copyright protection to respond more dynamically to these changes in copyright interests over the length of the copyright term.").

<sup>140</sup> See NICOLE CABRERA ET AL., AUTHORS ALL., UNDERSTANDING RIGHTS REVERSION 4 (2015), <http://authorsalliance.org/wp-content/uploads/Documents/Guides/Authors%20Alliance%20-%20Understanding%20Rights%20Reversion.pdf> [https://perma.cc/WQ9E-

Alliance member Robert Darnton, are motivated to seek rights reversions in order to make their older books available on an open-access basis.<sup>141</sup>

Another creative way to increase public access to in-copyright works would be through the use of tax incentives to induce authors to make some of their works available under Creative Commons licenses or to shorten the term of copyright.<sup>142</sup> Institutional policies favoring open-access licensing or requiring public access to federally sponsored research are becoming more common and offer promise to scholars and researchers whose main motivation is to share the knowledge embodied in their works.<sup>143</sup>

The Supreme Court foreclosed one path to mitigating notice failure caused by long copyright terms when it rejected the constitutional challenge to the Copyright Term Extension Act (“CTEA”) in *Eldred v. Ashcroft*.<sup>144</sup> Eric Eldred owned a website featuring public domain works.<sup>145</sup> He had expected to use this website to publish many works from the 1920s and 1930s as their copyright terms expired.<sup>146</sup> Professor Lawrence Lessig represented Eldred in a lawsuit filed against the Attorney General challenging the constitutionality of the CTEA under the First Amendment and Article I, Section 8, Clause 8.<sup>147</sup>

Lessig argued that Eldred was forbidden from “speaking” as he wished by the CTEA.<sup>148</sup> The statute failed intermediate scrutiny, in Lessig’s view, because Congress had not engaged in careful fact finding, weighing the costs and benefits (that is, only weak evidence existed of its benefits and its costs were ignored); there was no important government interest to support it; and it was not narrowly tailored.<sup>149</sup> Lessig argued that the Constitution required a

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URM8]. I am a founder and director of the Alliance. See *About Us*, AUTHORS ALLIANCE, <http://www.authorsalliance.org/about/> [https://perma.cc/ZT6D-CHU3].

<sup>141</sup> See *Robert Darnton and Authors Alliance: A Rights Reversion Success Story*, AUTHORS ALLIANCE (Sept. 11, 2015), <http://www.authorsalliance.org/2015/09/11/robert-darnton-and-authors-alliance-a-rights-reversion-success-story/> [https://perma.cc/N2TF-NCGR] (“I am making the first two books I published available online and free of charge through the Authors Alliance, because I hope in at least a small way to promote the diffusion of knowledge.”).

<sup>142</sup> See, e.g., Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1, 25-31 (2012) (proposing tax as a policy lever for increasing public access to copyrighted materials, and stating that the “beauty of the tax fix is that it completely bypasses Berne”).

<sup>143</sup> See, e.g., Office of Scholarly Communication, *UC Open Access Policies*, U. CAL., <http://osc.universityofcalifornia.edu/open-access-policy/> [https://perma.cc/6RFW-782E]; see also *NIH Public Access Policy Details*, U.S. DEP’T HEALTH & HUM. SERVS., <http://publicaccess.nih.gov/policy.htm> [https://perma.cc/5T6J-AXXL].

<sup>144</sup> 537 U.S. 186, 222 (2003).

<sup>145</sup> See *id.* at 193.

<sup>146</sup> See *id.*

<sup>147</sup> See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 213-15, 228 (2004).

<sup>148</sup> *Eldred*, 537 U.S. at 193.

<sup>149</sup> Brief for Petitioners at 39-47, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

“progress-promoting” act of new authorship to justify a grant of exclusive rights, and that extending the terms of existing copyrights did not satisfy the constitutional *quid pro quo*.<sup>150</sup> The Supreme Court rejected both arguments, deciding that Congress had a rational basis for enacting the CTEA and deferring to Congressional decisions about how best to promote the constitutional purpose of copyright.<sup>151</sup>

Better registries of information about authors, their works, and dates of authorial deaths would mitigate some notice failures arising from the current copyright regime. Although the 1976 Act does require the Copyright Office to maintain a registry of author death dates and sets forth a process by which a prospective user of possibly in-copyright materials can obtain a certified report to support a presumption that the copyright owner has been dead for more than seventy years,<sup>152</sup> these measures have not been effective to cure the notice failures that very long copyright terms have created. There are virtually no incentives for heirs or assigns to record author death dates with the Copyright Office, and there is no evidence that this has been an active part of the Office’s work.<sup>153</sup> Nor are incentives currently sufficient to induce private actors to invest in author death-date databases.<sup>154</sup>

A more general reinstatement of formalities, such as standardized copyright notices on publicly disseminated copies of protected works and requirements for prompt registration of copyright claims and recordation of transfers of copyright ownership, would mitigate the notice failures caused in part by long copyright terms.<sup>155</sup> Although current law provides some incentives for authors and their assigns to register copyright claims and place notices on publicly disseminated copies,<sup>156</sup> a relatively small proportion of eligible works are registered with the Copyright Office each year, and notices of copyright claims

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<sup>150</sup> *Id.* at 23 (“[Congress] may not handout a monopoly over speech in exchange for nothing—*quid pro nihilo*.”).

<sup>151</sup> *Eldred*, 537 U.S. at 208.

<sup>152</sup> 17 U.S.C. § 302(d)-(e) (2012).

<sup>153</sup> The Copyright Office does not mention recordation of author death dates or certified reports of presumptions of author death dates in its annual reports about its activities, although it provides information about registration and other recordations. *See, e.g.*, U.S. COPYRIGHT OFFICE, FISCAL 2013 ANNUAL REPORT 12 (2014).

<sup>154</sup> Professor Elizabeth Townsend-Gard and her students developed a software tool, the Durationator, to aid researchers in determining whether a particular work is in the public domain. She and her husband launched a company, Limited Times LLC, which grants access to the software at its website. *The Durationator Copyright Resource: A Global Online Tool*, LIMITEDTIMES, <http://www.limitedtimes.com/> [<https://perma.cc/GPH6-5735>].

<sup>155</sup> *See, e.g.*, PATRY, *supra* note 12, at 203-09 (calling for reinstatement of copyright formalities); Sprigman, *supra* note 23, at 490-91 (proposing implementation of “new-style” copyright formalities).

<sup>156</sup> 17 U.S.C. § 401(d) (stating that notice on copies forecloses innocent infringement defenses); *id.* § 412 (establishing that registration affects availability of statutory damages and attorneys’ fees).

are less common than in the past.<sup>157</sup> The Office could do more to encourage registration,<sup>158</sup> especially now that advances in digital technologies and the global networks make it so much easier for authors and other copyright owners to provide information about their works and their interests in those works.<sup>159</sup>

While the Berne Convention for the Protection of Literary and Artistic Works presently constrains Berne member states from making the existence or exercise of copyright dependent on copyright formalities,<sup>160</sup> there has been growing recognition that some flexibilities exist within Berne constraints.<sup>161</sup> Perhaps it is time to reconsider whether the Berne Convention's ban on formalities should be revised now that the practical obstacles to achieving more universal registration have been overcome.<sup>162</sup>

Finally, there is the option of reducing the duration of copyright terms. Berne Convention considerations aside,<sup>163</sup> there is little, as an economic or social policy matter, to justify the current law's excessively long copyright terms.<sup>164</sup> An initial term of twenty-five years, renewable perhaps for one or

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<sup>157</sup> See Sprigman, *supra* note 23, at 494-97 (describing how the current system of voluntary registration and notice are insufficient incentives for a large number of works). In his article, Professor Sprigman charts the diminishing rate of copyright registrations after 1991. *Id.* at 496. Likewise, the Copyright Office reports decreasing annual numbers of literary works registered from 2012 to 2014. See U.S. COPYRIGHT OFFICE, *Annual Reports Archive*, COPYRIGHT.GOV, [http://copyright.gov/history/annual\\_reports.html](http://copyright.gov/history/annual_reports.html) [<https://perma.cc/ZC7E-EA4C>] (showing 246,735 literary registrations in 2012; 224,795 in 2013; and 218,591 in 2014).

<sup>158</sup> See, e.g., Pallante, *supra* note 11, at 1418-20 (discussing how copyright registration could be updated).

<sup>159</sup> See, e.g., Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

<sup>160</sup> Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (revised at Paris on July 24, 1971 and amended Sept. 28, 1979).

<sup>161</sup> See, e.g., Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459 (2013); Jane C. Ginsburg, "With Untired Spirit and Formal Constancy": *Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583 (2013); Christopher Jon Sprigman, *Berne's Vanishing Ban on Formalities*, 28 BERKELEY TECH. L.J. 1565 (2013).

<sup>162</sup> See, e.g., STEF VAN GOMPEL, *FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE* 286-88 (2011) (discussing the usefulness of formalities in the copyright context and the possibility for their legal re-introduction to the international copyright world).

<sup>163</sup> Berne Convention for the Protection of Literary and Artistic Works, *supra* note 160, art. 7(1) (establishing life of the author plus fifty years as a minimum term).

<sup>164</sup> Scholars have called for shorter copyright terms. See, e.g., LESSIG, *supra* note 147, at 292-93 (lamenting length of copyright terms and suggesting that terms should be only as long as necessary to incentivize); PATRY, *supra* note 12, at 189-201 ("The evidence is overwhelming that the current, excessive length of copyright . . . denies access to vast troves

two additional terms, would more than suffice to allow authors and their assigns to recoup investments in the creation and dissemination of works of authorship.<sup>165</sup> Renewals no longer need to be burdensome for authors and their assigns or heirs because this can be accomplished online with minimum effort. Congresswoman Zoe Lofgren's Public Domain Enhancement Act, which would have required periodic renewals of copyright terms, was a step in the right direction.<sup>166</sup> Congress could make this change for works made for hire without intruding on Berne at all, and could also do it for U.S. authors. If Congress was really serious about making copyright a means of promoting the progress of science, as the Constitution directs, this would be an economically sound decision, politically infeasible as it may be in the current era.

#### CONCLUSION

The overwhelming majority of works of authorship created in the twentieth century are commercially inactive, but are effectively locked up because of copyright law.<sup>167</sup> There is inadequate information available about which works are in the public domain, and few proposals for how to get more of the commercially inactive works in that domain where they could be available for research and educational uses. There are at present very few mechanisms available for curing the notice problems that have been caused in no small part by excessively long copyright durations.

Cultural heritage institutions want to digitize and make more of the works in their collections available to their patrons and the public at large. It will be sad indeed if we as a society fail, either in imagination or will, to take advantage of the opportunity of global digital networks to improve access to knowledge and overcome the copyright obstacles that are inhibiting achievement of this goal for the benefit of our own and future generations.<sup>168</sup>

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of culture and not only thwarts the preservation of old works, but does not incentivize the creation of new ones.”).

<sup>165</sup> See Sprigman, *supra* note 23, at 519-28 (discussing benefits of copyright renewals); Van Houweling, *supra* note 9, at 24-27 (discussing property rules that allow rights to expire for failure to record ownership). Even a fifteen-year initial term might suffice for most works. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003) (analyzing empirical data and estimating an average copyright life of fifteen years).

<sup>166</sup> H.R. 2601, 108th Cong. (2003). The bill proposed requiring a nominal \$1 fee to renew a copyrighted work beginning fifty years after first publication. *Id.* § 3. Representative Lofgren reintroduced the bill in 2005. H.R. 2408, 109th Cong. (2005).

<sup>167</sup> See Band, *supra* note 120.

<sup>168</sup> See Shubha Ghosh, *Foreword: Why Intergenerational Equity*, 2011 WIS. L. REV. 103, 108; see also R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 288 (2012) (explaining the “promise” of copyright law that “inhabitants of the future will be able to copy the work freely, or adapt it, or sell it, or use it in any other way that copyright had restricted until then”).