

---

## RESPONSE TO OLIAR & STERN: ON DURATION, THE IDEA/EXPRESSION DICHOTOMY, AND TIME

WENDY J. GORDON\*

### INTRODUCTION

Courts often use possession to determine who should own unclaimed resources. Yet, as Oliar and Stern demonstrate, the concept of possession is little more than a metaphor, capable of being applied to a broad range of phenomena. The authors helpfully deploy “time” as a metric to sort through the rules determining what should count as possession, and they survey the likely costs and benefits attached to choosing earlier versus later events as triggers for acquiring title.

With those tools in hand, Oliar and Stern employ “time” and the analogy of physical possession to address problems in copyright, patent, and trademark law. The result is an article that offers fascinating windows both on the economics of private ownership, and on various doctrines within the legal domain conventionally labeled intellectual property (“IP”).

Their methodology raises some flags for a copyright scholar, however. Their approach comes from a scholarly subfield that focuses on eliminating waste in the exploitation of intellectual products rather than on inducing the creation of intellectual products.<sup>1</sup> The subfield’s emphasis on the management of existing products could lead to perpetual term length for copyrights and patents, because

---

\* Copyright © 2020 by Wendy J Gordon. Professor Gordon is a William Fairfield Warren Distinguished Professor and Professor of Law at Boston University School of Law. She thanks Michael Meurer and Michael Zimmer for their helpful comments.

<sup>1</sup> Among U.S. legal academics, Edmund Kitch was probably the first to analyze the economics of intellectual property from a perspective of how best to coordinate the exploitation of intangible products, as opposed to the more traditional perspective of how best to incentivize new creations. *See generally* Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

For patent law, the Kitch-style analysis might provide a valuable supplement to the more standard inquiries into how IP affects incentives and access. The Kitch tradition is far less applicable for copyrights. Wastefully duplicative research is more likely in the scientific and technological areas, where many researchers are likely to converge on a few major problems that need solving. In both copyright and patent, the Kitch analysis is alien to the thinking that gave rise to the Constitution’s copyright and patent clauses, and its role in law remains controversial. *See, e.g.*, Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 613-37 & nn.90-91 (2014) (discussing the Kitch approach).

investment in maintenance and exploitation can be continual.<sup>2</sup> An analytic structure that can lead to perpetual ownership is alien to the constitutional logic that gave Congress the power to grant exclusive rights to authors and inventors only for “limited times.”

By contrast, the Constitution’s “limited times” constraint fits perfectly with the classic focus on incentivizing new works. The classic economic analysis aims at building a system—one that is not too costly in terms of restraining public use—that helps authors and inventors (or their employers or assigns) meet the *one-time, up-front* costs of creation. Viewed from the one-time perspective of someone deciding how much effort or money to invest in a new project, rewards attainable in the far-distant future will have little or no persuasive power. A “limited” duration naturally follows.

Admittedly, it is legitimate to argue that lawmakers should embrace new economic methodologies. And Oliar and Stern do not assert that readers should disregard the more classic IP concern with incentivizing creation. Nevertheless, their stance implicitly reinforces a troubling development: Congress in its most recent extension of copyright term, and the Supreme Court in declaring the term extension to be constitutional, placed inappropriate weight on the interests of entities that own copyrights in already-existing properties.<sup>3</sup> The Oliar and Stern article could be taken to normalize that troubling perspective. At least for a copyright scholar who is skeptical of the value of long durations, and conscious of their cost, it is thus important to place the analysis by Oliar and Stern within a larger context.

---

<sup>2</sup> “For any particular version of any particular expressive pattern, creation can happen only once; by contrast, dissemination of the same version can continually recur. If the rights can be restarted whenever a category of disseminator requires incentives, copyright could last forever.” Gordon, *supra* note 1, at 623-24 (footnote omitted); *see also id.* at 636-34.

Congress is permitted to grant only rights with limited duration: “The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

<sup>3</sup> *See Eldred v. Ashcroft*, 537 U.S. 186, 206-08, 220 (2003) (emphasizing the noncreative exploitation of already-existing work and upholding the Copyright Term Extension Act). In the words of Justice Breyer dissenting in *Eldred*, this extension of copyright term “primarily benefits the holders of existing copyrights, i.e., copyrights on works already created.” *Eldred*, 537 U.S. at 248 (2003) (Breyer, J., dissenting).

As discussed below, copyright’s social costs increase drastically in the presence of overlong duration. Yet during the twentieth century the duration of a copyright’s term went from a renewable fourteen-year term, to a renewable twenty-eight-year term, then to life of the author plus fifty years, then to life of the author plus seventy years. *See United States Copyright Office: A Brief Introduction and History*, COPYRIGHT.GOV, <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/66R9-9Y6P>] (last visited Apr. 29, 2020).

The first order of business will be to look at how their intriguing argument operates. Then this commentary turns to what their analysis omits, presenting inter alia a summary of classic copyright economics.

#### I. OLIAR AND STERN'S ARGUMENT IN BRIEF

Oliar and Stern ask under what conditions might a rule granting ownership *early* yield a higher net social product than a rule awarding property *later*. They associate the costs of an early grant with the risk a resource will be underused.<sup>4</sup> They associate the costs of later grants with inducing both too much investment that is duplicative and too little investment by risk-averse but talented individuals.<sup>5</sup>

Among their illustrations is *Pierson v. Post*,<sup>6</sup> a classic dispute over ownership in wild animals. One party had found and flushed a fox. While in active pursuit, his chase was interrupted by another hunter who succeeded in killing the fox. The second hunter took the animal's body away with him. Did the latter hunter interfere with the first hunter's property rights? Oliar and Stern identify two main responses: A legal system can treat chasing or wounding a fox as a sufficient basis for owning the animal and give victory to the first hunter. Oliar and Stern would call such an approach a "first committed searcher" rule. Alternatively, a legal system could award ownership only to someone who succeeds in capturing or killing the fox, which would give victory to the second hunter. This result the authors dub a rule of "actual capture."<sup>7</sup>

---

<sup>4</sup> The principal danger of awarding rights too early in the development process is the risk that they will go to someone who will fail to complete the proverbial chase, leaving the resource underused. In such cases, it would have been better to allow the ownership race to continue. Late awards can therefore be seen as a mechanism to identify the more capable, cost-effective searchers.

Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U. L. REV. 395, 407-08 (2019) (footnote omitted).

<sup>5</sup> "[A] system in which rights are awarded later—as under a rule of capture—presents two chief social costs. One is excessive and wasteful investment in resource search and pursuit. . . . The other, and related, problem with late awards concerns their incentive effects. Because those who unsuccessfully compete for a resource get nothing for their troubles, would-be competitors may be discouraged from entering the competition in the first place."

*Id.* at 408-09.

<sup>6</sup> 3 Cai. 175 (N.Y. Sup. Ct. 1805).

<sup>7</sup> Note that the fox's life is not taken into account as something worth preserving. Apparently hunters and judges see the fox's only "value" residing in its corpse (for taxidermy), in its fur (for sale), or in the bragging rights its death confers.

A rule could be formed differently; it could, for example, give ownership to hunters who used humane techniques or to hunters who could show that they limited the numbers of foxes they take each season. Admittedly, the negative effect of hunting on wildlife was hardly as relevant in 1805 in England as it is today. Nevertheless, the *modern* roster of alternative

As it happens, the New York court in *Pierson v. Post* adopted “actual capture.”<sup>8</sup> Oliar and Stern present “committed search” and “capture” as poles marking each end of a spectrum, any point on which might (depending on the relevant lawmaker’s choice) constitute sufficient “possession.”

Oliar and Stern recognize that no author or inventor can “capture” or “solely possess” a story or song or invention.<sup>9</sup> That is because, while one person can solely possess a manuscript, a master disk, or a machine model, an unlimited number of people can—without touching the physical embodiments—copy the underlying patterns in embodiments of their own. By contrast to tangible copies, a story, song, or innovation is an *intangible*<sup>10</sup> and usually must be shared in order to be profitable.<sup>11</sup>

Because Oliar and Stern recognize that “possession” taken literally isn’t workable for authorial works and inventions, they develop analogies for “possession.”<sup>12</sup> Instead of “chase” and “capture,” IP provides its own potential

---

resolutions of *Pierson v. Post* should include—to be complete—rules that take the fox’s liberty into account as a positive value.

<sup>8</sup> *Pierson*, 3 Cai. at 178. It is interesting to note that, by contrast, John Locke thought the governing rule gave property to the hunter “who pursues [the animal] during the chase.” JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 30 (C.B. Macpherson ed. 1980) (1690).

<sup>9</sup> The closest authors and inventors come to “possession” is locking away their manuscripts and models. To profit from the work of authorship or inventorship, the authors or inventors will usually have to sell embodiments to users, making it increasingly strained to use the notion that authors and inventors “possess” the IP. Purchasers will have control of individual embodiments.

<sup>10</sup> At bottom, “intangible” products are *patterns*. See Wendy J. Gordon, *Intellectual Property*, in OXFORD HANDBOOK OF LEGAL STUDIES 617, 617-19 (Peter Cane & Mark Tushnet eds., 2003). Because creative and innovative patterns are commonly but not inevitably recorded in some tangible form, observers sometimes confuse the intangible pattern with the tangible substance that embodies it. But a manuscript or machine is merely an embodiment of the story or innovation. In federal copyright’s statutory parlance, an embodiment (whether on paper, in plastic, or in any other “tangible medium of expression”) constitutes either a “copy” or a “phonorecord.” 17 U.S.C. § 101 (2018). The embodiments are distinct from the intangible patterns they communicate, and are owned separately. *Id.*

A similar distinction can often be made between an invention and its embodiments, as when a patent offers an innovative configuration for a physical object. Patents, however, also extend to processes and other subject matters not dependent on stable fixation in particular form. Nevertheless, as in copyright, the nature of the information in the patent remains “intangible.” Someone can walk away from an “intangible” carrying in their mind an ability to copy the pattern, while leaving the original manuscript or model untouched.

<sup>11</sup> Authorial works other than computer programs almost by definition need to be shared to be profitable. By contrast, some computer programs and some inventions can be simultaneously used and kept secret. But even for secrets, the distinction holds between information (the intangible) and the mind or material that holds it.

<sup>12</sup> Although Oliar and Stern offer *Pierson v. Post* to illustrate ownership through “possession,” the majority opinion in *Pierson* used the term “occupancy.” *Pierson*, 3 Cai. at

landmark events. They range along dimensions such as effort, investment, or success. For example, when did an aspirant to copyright first communicate a song or story orally, or write down a recognizable version, or first publish it? Similar choices exist for patent and trademark law. When did the aspirant to patent conceive the invention, or reduce the invention to practice, or first sell machines embodying it? When did the trademark claimant first attach a symbol or word to products sold in commerce, or when did consumers begin to rely on the symbol's distinctiveness as an indicator of origin?<sup>13</sup> When did someone file notice with a government registry? Depending on circumstances, many of which Oliar and Stern try to identify and classify, any such event might be a candidate for marking the proper "time" for property rights to attach.

## II. WHAT OLIAR & STERN'S APPROACH OMITTS

Despite its insights, there are several difficulties with Oliar and Stern's analysis. First, not all their indicators correlate well with timing. (I give an example when I turn to the idea/expression dichotomy, below.) Often what they characterize as a "timing" issue has already been well studied under other labels.

Second, they sometimes imply that in order to be best used, virtually any intangible should be privately owned. For example, they deploy a tragic commons argument in ways that both largely ignore the inexhaustibility that intangibles possess and the flexible forms that commons can adopt.<sup>14</sup> Such factors can make privatizing ownership to a single person the wrong route to follow, regardless of timing.<sup>15</sup>

---

177. "Occupancy" when applied to a living being (the fox) is as metaphorical as is "possession" when applied to an intangible.

<sup>13</sup> The instant Response largely ignores trademark law. That is because for several centuries, a trademark has served different economic roles—and its law has had different goals—than has a copyright or a patent. Copyright and patent primarily serve to induce more and better writings and inventions. By contrast, during most of trademark law's existence, its focus was on combatting misinformation about the source of products and services. Through most of this period, few lawyers or economists would have seen trademark law's main function as inducing the adoption of more and better trademarks.

Toward the end of the last century, American trademark law began to mutate into misappropriation law. New protections were given to the value of trademarks themselves (rather than to marks' value as indicators of origin). Though the transformation is far from complete and the identity far from exact, the law of trademark is beginning to look more like copyright and patent and less like consumer protection.

<sup>14</sup> One might however interpret their citation to Elinor Ostrom as implicitly recognizing that not all commons are tragic. Oliar & Stern, *supra* note 4, at 407 n.51.

<sup>15</sup> Admittedly, private owners can unite to form commons of various sorts. *See, e.g.,* Mike, *Using CC0 for Public Domain Software*, CREATIVE COMMONS BLOG (Apr. 15, 2011), <https://creativecommons.org/2011/04/15/using-cc0-for-public-domain-software/> [<https://perma.cc/V26S-ULB3>] (identifying some distinctions between Creative Commons licenses and the General Public License of Richard Stallman's Free Software movement).

A more explicit recognition of the fruitful nature of many commons might even have led to Oliar and Stern to reevaluate what rules courts should be considering as new wildlife cases arise. Rather than assuming that courts merely should choose between the two alternatives of *Pierson v. Post* (giving property (a) to someone who chases a fox or (b) to someone who kills the fox), maybe courts should experiment with rules that incentivize wildlife management. In the contemporary landscape of environmental urgency, searching only for the “right owner” would seem a bit anachronistic.<sup>16</sup>

Third, the authors offer an *X* graph demonstrating the concept of trade-offs between the marginal costs and benefits associated with earlier versus later ownership.<sup>17</sup> Although it is elegant, the graph’s admitted independence from data makes it remarkably general. Readers need to be reminded that the graph proves nothing distinct about “timing.”

Fourth, and most importantly, Oliar & Stern’s analysis at various points seems to assume that the intangible work or invention *already exists*, like the fox does, and that the only significant problem is how to organize its optimal exploitation. Assuming a resource already exists may make sense for determining who should own previously unclaimed *land*,<sup>18</sup> and it may even make sense for determining who if anyone should own previously unclaimed foxes.<sup>19</sup> However, levels of scientific and aesthetic creation are far more sensitive to incentives.

Further, human creations are less dependent on IP incentives for their maintenance than they are for their creation. The dominant problem that federal legislators should seek to solve through laws of copyright and patent is how best to draw new authored works and inventive innovations into existence<sup>20</sup> without unduly restricting the access of consumers, audiences, and new creators.<sup>21</sup> The

---

<sup>16</sup> See *supra* note 8; *infra* notes 19-20 and accompanying text (discussing hunting rules that could favor wildlife preservation).

<sup>17</sup> *Id.* at 407 fig.1.

<sup>18</sup> Though land can be “created” by draining swamps and dumping landfill into shallow bays, most land preexists human effort. It is thus more legitimate to assume that incentives are unnecessary to induce existence in the case of land than they are in the case of human-made products.

The unspoken dominance of land in Oliar and Stern’s analysis is indirectly indicated by the language and metaphor. As mentioned *supra* note 12, the common law judges often preferred the concept of “occupancy” over that of “possession”; it is in regard to land that “occupancy” and “possession” can apply nonmetaphorically.

<sup>19</sup> Human activities have a significant impact on wildlife. How to “bring foxes into existence” may over time become an increasing part of the law governing ownership of wildlife.

<sup>20</sup> “The possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection.” *Golan v. Holder*, 565 U.S. 302, 345 (2012) (Breyer, J., dissenting).

<sup>21</sup> [C]opyright tends to restrict the dissemination (and use) of works once produced either because the absence of competition translates directly into higher consumer

stakes are highest (and copyright is most controversial) along the lines of contention drawn by the classic analyses. In particular, the cost of today's century-long copyright term<sup>22</sup> is so excessive it could drown the benefits of any fine-tuning offered by analyses like Oliar and Stern's.

### III. RESTORING CONTEXT: THE OMITTED COSTS

As mentioned, Oliar and Stern's analysis largely ignores the classic economics of copyright. The more traditional approach is often described as a problem of finding the best combination of access and incentives. (Although copyright imposes costs in addition to restraints on access, the access costs will suffice for illustration.)

"Access"<sup>23</sup> usually refers to the number of copies sold. It could as easily refer to the number of times or the intensity with which the work is used.<sup>24</sup> The lower the price for an embodiment (or for the desired use), the more access is likely to occur. However, low prices make it hard for markets to generate long-term "incentives" to create and invent. Copyright raises prices and profits, thus creating incentives to create, but the high prices inhibit access.

How incentives and access restraints will trade off will differ according to the specifics of different situations. Relevant factors include, among other things, the preferences of different audiences, the intrinsic or other nonmarket rewards available to different creators, the technological and other costs of creating, communicating, and distributing different types of work, and the creators' discount rates.

Exclusive rights empower a copyright or patent owner to restrict supply—both the supply of embodiments (e.g., sheet music or machines) and the supply of some uses (e.g., number of public performances or amount of times a patented

---

prices or because the need to secure copying permission sometimes imposes administrative costs that make it difficult for potential users of a copyrighted work to find its owner and strike a bargain.

*Id.* at 346 (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 68-70, 213-14 (2003)).

<sup>22</sup> With the current rule of life-plus-seventy, a book written or published by a thirty-year-old author will have, if the author dies at age seventy, a copyright duration of 110 years. Works for hire have terms of ninety-five years from publication or 120 years from creation, whichever expires earlier. *See How Long Does Copyright Protection Last?*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-duration.html> [<https://perma.cc/XK3M-8KGA>] (last visited Apr. 29, 2020). (This summary oversimplifies, particularly for works created prior to the most recent term extension.)

<sup>23</sup> On most economic graphs in the IP tradition, "access" is measured by the quantity of copies or other embodiments that consumers purchase. Access can of course take a multitude of other forms, such as performances viewed, adaptations made, and so on.

<sup>24</sup> People not only want to possess an embodiment of the work; sometimes they want to hear the song, see performances of the play, or turn a popular novel into a parody. *See* 17 U.S.C. § 106 (2018) (listing specific uses whose governance is given to copyright owners).

process is applied). This limit on supply raises price above marginal cost. The high price discourages some purchasing and licensing. The copyright or patent owner ordinarily makes a higher profit from selling fewer copies and licensing fewer uses at a high price than he or she would have made by selling more copies and licensing more uses at a low price. The rise in price and profit incentivizes new work.

Traditional IP economics asks three primary questions of any proposed rule in copyright or patent law. (The same questions are asked of existing IP rules, with an appropriate change of tense.) The questions are: (1) How many and what kind of additional authorial works or inventions will be drawn into existence by the proposed IP rule? (2) What will be the value of these *additional works* or *increases in quality* induced by the proposed rule? (3) Is that value greater or less than the cost imposed by the proposed rule's negative impact on the number of embodiments purchased and the manner in which works are used?

IP restricts access as a necessary byproduct of providing incentives to create. To see this, it's best to begin with a contrasting but simpler analytic setting: perfect competition in physical goods.<sup>25</sup>

In a "perfectly competitive" economy, anyone can offer for sale a product someone else has begun to offer. Potential suppliers always try to keep an eye out for products they could make, but which are currently on sale for prices *above* the marginal cost<sup>26</sup> of producing the last unit of the good. Circumstances where price substantially exceeds cost present opportunities for increased profit. So if a particular producer of armchairs is receiving a price per unit noticeably higher than the cost of producing its last armchair, other furniture manufacturers likely will jump into the armchair market.

As the new entrants build new armchair-making machines and offer more armchairs to the public, the number of armchairs available for sale increases. The increase in numbers offered will drive prices down. As prices go down, more consumers purchase armchairs. At some point the price will decrease to the point where the price of an additional armchair no longer exceeds the marginal cost of producing that chair. When price equals marginal cost, equilibrium is reached.<sup>27</sup> The equilibrium is not the point at which the first seller

---

<sup>25</sup> Of the many available renditions of the standard argument, a full appreciation of the importance of duration is best gained from reading Stan J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, in 8 RESEARCH IN LAW & ECONOMICS 181 (John P. Palmer, Jr. & Richard O. Zerbe eds., 1986), available at [https://personal.utdallas.edu/~liebowit/knowledge\\_goods/rle/rle1986.html](https://personal.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html) [<https://perma.cc/X79G-5X4F>].

<sup>26</sup> Marginal cost is the cost of making one more embodiment. It varies. The cost of moving from zero to one unit of the product might be immensely higher than the cost of moving from one unit to two.

<sup>27</sup> Manufacturers stop making armchairs when they anticipate that price will equal marginal cost. At equilibrium, price also is assumed to equal average cost, in part because of the new factories built to expand supply.



---

---

could have obtained maximum profit. It is, however, the point at which the price and number of purchases generates the maximum possible social welfare.

Of course, this ideal solution occurs only under some standard assumptions. One of those assumptions is that formulating the good did not require a unique, one-time startup investment of significant amounts of money, infrastructure, time, and talent. Instead, for physical goods it's assumed that periodic infusions of investment will be needed to expand supply toward equilibrium, and that over time the average cost of an armchair (over all units sold) will equal marginal cost (of the last unit).

By contrast, inventions and authorial works often do require just such significant one-time investments of time and money.<sup>28</sup> If periodic infusions of cash are needed, they will usually be dedicated to physical costs like manufacturing, printing, and distributing the embodiments. The high level of the one-time costs means that, for the originator or anyone who pays the originator, average cost will exceed marginal cost, and the competitive price cannot be relied upon to cover the start-up investments.

The standard thesis is therefore that "perfect competition" is ill-suited for intangibles. For illustration, assuming the following hypothetical facts:

No copyright law exists. An author writes a manuscript. Using this physical copy as leverage, the author extracts from a particular publisher a contract that will pay royalties. What happens? Without copyright law to restrain copying, an authorized supplier of books is unlikely to be able to restrict the number of copies on the market. Also, publishers who don't have to bear the cost of paying the author will have lower costs.

If the authorized publisher puts a price on her copies higher than the cost of making a duplicate, other publishers will duplicate the product and sell it for less. Eventually the price of a copy will drop to where it equals the cost of *physically* producing the copies and getting them to market<sup>29</sup>—that is, new entrants will only have to cover their physical costs of manufacture. That gives

---

<sup>28</sup> The recovery of up-front costs is a general concern for many producers, but authors face a special kind of economic problem, due to the technology of production for creative works. . . . For products generally, the second competitor must incur the same kinds of costs as the original entrant in order to participate in the market. Books, films, and other creative works are different: without legal protection, an author cannot prevent others from appropriating the fruits of the initial investment.

Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846, at \*4 [hereinafter Brief of George A. Akerlof et al.]. If investment results in a new creative work (like a movie sequel), the sequel will have a its own up-front costs. The economics of incentivizing the sequel's creation will tend to follow the pattern for IP rather than the pattern for physical products, and a new copyright will arise in the sequel (attaching to the creative elements added). The economic forces that affect the exploitation of any movie once made, whether original or sequel, will more closely follow the pattern for physical products.

<sup>29</sup> Liebowitz, *supra* note 2525.

them the ability to make a profit at low price levels. Without copyright or patent, the originator of the item being copied will have little power to keep prices high. Prices will drift down to equal the marginal (and average) cost of the *physical* manufacture, because physical costs of replication (plus other physical costs like delivery) are the only cost constraints the competitors face.

Under these assumptions, the authorized publisher can sell his or her inventory only by meeting the low market price. How much of the publisher's revenue would remain after paying bills from paper sellers, typesetters, delivery trucks, and other elements of physical production and distribution? No money would be left to compensate the author for the author's creativity and time.<sup>30</sup> Or if the publisher did pay the author, the publisher's total costs would outweigh total profit. Bankruptcies do not make for eagerness to pay royalties on the next round. If such were an author's prospects, even authors who love the creative experience for its own sake might be discouraged from investing substantial chunks of their lives in creating new works.

Introducing copyright law would change this scenario, largely because copyright law imposes on the public, including potential competitors, a duty not to make and sell copies of the work without the consent of the copyright owner. The power to grant or deny consent to such exact and near-exact substitutes<sup>31</sup> gives the copyright owner the ability to affect the price of copies by restricting their supply. A copyright owner can sue competitors who have copied and tried to sell exact or near-exact duplicates of the copyrighted book.

Possessed of market power, the copyright owner or an authorized publisher will make a greater profit. Incentives to create will therefore be larger under copyright, it is argued, than in a world of perfect competition where everyone is free to copy and sell the identical item.

In the rhetorical scheme mentioned above, the high price enabled by copyright is praised as the source of "incentive" and the lessened quantity sold is excoriated as "loss of access." To determine if a particular rule increases social welfare, the standard economic account tries to take both effects into account. It is here that the *duration* of the IP right can make a crucial difference.

---

<sup>30</sup> *Id.* The facts described adhere roughly to a prisoner's dilemma. See generally, e.g., Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853 (1992). Obviously, the real world does not always look like this. Sometimes factors such as lead-time advantage and customer loyalty (not to mention nonmarket options such as private patronage and governmental grants) make authors productive without copyright. A classic empirical study of copyright markets was written by Justice Breyer early in his career. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

<sup>31</sup> Independently created duplicates are not subject to a copyright owner's control, but outside of popular music, duplication without copying is rare for creative works.

First note a crucial distinction: In doing the weighing, restrictions on access do not matter for any work that *did* need copyright to come into existence.<sup>32</sup> For such works (something that otherwise wouldn't exist), any access is a gain. By contrast, for works that would have come into existence anyway, the restrictions on access impose a true social cost. That cost is worth bearing (economically speaking) only if outweighed by the long-term social gain of new works or greater quality induced by the copyright grant.

Now enters the crucial problem of duration. Just as "early" and "late" are just points on a spectrum, copyright protection isn't a binary yes/no question. The scope of owner control can be any degree of narrow or wide, and the duration of owner control can be any degree of short or long.

Each extra year a copyright lasts, the cost of access-constraint grows cumulatively larger.<sup>33</sup> That happens because different authors, works, and contexts need different kinds and periods of protection, but copyright law gives all industries the same duration of protection.

A copyright of a given number of years provides undoubted social gain for works whose creators would not have created them but for the promise of exclusive rights remaining in force for the specific number of years. Whether that gain is economically worth pursuing, however, depends on how it stacks up against the loss of access to works that would have been created without the lure of a the specified term. This includes not only the works that needed no copyright at all to be created but also the works that would have come into existence in response to a shorter copyright term. The baseline for comparison is the number, kind, and quality of works that would have existed if the given copyright were not enacted.

Say the period of anticipated revenue in a particular field is concentrated into the first three years after publication. Assume also that authors in that field will produce "extra" works if they are promised copyright protection, but only if they can anticipate the copyright lasting for three years after the publication date.

As to the incentivized "extra" titles, the baseline for comparison would be a world in which those works did not exist at all. For those "extra" titles, therefore, a three-year copyright would impose no social cost in terms of reduced access. It's meaningless to talk about "loss" of access to works that came into being only in response to the access restraint.

---

<sup>32</sup> *But see* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 *VAND. L. REV.* 493, 487-88 (1996) (arguing that copyright law can draw excessive resources into copyright industries, such as entertainment, away from other fields).

<sup>33</sup> The canonical statement is probably that of Lord Macaulay:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

THOMAS BABINGTON MACAULAY, *Speech Before the House of Commons (Feb. 5, 1841)*, in 8 *THE WORKS OF LORD MACAULAY* 195, 199 (Lady Trevelyan ed., 1866).

But for those works that did not need the three-year copyright to come into existence, the social costs from a three-year term could be high. A three-year copyright would incur social cost for the titles that would have been created even if no copyright had been enacted at all (loss of access in years one, two, and three). It would incur social cost for the titles that would have been created even had copyright been enacted with a mere one-year term (loss of access for years two and three). It would incur social cost for the titles that would have been created even had copyright been enacted with a two-year term (loss of access for year three).

Tweak the hypothetical a bit. Perhaps the field just mentioned is only one of many arenas governed by the relevant IP law. Perhaps because of other industries' perceived needs, the nation grants all works a copyright with a duration of five years from its public circulation. For those titles that needed only three years of incentives, now years four and five of the copyright would produce significant social cost.

Federal law generally gives the same term to all copyrights (musical works, graphic and pictorial works, audiovisual works, computer programs) regardless of the various industries in which the works are sold. Only if all creators needed the exact same duration of copyright, and only if the enacted copyright term tallied exactly with that number, would the cost in lost access be zero. The access loss flowing from inter-industry differences, and from authors with differing needs and preferences within the same industry, is stunning in light of today's copyright terms. More importantly, it is hard to imagine *any* work for which a century's term is needed.

What if all works only needed the lure of a three-year term but received a ninety-five-year copyright? Then losses would build as copyright lasted for the unnecessary fourth, fifth, sixth, and more years. A length of ninety-five years<sup>34</sup> would generate a net loss for every year from year four to year ninety-five.<sup>35</sup> The cost in terms of restrictions on access would keep growing even after the positive incentive effects start shrinking or disappear.<sup>36</sup>

Such restraints on access are almost invisible in Oliar and Stern. Admittedly, duration is not their focus. Nevertheless, when they do discuss duration, they ignore its most important potential effect (namely, as a mode of calibrating the incentive-access balance).

Instead they suggest that limits on duration might function "as a primary mechanism to coordinate between different generations of authors and

---

<sup>34</sup> *How Long Does Copyright Protection Last?*, *supra* note 22.

<sup>35</sup> For an arithmetic model, see Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159, 182 n.81 (2002).

<sup>36</sup> On the loss of marginal incentives as copyright terms expand, see, for example, the Economists' amicus brief in *Eldred*. See Brief of George A. Akerlof et al., *supra* note 28.

inventors.”<sup>37</sup> It is hard to see the current law’s century of copyright protection as equivalent to only one physical generation. Nor do physical generations constitute the key variable for assessing when the world and the canon need new interpreters.

What matters is cultural turnover. Some estimates plausibly suggest that during the last century, the United States has seen six cultural generations.<sup>38</sup> The next century will also likely see a half dozen or more overlapping cultural generations. Yet during that duration virtually none of today’s new copyrights will expire.

#### IV. WHY EXPRESSION AND NOT IDEAS ARE OWNABLE

The focus on time in the Oliar and Stern piece sometimes leads its authors to odd conclusions. In particular, the article seems to suggest quite inappropriately that *timing* is at the core of the idea-expression dichotomy doctrine. Here is Oliar and Stern on how a dramatist writes a play<sup>39</sup>:

A playwright sets out to write a play. She starts out with an abstract and preliminary motivating idea, and as she moves further along the creation path she develops the plot scene after scene, adding detail—such as names, times, places, and characters—and *gradually making her idea less abstract and more concrete*. Somewhere along this continuum of increasing concretization lies the point at which expression is distinguished from idea. Any version of the work lying to the “left” of that point would be regarded by copyright doctrine as an abstract idea, free for the taking. Any version of the work lying to its “right” is regarded by copyright doctrine as an original expression, subject to possession and thus property . . . . The point at which an author passes from idea to expression is copyright’s equivalent of capture.

. . . [C]opyright’s idea-expression dichotomy seeks to ensure that protection is awarded only *after* the *completion* of substantial steps along the developmental timeline.<sup>40</sup>

Never have I heard anyone other than a computer programmer describe his or her writing process in a way that matches the process Oliar and Stern describe.

---

<sup>37</sup> Oliar & Stern, *supra* note 4, at 457. *Cultural Generations of the Last 100 Years*, BOOMER PIE (Aug. 31, 2009), <http://www.boomerpie.com/2009/08/cultural-generations-of-last-100-years.html> [<https://perma.cc/4CAJ-CUD9>].

<sup>38</sup> *Cultural Generations of the Last 100 Years*, BOOMER PIE (Aug. 31, 2009), <http://www.boomerpie.com/2009/08/cultural-generations-of-last-100-years.html> [<https://perma.cc/4CAJ-CUD9>].

<sup>39</sup> It is also possible they are merely fleshing out Learned Hand’s abstractions test. That seems unlikely, though, as Hand wrote of varying components by focusing on their nature, not on their time of creation.

<sup>40</sup> Oliar & Stern, *supra* note 4, at 439 (emphases added) (footnote omitted).

Certainly some writers begin with abstraction. For example, Hollywood is known for “pitching ideas” as a first stage. But it stretches credulity to imagine most writers adding incremental detail in so rational and temporally linear a fashion. As Madeleine L’Engle said of a similarly warped view, “That isn’t the way people write.”<sup>41</sup>

When experienced writers of fiction or drama give writing advice, it’s not about starting with a big plan. Instead they advise: Know your characters and follow where they lead; seize any nugget of the particular you can; get the details down. Then let yourself learn from what emerges. “Most of what is best in writing isn’t done deliberately.”<sup>42</sup> The successive “concretization” described by Oliar and Stern has occasional applicability, but overall it has little to do with how playwrights work.

If Oliar and Stern really mean what they imply—that late-breaking contributions should always be ownable regardless of their ontological status—their treatment raises further questions. It is hard to imagine that society would be better off if we somehow propertized any idea simply because it came late in the creative process. Posit, for example, that the idea of natural selection occurred to Darwin only *after* he had filled his notebooks with chapters full of expressive detail. I cannot imagine that Oliar and Stern would really recommend giving Darwin property in the idea.<sup>43</sup>

Copyright declines to give ownership in ideas for a host of reasons. Among them are our free speech heritage, the belief that a “battle of ideas” will help find truth, and respect for the dignity and thought processes of audiences. There is also an economic dimension.

Ideas by definition are general as opposed to particular, broad as opposed to narrow. As such, an idea is open to a multitude of differing expressions. As Oliar and Stern recognize, every community and every generation needs someone who “speaks the local language” to express ideas in a way that can be heard and discussed by particular people at particular times. And a ninety-five-year copyright term (which is what typically applies today) is hardly tuned to the roughly dozen to fifteen years that mark generational cultural turnover.

Precisely because of the diversity of expressions that can give them life, ideas are well suited for *decentralized* exploitation by a multitude of audiences and

---

<sup>41</sup> Madeleine L’Engle, *Newbery Medal Acceptance Speech: The Expanding Universe*, in *A WRINKLE IN TIME* 239, 242 (Square Fish 2007) (1962) (quoting her younger self). A recording of the speech is available at <http://hdl.handle.net/11213/8036>.

<sup>42</sup> *Id.* at 243.

<sup>43</sup> In addition, the First Amendment would disable copyright law from doing so; it is hard to imagine a U.S. legal system that would empower a theorist to sue critics, rivals, or students who without permission explained his or her book’s ideas to audiences. The idea/expression dichotomy is a First Amendment “safeguard,” *Golan v. Holder*, 565 U.S. 302, 328-30 (2012), without which copyright’s constitutionality would be far more vulnerable. *Id.*

adaptors. They are ill-suited for exploitation by a favored few, no matter how eloquent. Time is only one of the ways in which audience needs can differ.

#### CONCLUSION

Oliar and Stern add to IP's conceptual vocabulary by applying analogues of "first committed search" and "capture" to IP. However, by not couching their analysis within a larger context, they unnecessarily imperil recognition of how important the standard economic problems remain for public policy, particularly the social costs imposed by giving IP owners lengthy terms of protection. Moreover, Oliar and Stern employ a methodology that implicitly directs the solicitude of IP law toward facilitating the exploitation of already-existing properties. Such a perspective itself encourages long IP terms.

In addition, their article's focus on "time of acquisition" causes them to miss instances when policy considerations unrelated to time dominate. Thus they fail to identify how subject matters that are ill-suited for centralized exploitation, such as "ideas," are ill-suited for private ownership regardless of timing.