

Public but Private: Copyright’s New Unpublished Public Domain

R. Anthony Reese *

I.	The Legal Scope of the Unpublished Public Domain.....	588
A.	The End of Perpetual Copyright in Unpublished Works	588
B.	Why Grant Federal Protection to Unpublished Works?	591
II.	The Works in the Unpublished Public Domain	595
A.	Private Works.....	595
B.	Preparatory Works	598
C.	Performed and Displayed Works	600
III.	Implications of Expanding the Public Domain to Unpublished Works	603
A.	Contracting Copyright Protection, Adding Material to the Public Domain and Reducing Clearance Costs.....	603
B.	The “Life-Plus” Term in Action	606
C.	The United States as Pioneer of the Unpublished Public Domain..	607
D.	Altering the Publicness of the Public Domain	613
IV.	Keeping Control of Unpublished Public Domain Works	617
A.	Controlling Initial Publication Through Access	617
1.	<i>Motivations for Control</i>	617
2.	<i>Mechanisms of Control: Denying or Conditioning Access</i>	621
3.	<i>Enforceability of Conditional Access Agreements</i>	623
4.	<i>Effectiveness of Conditional Access Agreements</i>	629
5.	<i>Promoting Dissemination Through Conditional Access Agreements</i>	631
B.	Controlling Use After Publication: A Publication Right?.....	633
1.	<i>The European Union’s Publication Right</i>	633
2.	<i>Congressional Power to Protect</i>	635
3.	<i>Should A Publication Right Be Granted?</i>	652
4.	<i>Disadvantages of Protection</i>	659

* Arnold, White & Durkee Professor, School of Law, The University of Texas at Austin; Visiting Professor, NYU School of Law, 2006–2007. Thanks to Paul Goldstein, Justin Hughes, Mark Lemley, Christopher Leslie, Margaret Jane Radin, Pamela Samuelson, Elizabeth Townsend Gard, and participants in faculty and student workshops at Stanford, Boalt Hall, the University of Arizona, Cardozo, Vanderbilt, and NYU law schools for helpful conversations and comments on this paper. Thanks also to Kurt Heinzelman, Executive Curator for Academic Programs at the Harry Ransom Humanities Research Center at The University of Texas at Austin for first inviting me to speak on this topic.

5. <i>Properly Limiting Any U.S. Publication Right</i>	661
V. Conclusion	663

January 2003, when the Supreme Court decided *Eldred v. Ashcroft*,¹ has not generally been viewed as a good month for the public domain. By upholding the constitutionality of the Sonny Bono Copyright Term Extension Act, the Court approved a 20-year delay in the entry into the public domain of everything published after 1922, and essentially validated a moratorium under which such works will not begin to enter the public domain until 2018. But January 2003 was also a very good month for the public domain. Two weeks before the Court's decision, every unpublished work ever created by any author who died before 1933 entered the public domain.² This was probably the largest single deposit of material into the public domain in history: every letter, journal, poem, short story, song, sketch, photograph, or painting that had never been publicly distributed and whose author died no later than 1932.

This enormous influx of material into the public domain has received little notice,³ but it has significant implications for copyright law and practice. Much of the material is primarily of educational or historical interest, but some of it has commercial value as well, so archives, museums, scholars, students, publishers, film studios, and others will be affected. And allowing copyright in unpublished works to expire for the first time in our history fundamentally changes the nature of the public domain. Before 2003, the public domain encompassed works that were not only legally free for the public to use but that had also been made available to the public. Adding to the public domain works that have been kept private may change the legal regulation of the public domain. One possible change might be to grant a

1. 537 U.S. 186 (2003).

2. If the plaintiffs in *Eldred* had succeeded, even more material would have entered the public domain: every unpublished work by any author who died before 1953.

3. Many other aspects of the public domain have recently been the subject of sustained scholarly commentary. A very partial list of the most important work on various aspects of the public domain includes JAMES BOYLE, *SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, 147; Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, LAW & CONTEMP. PROBS., Winter/Spring 2003, 147; the articles collected in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* (Lucie Guibault & P. Bernt Hugenholtz eds., 2006); and Symposium, *The Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, 1. For a more comprehensive overview of the public domain literature, see Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 786-813 (2006) [hereinafter Samuelson, *Enriching Discourse*].

limited copyright-like right to the first person to publish an unpublished public domain work. The European Union (EU) has uniformly adopted such a right, which might give rise to a move to create one in the United States.

This Article explores the creation and implications of the new public domain of unpublished material. Part I describes the evolution of copyright law governing unpublished works that led to the creation of the unpublished public domain in 2003. Part II then examines the kinds of works that make up the unpublished public domain, which fall into three categories: private works, works created as preparation for a published work, and works that have been performed or exhibited but not technically published under copyright law.

Next, Part III considers the implications of the changed legal regime for unpublished works. The new regime both represents one of the few ways in which copyright protection has contracted in recent years and places in the public domain an unprecedented amount of material at a time when virtually no other copyright is expiring. More fundamentally, the nature of the public domain has been significantly changed, by including for the first time a substantial body of material that is legally unprotected by copyright but that has never been publicly disclosed. And the United States, it turns out, is something of a pioneer among major copyright nations in ending copyright control over unpublished works. While some countries have followed this course, others have moved in the opposite direction and provided stronger copyright protection for long-unpublished works.

Finally, Part IV contemplates ways in which the legal regulation of the public domain may change now that it includes unpublished material. Those who hold unpublished works, or who wish to publish them, may seek to control publication of those works even after they enter the public domain. Owners of physical copies that embody such works—especially archives, which hold a large amount of older, unpublished material—may try to use that ownership to control the initial publication of those works. This Part considers the extent to which such owners may be able to do so. Finally, this Part examines the possibility that the United States might grant exclusive rights to the first person to publish an unpublished public domain work, as the European Union has done, and considers both whether the Constitution empowers Congress to grant such a right and whether such a right is necessary or desirable.

One preliminary note on terminology is in order. Recent years have seen significant scholarly discussion over what precisely the term “public domain” includes or should include, as Pam Samuelson’s very helpful recent analytic survey of the field has demonstrated.⁴ In copyright law, some use the term to mean works in which copyright rights have expired—or never

4. See Samuelson, *Enriching Discourse*, *supra* note 3, at 783.

attached.⁵ Others include in the term uses—such as fair uses—that copyright law authorizes of works still protected by copyright.⁶ Still others include in the term uses that they argue must be allowed as a matter of constitutional law, or uses that they argue should be allowed as a normative matter.⁷ Without taking any position on the broader meanings, in this Article I use the term “public domain” in the narrow sense of works for which legal protection under copyright law has expired.

I. The Legal Scope of the Unpublished Public Domain

A. *The End of Perpetual Copyright in Unpublished Works*

Until 1978, unpublished works of authorship were generally protected not by federal copyright but by state law.⁸ State “common law” copyright, as it was called,⁹ usually covered a work from the time of its creation and protected the owner against its unauthorized initial publication. This state law protection lasted until the work was first published, at which point it either acquired federal copyright protection, if the owner complied with the formalities imposed by federal law, or entered the public domain because state protection ended and federal protection was not obtained. Because a work could remain unpublished indefinitely, state law copyright was similarly indefinite and potentially perpetual.¹⁰

The 1976 Copyright Act ended this division of labor between state law protecting unpublished works and federal law protecting primarily published works. Indeed, Ralph Brown, a preeminent copyright scholar of the day, claimed this was the “greatest change” worked by the 1976 Act: “A dual system that has persisted since the beginning of the republic gives way to a

5. *Id.* at 789–92.

6. *Id.* at 798–805.

7. *Id.* at 792–94, 805–07.

8. *See, e.g.*, Copyright Act of 1909, ch. 320, § 2, 35 Stat. 1075, 1076 (repealed 1976) (“[N]othing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.”).

In fact, federal copyright protection was *available* for certain types of unpublished works—all of which were commonly exploited by public performance or display rather than by publication of copies—but only if the work’s owner affirmatively registered the work for protection with the Copyright Office. *Id.* § 11. Interestingly, the 1909 Act made no express provision for the term of federal copyright acquired by the registration of unpublished works, as the Act’s term provisions ran only from “the date of first publication.” *Id.* § 23. Courts eventually decided that the initial term of unpublished works registered for protection ran for 28 years from the date of deposit. *See Shilkrot v. Musicraft Records*, 131 F.2d 929, 932 (2d Cir. 1942); *Marx v. United States*, 96 F.2d 204, 206 (9th Cir. 1938).

9. The label “common law” copyright is generally used regardless of whether the state law governing the subject remained decisional or was codified into statute. *See* 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.4, at 17:44 n.7 (3d ed. 2006).

10. *See generally* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.03, at 4-19 to -20 (2006).

unified national copyright.”¹¹ For works created on or after January 1, 1978, federal copyright protection attaches to the work not when it is published or registered, as under all prior U.S. copyright acts, but as soon as it is fixed in a tangible medium of expression.¹² Whether a work is published or not, once created it enjoys federal copyright protection. This new unitary copyright system thus changed the term of protection for unpublished works. Whereas previously an unpublished work could be protected indefinitely, after 1978 an unpublished work is protected for the same term as any other copyrighted work, which under the 1976 Act as adopted was in most cases the life of the author plus 50 years.¹³

The 1976 Act ended state copyright protection not only for works created after January 1, 1978, but also for works created before that date. Section 303 of the 1976 Act made express provision for any work that already existed on January 1, 1978, but had (1) never secured a federal copyright¹⁴ and (2) not entered the public domain, a category that principally included existing but unpublished works protected by state common law copyright.¹⁵ The Act removed those works from state protection and granted them federal copyright as of January 1, 1978.¹⁶ But how long a federal copyright term should these newly protected works receive? Congress gave them the same basic term as all post-1977 works, which was generally the life of the author plus 50 years.

For unpublished works of long-dead authors, though, Congress felt that this created an inequity.¹⁷ Before 1978, such works were still protected by

11. Ralph S. Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 UCLA L. REV. 1070, 1070 (1977). He also noted that the Act’s greatest change “has been attended with the least controversy.” *Id.*

12. Copyright Act of 1976, 17 U.S.C. § 302(a) (1994) (current version at 17 U.S.C. § 302(a) (2000)).

13. *Id.* In the case of joint works, the term was measured from the life of the last surviving author. *Id.* § 302(b). For works made for hire, anonymous works, and pseudonymous works the term was the shorter of 75 years from publication or 100 years from creation. *Id.* § 302(c). These terms were all later extended by 20 years. *See infra* notes 22–23 and accompanying text.

14. The statute simply refers to works “created before January 1, 1978, but not theretofore . . . copyrighted,” 17 U.S.C. § 303(a) (emphasis added), but logic and the legislative history make clear that “copyrighted” in this context must mean copyrighted under the federal statute as opposed to under state common law, *see, e.g.*, H.R. REP. NO. 94-1476, at 138–39 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5754–55.

15. 17 U.S.C. § 303(a).

16. The one exception was sound recordings fixed before February 15, 1972. Federal copyright law offered no protection to sound recordings before that date, though state protection was available, even after records had been distributed to the public. The 1976 Act allowed state law to continue to protect such recordings for up to 75 more years (to 2047), and simply never brought pre-1972 recordings into federal copyright: “Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.” *Id.* § 301(c). At least one state court has held that pre-1972 sound recordings retain their state copyright protection even after the sale of records to the public. *See Capitol Records, Inc. v. Naxos of Am.*, 830 N.E.2d 250, 263 (N.Y. 2005).

17. H.R. REP. NO. 94-1476, at 139. In the discussions on an early draft of the bill that became the 1976 Act, Leon Kellman, of the American Guild of Authors and Composers, argued that the

state law copyright and could continue to enjoy this protection indefinitely. If Congress gave these works federal protection on January 1, 1978, only for a term that lasted until 50 years after the author's death, the copyright in these works would have expired immediately. For example, Rainer Maria Rilke died in 1926, so a Rilke poem that was unpublished (and protected by state common law copyright) on December 31, 1977, would have achieved federal copyright on January 1, 1978, and would have expired that same day, since 50 years had already passed since Rilke's death.

Congress sought to prevent this outcome, in part because questions had been raised about the constitutionality of cutting off potentially perpetual common law protection. The suggestion had been made that such a cut-off would be less problematic if a period of statutory protection was granted.¹⁸ Congress therefore adopted a transitional mechanism in § 303 and provided a minimum 25-year term of federal protection for all pre-1978 unpublished works.¹⁹ On January 1, 1978, these works acquired a federal copyright that lasted for the ordinary term of protection or for 25 years, until December 31, 2002, whichever was longer.²⁰ To encourage the publication of unpublished material, Congress held out the possibility of even longer protection: if the work was actually published during its 25-year minimum term, that term would be extended to 50 years, through December 31, 2027.²¹

In 1998, the Sonny Bono Copyright Term Extension Act lengthened the terms of copyright under U.S. law, but did not change the fundamental structure adopted in the 1976 Act.²² As a result, copyright now generally runs for 70 (rather than 50) years after the death of a work's last surviving author.²³ This new term also applies to works that were unpublished on January 1, 1978, and received federal protection on that day.²⁴ And for those works, the Sonny Bono Act also partially extended the minimum term of

estates of many authors and composers often retained unpublished works in reserve waiting for the right opportunity to exploit them, knowing that they could obtain a limited-term, statutory copyright by publishing those works. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION, PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 45–46 (Comm. Print 1964) [hereinafter FURTHER DISCUSSIONS]. He thus argued that “some period of protection should be given so that those who own [unpublished works of dead authors] can at least be warned that, if they do not hasten to exploit them, they must be deprived of all their rights.” *Id.* at 46.

18. See, e.g., FURTHER DISCUSSIONS, *supra* note 17, at 37–38 (remarks of Barbara Ringer).

19. 17 U.S.C. § 303.

20. *Id.*

21. *Id.*; H.R. REP. NO. 94-1476, at 139.

22. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

23. 17 U.S.C. § 302(a)–(b) (2000). For works made for hire, the term is the shorter of 95 years from publication or 120 years from creation. *Id.* § 302(c).

24. The Sonny Bono Act was adopted in 1998, before the 25-year minimum term for pre-1978 unpublished works had expired. As a result, the federal copyright term for all pre-1978 works that had acquired federal copyright on January 1, 1978, had not expired at the time of the extension, so the new terms apply to all of those works. See Sonny Bono Copyright Term Extension Act § 102.

protection under § 303. The basic minimum term of 25 years remained, expiring on December 31, 2002, but if a work was published before that date, it would receive 45 more years of protection (through 2047), for a total minimum term of 70 (rather than 50) years.

Congress made no further amendments, so at midnight on December 31, 2002, the minimum term for pre-1978 unpublished works expired.²⁵ As a result, works entered the public domain in the United States on January 1, 2003, if (1) as of January 1, 1978, they were unpublished and had never been registered for copyright protection, (2) they remained unpublished through December 31, 2002,²⁶ and (3) the author died on or before December 31, 1932.²⁷ Because all copyright terms run until the end of the year in which they expire, works that meet the first two conditions are today in the public domain if the author died on or before December 31, 1936.

B. Why Grant Federal Protection to Unpublished Works?

Why did those who drafted the 1976 Act choose to end the centuries-old system of potentially perpetual state protection for unpublished works? The law was the product of over 20 years of legislative revision efforts, and for most of the first decade, the revision work was led not by congressional committees but by the Copyright Office. Understanding the rationales behind § 303 thus requires looking not only at what Congress said when it passed the 1976 Act, but at the explanations and discussions outside of Congress of the early proposals and bills that evolved into the 1976 Act.

The new approach to unpublished works emerged fairly early in the revision process but was not a foregone conclusion. In 1961, the Copyright Office made its first tentative recommendations for a new statute.²⁸ With respect to unpublished works, the Register of Copyright's primary concern was that the technical definition of "publication" as restricted largely to the dissemination of copies of a work meant that some works could be "commercially and widely disseminated" (for example, by public

25. That date also marked the expiration of protection in most then-unpublished architectural works. Congress did not extend copyright protection to architectural works until December 1, 1990, and when it did so, it protected any work which, on that date, was "unconstructed and embodied in unpublished plans," but it provided that such protection would expire on December 31, 2002, "unless the work is constructed by that date." Architectural Works Copyright Act, Pub. L. No. 101-650, § 706(2), 104 Stat. 5089, 5134 (1990).

26. For a discussion of some of the issues involved in determining whether a work was first published between 1978 and 2003, see Elizabeth Townsend Gard, *January 1, 2003: The Birth of the Unpublished Public Domain and Its International Consequences*, 24 CARDOZO ARTS & ENT. L.J. 687, 697-702 (2006).

27. If the work is a work made for hire (or an anonymous or pseudonymous work), then the relevant question is not whether the author has been dead for more than 70 years, but rather whether more than 120 years have elapsed since the work was created. 17 U.S.C. § 302(c).

28. See H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) [hereinafter REGISTER'S REPORT].

performance) while remaining unpublished and protected by common law copyright, potentially forever, which the Register viewed as “contrary to the principle” of the “limited times” provision of the Constitution’s Copyright Clause.²⁹ The Register therefore recommended that common law protection should end, and protection under the statute begin, whenever a work was publicly disseminated, either by publication of copies or by other means such as public performance.³⁰

But the Register recommended retaining potentially perpetual common law protection for works that were not publicly disseminated, despite the appeal of the simplification and uniformity that would result from protecting all copyrightable material under federal law. The Report concluded that most undissemated material consisted of letters, diaries, family photos, and similar material in which the privacy interest of the authors and their heirs was “paramount” and deserved protection against unauthorized disclosure without any time limit.³¹ The Register did recognize that privacy interests diminished over time and that scholarly use of valuable information in unpublished papers “is often handicapped by the uncertainty as to whether they are still subject to the authors’ common law rights, and by the impracticality of seeking permission from numerous authors or heirs.”³² The Report therefore proposed that unpublished material that was made accessible to the public in an archive or library would enter the public domain “when it is 50 years old and has been in the institution for more than 10 years.”³³

In the formal discussions of the Register’s Report among interested parties “[v]ery strong objections were lodged against a dual common law-statutory copyright system based on ‘public dissemination . . .’”³⁴ Instead, “the overwhelming sentiment was definitely in favor of a single Federal

29. *Id.* at 40. The Report also expressed concern that such unpublished works were “immune from limitations on the scope of statutory [copyright] protection that have been imposed in the public interest,” such as fair use. *Id.*; see also Brown, *supra* note 11, at 1077 (noting that the possibility for exploitation in perpetuity of technically “unpublished” works seemed at odds with the constitutional mandate of limited terms for federal copyright); Benjamin Kaplan, *Revision of the Copyright Law*, 52 LAW LIBR. J. 3, 5 (1959) (noting that treating works widely exploited by performance as unpublished could allow owners of such works to “maintain exclusive ownership of [them] for an indefinite period of time under protection of state law” and to avoid the limited duration of federal statutory copyright).

30. REGISTER’S REPORT, *supra* note 28, at 43. The Report also recommended that “[t]he privilege of securing statutory copyright in lieu of common law protection, by voluntary registration in the Copyright Office, should be extended to all copyrightable works.” *Id.*

31. *Id.* at 41.

32. *Id.* at 41–42.

33. *Id.* at 43. If the copyright owner had registered the work for copyright, its term would instead be governed by the ordinary term provisions. *Id.* The proposal would also have subjected unpublished material to fair use as soon as the holder of the material made it publicly accessible in a library or archive. *Id.*

34. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 82 (Comm. Print 1965) [hereinafter REGISTER’S SUPPLEMENTARY REPORT].

copyright system with protection starting upon creation and with a limited term for all works, published or unpublished, disseminated or undissemated.”³⁵ The advantages urged for such a system included the elimination of the “confusion, uncertainty, and capriciousness” resulting from the concept of “publication,” the national uniformity of a single system (which was now “universal” elsewhere in the world), and fidelity to the “limited times” principle of the Copyright Clause.³⁶ This last advantage, it was argued, would “aid scholarship and the public’s ‘right to know’ by making unpublished, undissemated manuscripts available for use after a reasonable period.”³⁷ These views convinced the Copyright Office “that the advantages of simplicity and uniformity in a single Federal system outweigh the advantages of preserving common law copyright for undissemated works,”³⁸ and its first preliminary draft of a new copyright law therefore provided that federal copyright would arise as soon as a work was created and would endure for a limited term, regardless of whether the work was publicly exploited.³⁹

Moving to a unified system required dealing with existing unpublished works. The preliminary draft addressed the issue by bringing all such works under federal statutory protection on the law’s effective date and granting them the ordinary term of copyright protection.⁴⁰ Noting concerns about constitutional (and fairness) objections to replacing potentially perpetual common law protection with limited statutory protection,⁴¹ the Copyright Office took the view that Congress could make the substitution “as long as it accords the work protection under the statute for a reasonable time.”⁴² The draft therefore proposed guaranteeing existing works a minimum term of about 25 years.⁴³ In response to suggestions to lengthen that minimum term, it was proposed that any such lengthening be tied to making the work

35. *Id.*

36. *Id.*

37. *Id.* at 82–83.

38. *Id.* at 83.

39. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT § 20, at 18–19 (Comm. Print 1964). The draft proposed two alternatives for the length of the term. Alternative A provided that the copyright would last for the shorter of 75 years from publication or 100 years from creation. *Id.* at 18. Alternative B provided for the same calculation if the work was for hire or anonymous or pseudonymous, but for a life-plus-50 term for other works. *Id.* at 19.

40. *Id.* at § 20.

41. FURTHER DISCUSSIONS, *supra* note 17, at 37–38 (remarks of Barbara Ringer).

42. REGISTER’S SUPPLEMENTARY REPORT, *supra* note 34, at 93.

43. FURTHER DISCUSSIONS, *supra* note 17, at 38 (remarks of Barbara Ringer). The length of the minimum term was apparently set at 25 years in part because the Universal Copyright Convention provides for a 25-year minimum term for some purposes. *Id.* There was some debate over the appropriate length for the minimum term, with 50 years also being suggested. *Id.* at 43 (remarks of Irwin Karp, Authors League of America).

available,⁴⁴ and the copyright revision bill introduced in 1964 provided that if a previously unpublished work were published during the 25-year minimum term, that minimum term would be extended for an additional 25 years.⁴⁵

The 1976 Act's provisions on unpublished works are essentially unchanged from those in the 1964 revision bill.⁴⁶ Not surprisingly, the 1976 House Report's discussions of these provisions echo the explanations of the earlier drafts. It described the move from "the present anachronistic, uncertain, impractical, and highly complicated dual system" to a single federal copyright system as a "bedrock provision" of the bill and a "fundamental" change that would have four main advantages: promoting national uniformity; dramatically reducing the importance of the "increasingly artificial and obscure" concept of publication; improving international copyright relations by abandoning the unique American dual system; and ending perpetual common law protection for works widely disseminated by means other than publication, in concert with the Constitution's "limited times" provision.⁴⁷ In connection with this last advantage, the report noted that eliminating common law protection would "aid scholarship and the dissemination of historical materials by making unpublished, undissemated manuscripts available for publication after a reasonable period."⁴⁸

The primary motivations for eliminating common law protection for unpublished works therefore seem to have been twofold: eliminating confusion over what constituted "publication" that would end common law protection, and not allowing copyright owners to evade the limited federal copyright term by commercially exploiting their works through public dissemination that did not amount to "publication" and thus did not divest their potentially perpetual rights under common law copyright. The fact that never-published works would receive only a limited term of protection seems

44. In response to arguments that the 25-year minimum term was too short, John Whicher stated:

I think that if there is to be any larger extension of the term . . . , there should also be a positive inducement to the owner of a work (like an unpublished Mark Twain work) to publish it fairly promptly. I think there is a public interest involved there. I would, therefore, suggest that, if we do extend the term for posthumous works, it should be for a period of 25 years from the date of enactment, with a proviso that it be extended to 75 years from the date of enactment if published within the 25-year period.

FURTHER DISCUSSIONS, *supra* note 17, at 49; *see also id.* at 51 (remarks of Sydney Kaye) (supporting Whicher's proposal).

45. H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS § 21, at 13 (Comm. Print 1965) [hereinafter 1964 REVISION BILL]. Ralph Brown later noted that the 50-year term secured by someone who promptly published a work after 1977 approximated the maximum 56-year term that the common-law copyright owner could have secured at any time under the 1909 Act by publishing the work. Brown, *supra* note 11, at 1081 n.67.

46. Compare Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2573 (codified as amended at 17 U.S.C. §§ 101, 303) with 1964 REVISION BILL, *supra* note 45, at 13.

47. H.R. REP. NO. 94-1476, at 129-30 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5745-46.

48. *Id.* at 130.

to have been a less important motivation, though the effect of the change on the ability to use older works was recognized as an advantage.

II. The Works in the Unpublished Public Domain

The 1976 Act's expansion of the public domain to include unpublished works will affect primarily three kinds of works. The first category, private works, comprises works that were never published in any form and in many cases were never intended for publication, such as letters and diaries. The second category, preparatory works, is unpublished material prepared as part of the process of creating a published work, such as early drafts of a novel, preparatory sketches for a painting, or unused footage from the filming of a motion picture. The third category, performed or displayed works, is made up of works that were publicly performed or exhibited but were never technically *published* under copyright law, such as paintings only displayed in museums or films only shown in theaters and on television. This Part examines in more detail the material in each category.

A. Private Works

Replacing potentially perpetual common law copyright with a finite life-plus-70 statutory copyright term will have the biggest impact on works that have been kept entirely private. This category encompasses essentially all recorded original works of authorship produced by individuals in their private capacity—and as copyright law defines both originality and authorship quite broadly, many relatively ordinary compositions (literary, visual, and musical) will qualify for protection. The material in this category is therefore potentially quite extensive: many personal letters, journals, diaries, notebooks, sketchbooks, snapshots, and home movies, as well as business correspondence and internal memoranda and reports will likely meet the standards of copyrightability and have remained unpublished since their creation. Most recorded authorship produced by ordinary individuals seems likely to fall in this category. The category also includes manuscripts for novels, stories, or plays written with an eye to publication that never occurred, as well as analogous never-published versions of nonliterary works, such as musical compositions or works of visual art.⁴⁹ This category therefore comprises a huge number of works: all of this material created by *all* individual or joint authors who died before 1937.⁵⁰

49. These works may at some point have circulated to some extent, as the authors sought to interest publishers in the works, just as private correspondence, journals, snapshots, and so forth may have circulated among their authors' friends and families. Such exposure, however, would likely have constituted only "limited publication" under pre-1978 copyright law, such that the works remained protected by state common law copyright and never entered the federal copyright system. See 1 NIMMER & NIMMER, *supra* note 10, § 4.13, at 4-73 to -74.2(1).

50. Material in this category that constitutes work made for hire is in the public domain if it was created before 1887.

But what of the *quality* of this material? Is all this new public domain material simply a vast wasteland in which there will be no interest?⁵¹ The commercial value of most of this work, standing alone, is likely quite small.⁵² But much of it will be of great interest to historians, biographers, and literary and artistic critics, and much will have educational value.⁵³ For example, in 2004 archivists discovered a trunk of the personal and professional papers, previously believed lost, of Louise Bryant, the writer and journalist, perhaps most famous for her coverage, together with her husband John Reed, of the 1917 revolution in Russia.⁵⁴ Since Bryant died in 1936, the unpublished material in those papers is now in the public domain, and likely to be of interest to historians.⁵⁵ And, of course, uses of material of historical interest need not be limited to scholarly articles or monographs as Ken Burns has demonstrated: a commercially viable documentary film about, for example, World War I would surely be enlivened by readings from letters and journals written at the time, as well as by photographs or drawings from the period.⁵⁶ And some of this material may find uses beyond the scholarly and educational: one can imagine, for example, long unpublished personal correspondence inspiring, and being incorporated into, a work of historical fiction, a song cycle, or some other artistic work. As discussed below in subpart III(A), this material's new public domain status may well encourage its use more liberally than when it was in copyright, particularly in the creation of new works of authorship.

The other primary subcategory of private works may have greater commercial value. Unlike the writers of letters or diaries, the authors of

51. See, e.g., Pamela Samuelson, *Challenges in Mapping the Public Domain, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW*, *supra* note 3, at 7, 23. Samuelson notes that many public domain works, as well as many copyrighted works, are "detritus" with little value. *Id.* She acknowledges, however, that even such detritus may have "serendipitous value" once "someone has a reason to use it." *Id.* Indeed, while she gives grocery lists as an example of "detritus," a collection of shopping lists from the 1880s or earlier might well have such "serendipitous value" to a social historian. *Id.*

52. Of course, the commercial value of much published work is quite small by the time its copyright expires 95 years after first publication or 70 years after the death of the author. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 248 (Breyer, J., dissenting) ("[O]nly about 2% of copyrights between 55 and 75 years old retain commercial value.").

53. See, e.g., *Eldred*, 537 U.S. at 250 (Breyer, J., dissenting) ("The potential users of [old works whose copyright terms had been extended by 20 additional years] include not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others.").

54. Mary V. Dearborn, *The Bohemian, the Bolsheviks, and the Old Blues*, *YALE ALUMNI MAG.*, Sep./Oct. 2005, at 30, available at http://www.yalealumnimagazine.com/issues/2005_09/bryant.html.

55. *Id.* at 34 (noting that Bryant's papers include "copious notes" from interviews with historical figures including Russian leaders, Kemal Ataturk, and many others).

56. For examples of documentaries by Ken Burns utilizing such material, see for example, *BASEBALL* (Florentine Films et al. 1994); *THE CIVIL WAR* (American Documentaries Inc. et al. 1990); and *JAZZ* (BBC et al. 2001).

these works originally created them with the hope of public dissemination, but the works never in fact reached the public. Some authors may well leave behind a substantial amount of such work, perhaps especially authors who were underappreciated in their own lifetimes. In addition, the nature of certain media may result in a significant body of work remaining unpublished. For example, professional photographers generally shoot far more photographs than they ever publish, whether they produce art photography, photojournalism, or stock images.

Some of these never-published works may have significant artistic or entertainment value, particularly if they are newly discovered works by well known authors—for example, *Is He Dead?*, a previously unpublished and unperformed play by Mark Twain, first published in 2003.⁵⁷ Similar discoveries are not entirely uncommon. In 1999, an 1817 manuscript of a movement of a Beethoven quartet not previously known was discovered in a private collection;⁵⁸ unknown works by Bach and Pachelbel have recently been discovered as well.⁵⁹ Louisa May Alcott's suspense novel *A Long Fatal Love Chase* was written in 1866 but published only in 1995.⁶⁰ And in 2001, seven long forgotten unpublished watercolors painted by William Blake in 1805 were discovered in Britain.⁶¹

Other never-published works may be of mixed historical, artistic, and commercial interest, such as *The Bondwoman's Narrative*, a novel written in the 1850s by escaped slave Hannah Crafts that is the first known novel written by a black woman in America;⁶² the manuscript was discovered by Henry Louis Gates, Jr., at an auction and published in 2002.⁶³ Another example is the lengthy memoir and approximately 1,000 watercolors that Robert Sneden wrote and painted to depict his time as a Civil War soldier and prisoner of

57. MARK TWAIN, *IS HE DEAD? A COMEDY IN THREE ACTS* (Shelley Fisher Fishkin ed., 2003); accord Mark Twain, *A Murder, a Mystery, and a Marriage*, ATLANTIC MONTHLY, July/Aug. 2001, at 54 (publishing Mark Twain's 1876 novelette for the first time); Roy Blount Jr., *Mark Twain's "Skeleton Novelette,"* ATLANTIC MONTHLY, July/Aug. 2001, at 51 (introducing the literary history and origins of Mark Twain's novelette, *A Murder, a Mystery, and a Marriage*).

58. Sotheby's, *Manuscript of Unknown Beethoven Movement Discovered in Cornwall Sells at Sotheby's for £166,500*, <http://www.shareholder.com/bid/news/19991209-12485.cfm>.

59. See, e.g., Lawrence Van Gelder, *Bach Manuscripts Found*, N.Y. TIMES, Sep. 1, 2006, at E3 (reporting the discovery of the earliest known manuscripts by Bach and Pachelbel); Bach-Archiv Leipzig, *Unknown Vocal Work by J. S. Bach Discovered*, http://www.bach-leipzig.de/main_englisch/aktuelles/menu/aktuelles/start_text.html (announcing a researcher's discovery of a previously unknown Bach composition dating from October 1713).

60. LOUISA MAY ALCOTT, *A LONG FATAL LOVE CHASE* (Kent Bicknell ed., 1995); accord Steven King, *Blood and Thunder in Concord*, N.Y. TIMES, Sept. 10, 1995, § 6 (Magazine), at 17.

61. Carol Vogel, *Art Experts Protest Sale of Rare Set of Blakes*, N.Y. TIMES, Feb. 16, 2006, at E1. The watercolors were part of a series of twenty, twelve of which were sold at auction for a total of \$7.1 million. Carol Vogel, *Rare Watercolor Collection Auctioned Piece by Piece*, N.Y. TIMES, May 3, 2006, at E1.

62. HANNAH CRAFTS, *THE BONDWOMAN'S NARRATIVE* (Henry Louis Gates, Jr. ed., 2002).

63. Mia Bay, *Broken Chains*, N.Y. TIMES, May 12, 2002, at H30.

war, which were discovered in the 1990s.⁶⁴ Simon & Schuster paid \$355,000 for the publishing rights to an abridged version of the memoir, and the Virginia Historical Society marketed prints, note cards, and a day planner using Sneden's artwork.⁶⁵

On the whole, then, unpublished private works will likely vary in value, but many will likely be useful at least for scholarly or educational purposes, and some will have commercial value as well. Section 303 has placed an enormous amount of this material in the public domain and will continue to do so moving forward.

B. Preparatory Works

The second major category of unpublished material entering the public domain comprises preparatory works: material created in the course of producing a work that has itself already been published. Most obviously, this will include early drafts of novels, short stories, plays, screenplays, poems, songs, etc.; sketches, models, and preliminary studies for paintings, prints, sculptures, etc.; film footage not used in the final version of a film or television program; and recordings of studio and concert musical performances not released on album.⁶⁶ As with private works, much of this work will not be of widespread interest. Some will be of largely scholarly, historical, or educational interest to those who study a particular author or genre or medium. But some of this material, particularly if it involves famous or popular works or authors, may have independent commercial value as well: a draft by Jane Austen of an alternative ending for *Pride and Prejudice*, for example, would likely sell large numbers of copies.⁶⁷ Past experience shows that much

64. Ken Ringle, *A Brush with History: Robert Sneden's Civil War Memoir Was as Unknown as Its Author. But Now It's a Different Story*, WASH. POST, Dec. 20, 2000, at C1. Sneden died in 1918, so any of his work that remained unpublished as of January 1, 2003, entered the public domain on that date, which was more than 70 years after his death.

65. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*, 49 J. COPYRIGHT SOC'Y U.S.A. 259, 273-74 (2001); Ringle, *supra* note 64.

66. As noted above, *see supra* note 16, § 303 only applies to sound recordings fixed on or after February 15, 1972, so unpublished sound recordings will not begin entering the public domain for many years.

67. Because pre-1978 unpublished works are governed by a life-plus-70 term, and pre-1978 published works are governed by a publication-plus-95 term, the period of protection can differ between a published work and a preparatory version of that same work that is unpublished. As a result, the transition to an unpublished public domain will make it important to determine, in some cases, whether a preparatory work is in fact unpublished, to the extent that a later published version of the work contains material that is identical to that in the preparatory work. A detailed examination of this issue is beyond the scope of this Article. Some older cases held that the publication of a derivative work (such as a film based on a play) did not constitute publication of the underlying work (the play) on which it was based. *See, e.g., De Mille Co. v. Casey*, 201 N.Y.S. 20, 28 (N.Y. Sup. Ct. 1923). More modern authority, though, has held that the publication of a work such as a motion picture publishes all of the content of that work, including content that first appeared in an earlier, unpublished preparatory work (such as a screenplay). *See, e.g., Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1231 (9th Cir. 1998). For

material of this kind exists—for example, “Mark Twain’s complete, original manuscript [for *Huckleberry Finn*], including its first 665 pages, had been lost for over a hundred years when [it] turned up in 1990 in a Los Angeles attic.”⁶⁸

The 1976 Act grants different terms of protection for published and unpublished works made for hire: those works are protected for the shorter of 95 years from publication or 120 years from creation, regardless of when the work was created.⁶⁹ As a result, bringing unpublished preparatory works into federal copyright allows any unpublished material created in the process of preparing the published version of a work made for hire to enter the public domain up to 25 years later than the published version itself.

This difference will offer a commercial opportunity, most obviously relevant to the motion picture industry, probably the most significant copyright industry in which most works are created for hire. In making a film, much footage (and other copyrightable material) will be produced but is not included in the film’s release version. While the released film will generally be published, the unused footage and other preparatory material will typically remain unpublished, and therefore protected by copyright for up to 25 years longer than the film (depending on how quickly after creation the final film is published). Once the released film eventually enters the public domain, anyone can sell a DVD of the film itself. But if a film studio owns unreleased preparatory footage, then only the studio can release a DVD that includes that footage as a bonus feature in order to attract customers away from competing DVD versions featuring just the original film, and the studio can presumably charge a slightly higher price for its enhanced DVD version. This suggests that as a strategic matter, film studios (and others who routinely commission works for hire) could create and maintain additional material that would not be included in the final version of the film (or other work) and should release that material later in order to enjoy a longer copyright in it. And a studio need not wait 95 years in order to take advantage of this strategy. Because the work-made-for-hire term is the shorter of 120 years from creation or 95 years from publication, a studio can capture the full benefit of the additional term by waiting only 25 years from the material’s creation to publish it.⁷⁰

consideration of these principles as applied to preparatory works, see R. Anthony Reese, *Puzzles of the Unpublished Public Domain* (unpublished manuscript, on file with author).

68. Bancroft Library, Univ. of Cal., Berkeley, The Mark Twain Papers & Project: News & Notes, <http://bancroft.berkeley.edu/MTP/notes.html>.

69. The same term applies to anonymous or pseudonymous works, at least where the author’s identity is not revealed during this term. 17 U.S.C. § 302(c) (2000). As far more works made for hire are likely to exist and be of lasting commercial value than anonymous or pseudonymous works, my discussion focuses on the former.

70. For example, for a film and preparatory material created in 2010, if the film was published in 2010 and the preparatory material was published in 2035, the film’s copyright would expire in 2105 but the copyright in the “bonus” material would not expire until 2130. Any shorter lag (of at

C. *Performed and Displayed Works*

This final category includes works that have been publicly exploited but that copyright law technically treats as unpublished. The concept of “publication” in copyright law was traditionally relatively complex, so that many works that have been exposed to the public are nonetheless, as a matter of copyright law, unpublished. Such works might include works of visual art only displayed in galleries and museums, audio or audiovisual works only broadcast over radio or television, plays only performed live on stage, and motion pictures only shown in theaters and on television.

Generally, under the 1909 Act,⁷¹ a work was published when tangible copies of the work (including the original) were distributed or made available to the public, by sale, rental, loan, gift, or otherwise, by or under the authority of the copyright owner.⁷² But publicly performing or exhibiting a work generally was *not* publication, at least as long as the audience was not allowed to copy the work while viewing or listening to it.⁷³ So delivering a lecture or speech to a crowded auditorium, playing or singing a musical work in a packed concert hall, performing a play or showing a film before a theater audience, transmitting a radio or television show to millions of receivers, and showing a painting or sculpture in a gallery or museum did not ordinarily constitute publication that ended the common law copyright in those works. The starkest example of this is Martin Luther King’s “I Have A Dream” speech, which was delivered to a live audience of, by one estimate, 200,000 listeners and transmitted by national broadcast, but which the Eleventh Circuit later held was not published for copyright purposes by that delivery and broadcast.⁷⁴ The traditional definition of publication means that many works that received wide public dissemination before 1978 may never have

least a year) between the publication of the film and of the preparatory footage means the copyright term in the preparatory footage will exceed that of the film only by the length of that lag.

71. The Act did not contain a general definition of “publication,” so the contours of the concept were delineated by court decisions. The 1976 Act did define publication as the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101 (2000). This definition essentially restates the concept as it developed under the 1909 Act, though the current definition may differ slightly in some respects not relevant here. Compare 1 GOLDSTEIN, *supra* note 9, § 3.2, at 3:8 to :30 (detailing development through case law under the 1909 Copyright Act), with *id.* § 3.3, at 3:30 to :41 (discussing the 1976 Copyright Act provisions on publication).

72. *Id.* § 3.2, at 3:10 to :11 (defining “divestive” publication under the 1909 Copyright Act); 1 NIMMER & NIMMER, *supra* note 10, § 4.04, at 4-20 to -21.

73. See *Ferris v. Frohman*, 223 U.S. 424, 437 (1912); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 300 (1907); see also *Nutt v. Nat’l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929) (holding no publication even where the audience was allowed to make copies for personal use). The 1976 Act expressly adopted this view and provided that “[a] public performance or display of a work does not of itself constitute publication.” 17 U.S.C. § 101.

74. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1218 (11th Cir. 1999).

technically been published and therefore retained their common law copyright.⁷⁵ As noted above, this was one motivation for the move to a unitary federal system in the 1976 Act.

A substantial amount of material of continuing interest was probably exploited but not distributed in copies before 1978—in particular radio and television programs broadcast to the public, movies shown in theaters or on television, and works of visual art exhibited in galleries and museums. In many cases, of course, the public performance or display of a work will have been accompanied, or quickly followed, by distribution of copies, ending the work's common law copyright. For motion pictures, for example, most commercially exploited films will have been distributed to cinemas for exhibition, and the rather sparse case law, as well as industry and Copyright Office practice, seems to have treated this distribution as publication,⁷⁶ in any event, major film studios generally registered their films in order to benefit

75. In one circumstance, no publication may have occurred even when tangible embodiments of a work were disseminated to the public, due to a view that publication required dissemination of visually perceptible copies. Consider a composer who wrote a musical work, recorded her performance of it, and sold these aurally perceptible recordings to the public. Under the 1976 Act, the sale of the records would expressly constitute publication. 17 U.S.C. § 101 (defining “publication” to include distribution of copies or phonorecords). But courts interpreting the 1909 Act eventually divided over whether under that statute the composer had published her musical work so that any common law copyright protection of it ended. *Compare* *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995) (holding that selling records constitutes a publication), *with* *Rosette v. Rainbo Record Mfg. Corp.*, 546 F.2d 461, 462–63 (2d Cir. 1976) (affirming an opinion that declared that a publication occurs only when statutory copyrights have been obtained). In 1997, Congress amended copyright law to provide that “distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.” 17 U.S.C. § 303(b). As a result, musical compositions that had been released as recordings but not as sheet music (and not registered with the Copyright Office) were unpublished and not previously copyrighted on January 1, 1978 and thus received federal copyright on that date, although the sound recordings embodied in the records did not get federal protection if they were fixed before February 15, 1972. Many of those works were certainly published before 2003 (at the least by the continued distribution of recordings of the works after January 1, 1978, when the 1976 Act's definition of publication clearly encompassed the sale of aurally, as opposed to visually, perceptible copies), so that they enjoy the longer minimum term of protection to at least 2047. *See* 1 NIMMER & NIMMER, *supra* note 10, § 4.05[B][7], at 4-39 to -40. But no doubt some musical works that were released only in recordings before 1978 were not distributed after that date, so that their minimum term expired at the end of 2002, and those works are in the public domain today if their author died before 1937.

76. *See* *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1028 (9th Cir. 1981) (holding that film is published when prints are made available to theater operators for public performance). *But see* *Brandon Films, Inc. v. Arjay Enters.*, 230 N.Y.S.2d 56, 57–58 (N.Y. Sup. Ct. 1962) (ruling that plaintiff did not lose common law copyright, despite the fact that the films in question had been aired to multiple audiences worldwide). The 1976 Act adopts this view, providing that “offering to distribute copies . . . to a group of persons for purposes of further . . . public performance . . . constitutes publication.” 17 U.S.C. § 101. Melville Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 197–98 (1956), noted that film companies proceeded on the premise, implied but not expressed in decisions up to that time, that their making copies available on an unrestricted and commercial basis for theaters to exhibit constituted publication.

from federal copyright protection.⁷⁷ Similarly, many radio and television programs were broadcast to wide audiences without copies being distributed to the public, but in many cases those programs will have been registered for copyright as unpublished works,⁷⁸ or, particularly for television programs, perhaps considered published when distributed to television stations at large for syndication.⁷⁹

But registration of radio and TV shows and films does not appear to have been universal,⁸⁰ so some of those works probably remained protected by common law copyright and were brought into federal copyright protection by § 303 on January 1, 1978. The copyright in these works will now expire under § 303 at the end of the ordinary term or on January 1, 2003, whichever comes later. For much of this material—particularly motion pictures and television programming—the ordinary term will not yet have expired.⁸¹ But going forward, some of this material will enter the public domain each year.⁸²

The other important category of work that may have been publicly exploited but not technically published is works of visual art. Many of these were sold by the artist to a buyer, and perhaps exhibited publicly in galleries or museums, but not considered published.⁸³ These works were, in many

77. Motion pictures were expressly added to the statute in 1912 as a category of work for which copyright could be secured by registration rather than by the sale of copies. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (1912) (amending Copyright Act of 1909, ch. 320, § 11, 35 Stat. 1075, 1078 (1909) (repealed 1976)); *see also* Brown, *supra* note 11, at 1076 (noting that film producers secured federal copyright).

78. *See* Brown, *supra* note 11, at 1074–75, on the difficulties of registering television broadcasts under the 1909 Act.

79. Nimmer states that television programs may be published “when copies are made available for general distribution or syndication to television stations” as when “a television producer sells or distributes film prints or video tape to independent television stations.” 1 NIMMER & NIMMER, *supra* note 10, § 4.11[B]; *see also* Nimmer, *supra* note 76, 197–98 (detailing the analogous problems regarding publication of motion pictures). *But see* Paramount Pictures Corp. v. Rubinowitz, No. CV 81 0925, 1981 WL 1396, at *4–5 (E.D.N.Y. June 26, 1981) (ruling that Paramount Pictures did not publish Star Trek by putting it in heavy syndication, due in part to its strict licensing agreements). Many motion pictures, television programs, and radio scripts were registered for protection under the 1909 Act. Many theatrical films and TV programs were registered as published works, presumably indicating that there had been some distribution of copies at least to cinema operators or affiliated TV stations, even if not to the public at large; however, these works could have been registered for protection even if they were technically unpublished. Act of Aug. 24, 1912, ch. 356, 37 Stat. at 488–89. The radio scripts appear to have been registered principally as unpublished dramas.

80. *See* Brown, *supra* note 11, at 1075 (suggesting that common law copyright remained important for broadcasts).

81. If these works were created for hire under the 1909 Act’s rules, then protection will last for 120 years from the date of creation, and clearly no films or radio or TV shows were created before 1887. Even if these works were not created for hire, many of the authors of films created in the 1910s and 1920s, and certainly of radio programs created from the 1920s on, would have lived past 1936, so that the 70 years *post mortem* term will not yet have expired.

82. Much of this material is likely to have been made for hire starting in the 1920s, and thus the copyrights will begin to expire in the 2040s, 120 years after its creation. 17 U.S.C. § 302(c) (2000).

83. *See* Brown, *supra* note 11, at 1073. Whether the sale of a work of art such as a painting by the artist (or her dealer) to a private collector for private display constituted publication of the work

cases, published prior to 1978 (or 2003): reproductions appeared in books or museum catalogs, on slides, on prints or posters, or on merchandise such as note cards, mugs, tote bags, and so on, and public distribution of those items published the work. But no doubt many works of visual art in private collections and even in museums were never reproduced and published before 1978. So those works were brought into federal copyright that year, and are now in the public domain if their authors died prior to 1937, which means a large amount of material probably recently entered the public domain. As a result, museums, which often acquired an original work of art without acquiring its copyright, can now exploit these works, beyond simply displaying the original, without having to obtain permission from the copyright owner.

III. Implications of Expanding the Public Domain to Unpublished Works

This Part discusses the practical and conceptual implications of placing unpublished material in the public domain. Most immediately, § 303 has dramatically increased the amount of material that is free for the public to use at a time when almost no other copyright terms are expiring, and the end of copyright protection for this material will reduce the cost of using it. In addition, the end of § 303's minimum term marked the first time that any U.S. copyright measured by the life of the author has expired, bringing certain of the 1976 Act's term provisions into operation for the first time. The new unpublished public domain also has international implications, as few other countries have much experience with treating unpublished works as unprotected by copyright law. And most significantly, ending copyright protection in unpublished works may change the concept of the public domain, which until now has always consisted of works that have been publicly exploited.

A. *Contracting Copyright Protection, Adding Material to the Public Domain and Reducing Clearance Costs*

Limiting the copyright term for unpublished works is one of the very few instances in recent decades in which copyright rights have been contracted rather than expanded. Since the 1970s, copyright law has generally granted more exclusive rights in more categories of subject matter for longer periods of time and with fewer required formalities and stronger remedies for infringements. Replacing the traditional potentially perpetual term for unpublished works with a limited term of protection was a small move in the opposite direction—protecting works of authorship for a shorter period than under earlier law.⁸⁴

that placed it in the public domain if statutory formalities were not complied with is uncertain. For further consideration of the question, see Reese, *supra* note 66.

84. See Brown, *supra* note 11, at 1081 (noting that imposing a limited term on unpublished works was “one case where the imposition of the new durational limits [of the 1976 Act], protracted as they are, will have some bite”).

The end of § 303's 25-year minimum term on January 1, 2003, placed into the public domain perhaps the largest amount of material ever to leave copyright protection at a single time—every unpublished work created by someone who died before 1933.⁸⁵ This enormous amount of material would all have remained protected by copyright indefinitely but for § 303. The flood of material into the public domain on January 1, 2003, was the most concentrated impact of bringing unpublished material into federal limited-term copyright, but of course the effect will continue every year, as another group of authors will have been dead for 70 years and their unpublished works will enter the public domain instead of remaining under common law copyright. And the Sonny Bono Copyright Term Extension Act of 1998 dramatically increased § 303's importance in placing material in the public domain now and for the near future. The act extended by 20 years the term of all works that would otherwise have expired annually starting in 1998, so that they will now not begin to expire until 2018.⁸⁶ But the act did not lengthen the minimum term of protection for older unpublished works under § 303. As a result, between 1998 and 2018, the *only* works that will enter the public domain in the United States through the expiration of their copyright term are unpublished works covered by § 303—a torrent of material in 2003, followed by a steady flow, all during an otherwise prolonged drought.

The principal effect of ending copyright protection for these unpublished works is to reduce the cost of using them.⁸⁷ Until these works entered the public domain, anyone who wanted to reproduce or adapt any of them needed permission from the author's successors. In the case of older material by obscure authors, securing such permission could pose significant transaction costs.⁸⁸ Consider the historian who wrote an article comparing

85. Perhaps the only similar single entry of a large amount of material into the public domain under Anglo-American law occurred in 1731. When the British Parliament adopted the Statute of Anne, effective in 1710, it extended copyright protection to all "Books already Printed" for a period of 21 years. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *reprinted in* 9 STATUTES OF THE REALM 256 (1822). Thus, in 1731, the statutory copyright on all books printed in England prior to 1710 expired, though it took nearly 50 more years for Parliament to finally decide that no common law protection remained in those works. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837, 847 (H.L.) (appeal taken from Eng.), *available at* <http://ets.umdl.umich.edu/cgi/t/text/text-idx?c=foruk;idno=79434.0001.001>. But the number of books printed in England before 1710 probably pales in comparison with the amount of material created by anyone born before 1933 and unpublished as of 2003.

86. Works published between 1923 and 1943 would otherwise have expired annually, 75 years after their initial publication, between 1998 and 2018. No works created after 1978 will see their copyright terms expire until 2048 at the earliest, as that is when a work created in 1978 by an author who died the same year will expire; for works covered by a term measured by publication, the term for works first published in 1978 will not expire until 2073, 95 years after publication.

87. *See* Brown, *supra* note 11, at 1081 (noting that after enactment of the 1976 Act, the discoverer of an unpublished poem by John Milton could, starting on January 1, 2003, publish the poem without fear that "descendants of Milton would turn up with valid literary property claims" as they could have previously).

88. *See, e.g.*, 1964 REVISION BILL, *supra* note 45, at 174–75 (remarks of Irwin Karp, Authors League of America) ("Valuable manuscripts [or] collections of letters [may] be deposited in

the Civil War experiences of soldiers from the eastern and western regions of the country and quoted from soldiers' letters and diaries housed in archival collections. A journal accepted the article but required the historian to obtain copyright permission for each quoted work.⁸⁹ The copyright in these works

would have remained with the author and been inherited by the author's heirs. Many of the soldiers would have died during the course of the war, leaving no direct descendant to inherit the copyright and requiring extensive genealogical investigation, as well as investigation of probate practices in several states, in order to identify the current copyright owners. In short, the amount of research needed to . . . clear all copyrights in the article would easily dwarf the amount of effort put into researching the piece in the first place.⁹⁰

As the example demonstrates, tracing the copyright ownership of older unpublished works can be difficult, time consuming, and expensive, particularly when the works were not authored by prominent individuals.⁹¹

libraries and other archives where they may rest for a hundred or two hundred or three hundred years. No one has the right to publish them. No educator has the right to make excerpts . . . There is no right of fair use in connection with common-law property. . . . And [those who want to use them] face much greater complications than deciding when fifty years after an author's death may have elapsed."); *id.* at 176 (remarks of Charles Gosnell, American Library Association) (welcoming "a terminal [date] for unpublished material, which has long been a serious problem to libraries holding archival materials"); FURTHER DISCUSSIONS, *supra* note 17, at 20 (noting that historians and scholars would like "a definite date . . . after which they could use" unpublished materials, and that as of 1963, they were "very much concerned" about potential copyright violation by use of such material); REGISTER'S REPORT, *supra* note 28, at 42 ("Scholarly use of the manuscripts in a library is often handicapped by the uncertainty as to whether they are still subject to the authors' common law rights, and by the impracticality of seeking permission from numerous authors or heirs."); Kaplan, *supra* note 29, at 9 ("Anyone who has attempted to 'clear' old letters for publication will not need to be reminded of the excruciating troubles that can be encountered.").

89. Hirtle, *supra* note 65, at 259.

90. *Id.* at 260.

91. For more on the costs of copyright clearance, see *Eldred v. Ashcroft*, 537 U.S. 186, 249–52 (2003) (Breyer, J., dissenting); S. REP. NO. 104-315, at 14 (1996); Hirtle, *supra* note 65, at 262; and Kaplan, *supra* note 29, at 9. Discussing the difficulty in determining the ownership of copyrights, Professor Kaplan observed:

[O]wnership of the physical paper does not necessarily carry with it ownership of the so-called common-law copyright; this copyright continues in force so long as the manuscript is not published by authority of the copyright owner; and while it lasts it may pass from one generation to another like ordinary personal property. Sometimes a library will not know how it came by a manuscript, and even when it does, even when the donor at the time of the gift made an explicit effort to vest the copyright in the library, it may be doubtful whether the donor himself owned the copyright and had a right to convey it. The older the manuscript the more confused the legal situation is likely to be.

Id.

Of course, a publisher could simply take the risk that no one would emerge with a good claim to own the copyright. *See, e.g.*, 1964 REVISION BILL, *supra* note 45, at 177 (remarks of Charles Gosnell, American Library Association) ("[A] great deal of [unpublished work protected by common law copyright and held by libraries] is used and published simply because it is impossible to trace the proper ownership under the common law, or because it is

Now, however, *all* of this material is in the public domain if its author died anytime before 1937.⁹² In most cases, a user will now need to determine only when the author died and whether the work was in fact unpublished as of 2003 in order to know whether the work can be used. For the article comparing Civil War experiences, permission would no longer be required to quote from the soldiers' wartime writings, as the authors either will have died before 1937 or can be presumed under the Copyright Act to have died before then.⁹³ As a result, someone producing a history of the Civil War, or even World War I, is now free under copyright law to use any unpublished letters or journals by anyone who died in the war, and will not need to locate the heirs or successors of the writers in order to seek permission. This elimination of transaction costs seems likely to increase use of unpublished material. Authors and publishers of works of history, biography, and criticism that quote from unpublished works by or about their subjects will be able to publish with much less fear of infringing and with much less clearance cost. And archives and museums can make many unpublished works in their collections more widely available at a lower cost by, for example, digitizing the works and posting them online.

Ending indefinite copyright protection for unpublished works thus has substantially increased the amount of the material in the public domain (at a time when such increases are rare) and has thereby significantly reduced the copyright clearance costs involved in using such works, which should increase the use of this material.

B. The "Life-Plus" Term in Action

A small but important structural effect of § 303 is that the annual expiration of copyright terms in unpublished material starting in 2003 marked the first actual operation in U.S. law of the life-plus-70 term system. While that term has been in place for all works created since 1977, the length of the post-death period means that no such work will have its term expire until 2048. Until then, the only works whose copyright terms will expire 70 years after the author's death are those already created but unpublished as of 1978. As a result, the expiration of those copyrights will provide the first opportunity for authors, publishers, users, courts, and the Copyright Office to experience a public domain based on a term measured by the author's life.

The principal legal and practical problem that is likely to arise out of the operation of the "life-plus" system is determining authors' death dates. This

assumed that nobody else can trace it either and lay claim to it. It is more or less abandoned property in that respect.").

92. Or, if it was created as a work made for hire, it is in the public domain if it was created before 1887.

93. 17 U.S.C. § 302(e) (2000). Under this section, anything created before 1887 can be presumed to have been created by an author who has been dead for at least 70 years if nothing in the records of the Copyright Office indicates otherwise, and Civil War letters and journals will all have been created well before that date.

should be relatively easy for well-known authors, but will be a challenge in the case of works of more obscure authors, particularly for works such as letters or diaries of ordinary people. The statute addresses this challenge through a presumption of death. The Copyright Office must maintain records on authors' deaths, including statements filed by any interested party that a particular author was alive on, or died on, a certain date.⁹⁴ When 120 years have passed since a work was created, anyone who obtains a report from the Copyright Office certifying that its records do not indicate that the author died less than 70 years earlier is entitled to presume that the author has been dead for at least 70 years; good-faith reliance on that presumption is a complete defense to a claim of copyright infringement.⁹⁵

Section 303 will allow those with an interest in copyrighted works and their use to become familiar with the death records process, and the operation of the presumption, before it becomes widely applicable. Authors and their successors and representatives may become more familiar with the procedures for, and benefits of, filing statements about an author's status. Users may become more familiar with procedures for obtaining reports from the death records, and courts may answer interpretive questions about the scope and operation of the presumption of the author's death under the statute.⁹⁶ And the Copyright Office will no doubt develop more formalized procedures for providing reports on the information contained in the records; it is apparently possible today to obtain such a report, but the process for doing so does not appear to have been standardized.

C. The United States as Pioneer of the Unpublished Public Domain

The United States appears to be a pioneer among major copyright nations in uniformly placing unpublished works in the public domain at the end of the ordinary copyright term, usually 70 years after the death of the author.⁹⁷ Few countries of either the copyright tradition or the civil law

94. *Id.* § 302(d).

95. *Id.* § 302(e).

96. For example, a user who relies on the presumption but is later notified by a successor to the author that the author has not been dead for 70 years would appear to be immune from infringement liability for use of the work before the successor appears. However, it is unclear whether the user could continue to exploit the work once the author's actual death date is proven. The outcome would depend on how a court interprets the language of § 302(e). In addition, courts may clarify what evidence is necessary and sufficient to determine the date that a work was created in order to know if 120 years have elapsed so that the presumption applies.

97. While the United States grants the same terms of protection to all types of copyrighted subject matter, many nations provide different terms, often measured from publication rather than by an author's life, for certain types of works. The Berne Convention allows, for example, a term of 50 years after creation or publication for cinematographic works and a term of 25 years from creation for photographic works. PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 235 (2001). The following discussion generally focuses on works covered by the basic term provisions and not on those governed by the various exceptions.

author's right tradition have significant experience in treating unpublished works by dead authors as part of the public domain.

The traditional U.S. system of potentially perpetual common law protection for unpublished works originated in British law, and other nations whose copyright law derived from Britain generally followed that system. Most of these nations, like the United States, have now eliminated potentially perpetual protection for unpublished works, but among such countries with a substantial copyright industry, the United States appears to have done so at the earliest date and with the shortest transition period.⁹⁸ Thus, British law ended perpetual protection for unpublished works effective August 1, 1989,⁹⁹ but provided a 50-year transition period, so that any work that was unpublished as of that date will be protected through the end of 2039.¹⁰⁰ Similarly, Canada abolished perpetual protection for unexploited works as of 1999,¹⁰¹ but provided transitional protection: if an author died on or before December 31, 1948, her unexploited works were protected until January 1, 2004,¹⁰² and

98. New Zealand may have been the first inheritor of the British copyright system to end perpetual protection for unpublished works. Such protection was perpetual under the New Zealand Copyright Act of 1913, which granted a life-plus-50 term but provided that if a work was copyrighted and unpublished at an author's death, then the copyright subsisted until the work was published or performed, and then for another 50 years. Copyright Act, 1913, 4 Geo. 5, 1913 S.N.Z. No. 4, §§ 6, 23(1). New Zealand appears to have eliminated perpetual protection in its 1962 Act with a 10-year transition period that ended in 1973. See Copyright Act, 1962, 11 Eliz. 2, 1962 S.N.Z. No. 33, §§ 5(1), 8(1)(a)–(b) (ending perpetual protection by limiting protection of unpublished and undissemated works to 75 years from the end of the calendar year in which the author died or 50 years after publication, whichever is shorter); *id.* § 68, sched. 1, § 4 (detailing transitional provisions to phase in the Copyright Act of 1962 and providing that if copyright in an unpublished work would expire in the first ten years of the Act's effectiveness, then the copyright would continue until March 31, 1973). New Zealand, however, appears to allow copyright owners in certain circumstances to restrict publication of their unpublished works in perpetuity and deems publication of unpublished public domain works in violation of such restrictions to constitute copyright infringement. See *infra* note 146.

99. British law abolished common law copyright in its 1911 Act, but the statutes continued to protect most unpublished works in perpetuity, as long as they remained unpublished. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, §§ 17(1), 31. When such a work was first published (or publicly performed) after the death of the author, it was protected for an additional 50 years. *Id.* § 17(1). This regime continued under the 1956 British Act. Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, § 2(3). Artistic works were treated differently, with no posthumous publication term except for engravings and photographs. *Id.* § 3(3)–(4).

100. HUGH LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* 10A.19, at 493, § 11.38, at 527–28 (3d ed. 2000). This statement is true for literary, dramatic, musical works, and artistic works, while engravings and photographs are treated differently. *Id.* at 493–94; see also Gard, *supra* note 26, at 706–07 (describing the United Kingdom's approach to literary, dramatic, musical, and artistic works as well as photographs).

101. "Unexploited works" is a somewhat more narrow category than unpublished works under U.S. law, as publicly performing a work or communicating it to the public does not necessarily constitute publication under U.S. law, see *supra* subpart II(C), but does constitute relevant exploitation under Canadian law, Copyright Act, R.S.C., ch. C-42, § 7(1), (2) (1985), amended by 1997 S.C., ch. 24, § 6 (Can.).

102. Copyright Act § 7(4) (Can.). Attempts to extend the initial transition term beyond 2004, apparently motivated in part by the fact that unpublished diaries of Lucy Maud Montgomery (the author of the *Anne of Green Gables* books) would expire then, were unsuccessful. See, e.g., James

if the author died between 1949 and 1998, her unexploited works will be protected until January 1, 2049.¹⁰³ Australia appears to be the sole major inheritor of the British copyright system to retain perpetual protection for unpublished works; if such a work is first disseminated after the author's death, Australian copyright law protects the work for 50 years from its dissemination.¹⁰⁴ Thus, while common law copyright nations are mostly moving toward an unpublished public domain, the United States is the first major copyright nation to fully implement that concept.

The creation of the unpublished public domain in the United States resulted from adopting a unitary "life-plus" term of protection for all works, regardless of their publication status. Since civil law countries have long had a comprehensive "life-plus" term system, they would seem likely to have long experience with unpublished works in the public domain. But in fact most of the major civil law jurisdictions have long had provisions that restricted use of unpublished works even after the running of the ordinary copyright term. The conception of moral rights in many countries gives an author's successors continuing control over *whether* to publish an unpublished work by a long-dead author, and once such a work is published many nations offer it a term of copyright protection even though the ordinary copyright term had previously expired.

In some civil law nations the moral right of disclosure (or divulgation) limits the use of unpublished works even long after the author's death. In France, for example, the divulgation right gives the author the exclusive right to determine whether a work is completed and whether to disclose it to the public.¹⁰⁵ This right is apparently perpetual and descendible, and can be exercised by the author's heirs or other parties specified in the statute.¹⁰⁶ As

Adams, *Bill's Death Opens Diaries of Canadian Notables*, GLOBE & MAIL, Nov. 15, 2003, at R16 (describing the Canadian Senate's pigeonholing of the proposed extension to the copyright protection of unpublished works by authors dying before 1949); Ian Jack, *MPs Battle over Claims to Montgomery's Works: Copyright Amendment: Liberals, Alliance Oppose Extending Heirs' Hold on Writings*, NAT'L POST, June 24, 2003, at A12.

103. Copyright Act § 7(3) (Can.).

104. Copyright Act, 1968, § 33(3) (Austl.). Even Australia, however, has provisions allowing for the publication under certain conditions of most unpublished copyrighted works that are available to the public in a library or archive once the work's author has been dead for 50 years, thus limiting the degree to which the indefinite copyright in unpublished material would prevent use of such material after the ordinary life-plus-50 copyright term. *Id.* § 52; see 1 JAMES LAHORE & WARWICK A. ROTHNIE, COPYRIGHT & DESIGNS § 44,195 (2004) (describing the conditions necessary for the permissible publication of a copyrighted work that is unpublished at the date of the author's death). This approach is similar to that originally proposed in the United States by the Register of Copyrights in 1961. See *supra* note 32 and accompanying text.

105. See, e.g., Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467-73 (1968).

106. *Id.* at 472, 483 (quoting Art. 19 of French copyright law of March 11, 1957). The statute also provides for a court to determine the issue if an author has left no known successor. See World Intellectual Prop. Org., *France*, in COPYRIGHT LAW SURVEY (1979) (summarizing Art. 20 of French copyright law of March 11, 1957). The very origins of the divulgation right in France appear to lie in a case involving a widow's assertion of the right to determine whether to publish a

a result, the heirs of an author who died more than 70 years ago would have the right to decide whether to publish an unpublished work by that author, although the statute does limit “notorious abuse” of the right.¹⁰⁷ Countries with a strong divulgation right would thus allow control over the initial publication of an unpublished work, even where the work’s ordinary copyright term had already expired.

The divulgation right, of course, only restricts initial publication of a work, not any subsequent use of that work once published. But most major jurisdictions with a “life-plus” term traditionally protected “posthumous works”—works first published after the running of the ordinary life-plus copyright term. A 1957 Copyright Office study indicated that Britain, France, Mexico, Japan, and Italy all protected posthumously published works for a period of years measured from publication;¹⁰⁸ a 1987 summary of protection in 76 members of the Berne Union indicated that 31 nations provided some protection beyond the ordinary copyright term for works first published after the author’s death.¹⁰⁹ The French copyright law of 1957, for example, protected for 50 years from publication a work that was first published after the author’s death.¹¹⁰ The German statute of 1901, which generally provided for a life-plus-50-year term, protected many categories of works for a minimum term of 10 years from publication;¹¹¹ the 1965 German Act expressly provided a 10-year-from-publication term of protection for posthumously published works even if the ordinary copyright term had expired.¹¹² When Britain adopted the life-plus-50 term for published works in 1911, it simultaneously provided a 50-year-from-publication term for

work by her deceased composer husband. See Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT’L & COMP. L. REV. 423, 447 (1998–1999) (discussing Widow Vergne C. Creditors of Mr. Vergne, CA Paris, 1re ch., Jan. 11, 1828, S. Jur. II, 1828, 5).

107. See World Intellectual Prop. Org., *supra* note 106 (summarizing Art. 20 of French copyright law of March 11, 1957); see also Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC’Y U.S.A. 269, 276–78 (1989) (discussing the application by French courts of the “notorious abuse” exception).

108. William S. Strauss, *Protection of Unpublished Works*, in 1 STUDIES ON COPYRIGHT 191, 209 (Arthur Fisher mem. ed. 1963).

109. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 356–63 (1987); see, e.g., Copyright Act § 24, No. 14 of 1957, INDIA CODE (1993), reprinted in 12 *THE STATUTES OF INDIA: A MANUAL OF CENTRAL ACTS & RULES* 240 (1st ed. 1994) (granting protection for 60 years from first publication for any literary, dramatic, or musical work, or engraving, which is protected by copyright at the death of the author but which is published posthumously).

110. See World Intellectual Prop. Org., *supra* note 106.

111. Copyright Law for Literary and Musical Works § II, art. 29 (amended 1934), translated in 5 LEO G. KOEPFLE, DEP’T OF COMMERCE, *COPYRIGHT PROTECTION THROUGHOUT THE WORLD* 82, 89 (1936); see also Eugen Ulmer & Hans Hugo von Rauscher auf Weeg, *Germany (Federal Republic)*, in STEPHEN M. STEWART & HAMISH SANDISON, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 414, 441 (2d. ed. 1989).

112. Ulmer & von Rauscher auf Weeg, *supra* note 111, at 441.

posthumously published works.¹¹³ As a contemporary matter, since 1995 all European Union nations have been obligated to provide 25 years of protection to a work first published after the expiration of its copyright, thus harmonizing on a Europe-wide basis the type of posthumous protection that previously existed in British, French and German law for unpublished works.¹¹⁴ Thus, while some states that adhere to the civil law tradition of copyright term apparently have generally allowed unpublished works to expire when the ordinary *post mortem auctoris* term expires, many of them (including some of the most productive jurisdictions) have long protected posthumously published works beyond the expiration of their ordinary copyright term.

Therefore, by putting all unpublished works into the public domain when their ordinary copyright terms expire, U.S. law is breaking relatively new ground, at least among major copyright nations. And while the United States is merely in the vanguard of a general trend among countries of British copyright heritage in moving away from perpetual protection for unpublished works, European nations (including Great Britain itself) have moved in the opposite direction and now uniformly provide protection for works first published after their ordinary copyright term has expired. As a result, the United States cannot rely on the experience of other nations in addressing issues that arise from the new public domain status of old unpublished works.

Perhaps more importantly as a practical matter, the varying treatment of unpublished works in which copyright has expired means that an unpublished work in the public domain in the United States may well remain protected by copyright law in other countries.

Works that meet the three conditions imposed by § 303(a) are in the public domain in the United States regardless of the nationality of the work's author. Although federal copyright protection in the United States for published works of foreign authors has long depended on the author's nationality and domicile (and, in some circumstances, the country in which the work

113. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, §§ 3, 17(1). While British law, as noted above, retained perpetual protection for unpublished works until 1989, it adopted a "life-plus" copyright term for published works much earlier. See Copyright Act 1814, 54 Geo. 3, c. 156 § 4 (protecting works for minimum term of author's life); 1 KEVIN GARNETT ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT § 2-18, at 36 (15th ed. 2005) [hereinafter COPINGER AND SKONE JAMES]. But as early as 1842 Britain protected a posthumously published work for 42 years from publication. The Copyright Act, 1842, 5 & 6 Vict., c. 45, § 3. The statute protected works published while the author was alive for the author's life plus seven years, but provided that in any event a work would be protected for at least 42 years from publication, even if that was longer than seven years after the author's death. *Id.*; see 1 COPINGER AND SKONE JAMES., *supra*, § 6-03, at 327 (describing the operation of the Copyright Act of 1842). The 42-year term for posthumously published works was therefore simply equivalent to the minimum term of protection for works published during the author's lifetime, though for posthumously published works, the copyright belonged to "the proprietor of the author's manuscript from which such book shall be first published" rather than to the author's descendants. See *Macmillan & Co. v. Dent*, [1907] 1 Ch. 107, 112-19 (C.A.).

114. Council Directive 93/98, 1993 O.J. (L 290) 9, 9-13 (EC); see *infra* notes 198-204 and accompanying text.

was first published), state common law copyright protection generally protected unpublished works against first publication regardless of the author's nationality.¹¹⁵ Therefore, unpublished works by foreign authors created before 1978 (and thus governed by § 303) would have been protected by state common law copyright as long as they remained unpublished.¹¹⁶ When the 1976 Act brought existing unpublished works into statutory copyright, it did so regardless of the author's nationality. Section 104(a) provided, as of January 1, 1978, that federal copyright protects unpublished works regardless of the author's nationality, and the provision is not expressly limited to works created on or after January 1, 1978. Similarly, the grant of federal copyright on January 1, 1978, to previously unpublished works is not expressly limited to works of American authors, or to authors of nations with which the United States enjoyed copyright relations in 1978.¹¹⁷

So, for example, because a British author's unpublished work would, as of January 1, 1978, meet the conditions of § 303(a)—the work would never have been federally copyrighted in the United States and would not have entered the public domain here—and because a foreign author's unpublished works are eligible for federal copyright protection as of January 1, 1978, the British author's unpublished works would have acquired federal copyright on that date. That copyright would last for the life of the author plus 70 years. As a result, a work that meets the conditions of § 303(a), and which was written by a foreign author who died on or before December 31, 1936, is now

115. *See, e.g.,* *Palmer v. DeWitt*, 47 N.Y. 532, 536, 540 (1872) (explaining that the author of a literary work or composition has a right to the first publication of it and the alienage of the author is no obstacle to the author proceeding in New York courts for a violation of his rights of property in his unpublished works); *see also* *Keene v. Wheatley*, 14 F. Cas. 180, 198, 207–08 (C.C.E.D. Pa. 1861) (No. 7,644) (recognizing the proposition that the sole ownership of an author's manuscript was in the author until the author publishes it and finding an infraction of a proprietary right derived from a nonresident alien author); *Jefferys v. Boosey*, (1854) 10 Eng. Rep. 681, 708–09 (H.L.) (appeal taken from Eng.) (observing that under English common law, the author of a literary work had the sole right of first publishing and that an alien had as much capacity to enjoy such a right as a natural-born British subject). This was clearly the understanding of the drafters of the 1976 Act. *See, e.g.,* ARPAD BOGSCH, U.S. COPYRIGHT OFFICE, GENERAL REVISION OF THE COPYRIGHT LAW STUDY NO. 20: PROTECTION OF WORKS OF FOREIGN ORIGIN I (1959) (observing that in the case of unpublished works protected by the common law, works of alien authors had the same status as works of U.S. citizens under the common law); REGISTER'S SUPPLEMENTARY REPORT, *supra* note 34, at 8 (“Whatever the citizenship or domicile of their authors, unpublished works are now given protection under common law in the United States, and subsection (a) of section 104 is intended to continue this protection under the statute.”).

116. The number of countries whose authors' works are protectable by federal copyright law has grown steadily since 1891, but works of many foreign authors who died before 1937 would not have been eligible for federal copyright protection in the United States at the time they were created. As a result, these works might not have been able to obtain U.S. federal copyright protection if the authors had published them at that time (though U.S. copyright in many such works was later restored under Section 104A of the current statute, as discussed below, *see infra* notes 234–36 and accompanying text). If the works remained unpublished, however, they would have remained protected at common law until federal protection was granted to them in 1978.

117. H.R. REP. NO. 94-1476, at 138, *as reprinted in* 1976 U.S.C.A.N. 5659, 5754 (noting that § 303 would apply “as long as the work is not in the public domain in this country”).

in the public domain in the United States. That work, though, might still be protected in the author's home country and elsewhere. To continue with the example of the British author, if she died in 1930, then her unpublished work would have entered the public domain in the United States in 2003, at the end of § 303's 25-year minimum term, and in Canada in 2004 at the end of Canada's term of transitional protection for authors who died before 1949.¹¹⁸ In the United Kingdom, however, given the later and longer transition away from perpetual protection, the work will be protected by copyright until 2039,¹¹⁹ and in Australia, the work remains under copyright as long as it is unpublished.¹²⁰ This disparate treatment will obviously complicate any plans to exploit such a work on a worldwide basis.¹²¹

D. *Altering the Publicness of the Public Domain*

The expiration of federal copyright protection for pre-1978 unpublished material also marks a fundamental change in the nature of the public domain under U.S. copyright law. Traditionally, copyright's public domain consisted almost entirely of works that had been issued to the public.¹²² Starting in 2003, the public domain increasingly will consist of material that has never been publicly disseminated. This change in the nature of material in the public domain may lead to changes in the legal regulation of that material.

Before 2003, works entered the public domain in the United States essentially in one of two ways, both of which involved publishing the work. The most familiar way was through the expiration of copyright: a work initially protected by a federal copyright reached the end of its term, lost its protection, and entered the public domain, becoming free for anyone to copy.¹²³ Because federal copyright before 1978 was almost always *acquired* by means of publishing the work and attaching proper notice to each

118. See *supra* notes 101–03 and accompanying text.

119. See *supra* note 100 and accompanying text.

120. See *supra* note 104 and accompanying text.

121. For further examples, see Gard, *supra* note 26, at 710–14.

122. The one major exception was works of the United States government, which under the 1976 Act are simply not subject to copyright protection. Thus, unpublished works created by government employees as part of their official duties may be freely copied as a matter of copyright law, but of course will often not be available to the public. The 1909 Act had a similar provision, but it denied protection only to “any *publication* of the United States Government, or any reprint, in whole or in part, thereof,” and did not expressly deal with unpublished government works. Copyright Act of 1909, ch. 320, § 7, 35 Stat. 1075, 1077 (repealed 1976) (emphasis added). Another exception was the protection granted to certain unpublished works when registered for copyright, discussed in note 125, *infra*.

123. In most cases under pre-1978 U.S. copyright law, works entered the public domain at the end of an initial term of protection. See, e.g., Barbara A. Ringer, *Renewal of Copyright*, in 1 STUDIES ON COPYRIGHT, *supra* note 108, at 503, 618 (noting that fewer than 15% of eligible works were registered for renewal in 1959). The law provided for a second, “renewal” term of copyright protection for those copyright owners who affirmatively acted to renew their works, but most did not do so. When the copyright owner did renew, the work entered the public domain at the expiration of the renewal term.

published copy, virtually all works that entered the public domain by virtue of the expiration of their copyrights had been made available to the public.¹²⁴ Indeed, the federal copyright term was measured from the date of a work's publication.¹²⁵ The other route into the public domain before 1978 also required publication. If the copyright owner initially published a work and did not comply with the formalities prescribed by federal law, then the work went immediately into the public domain: publication ended state common law protection, and failure to comply with required formalities forfeited any claim to federal statutory protection.

In either case, a work generally had to be *published* to enter the public domain: publication either placed the work in the public domain immediately, or started the clock running on the statute's limited term of protection. As a result, the public domain was, in a very important practical sense, *public*—made up almost entirely of works that had been released to the public by their owner. A work's public domain status obviously had a legal component: the law imposed no restraint on activities using the work. But a public domain work was also “public” as a practical matter: copies of the work had, at some point, been disseminated to the public.¹²⁶

By contrast, works that had never been publicly exposed were essentially never in the public domain. As long as a work remained unpublished, it was protected by common law copyright, which never ended through the mere passage of time. If a work was kept private (so that the public never had access to the work), then the work remained private property (so that the public never acquired the right to use the work freely without permission).

Thus, the traditional phrase “public domain” simultaneously reflected two different senses of the word “public.” The public domain was not “private” in two ways. First, works in the public domain were not the *private property* of any individual; they were instead common and open to the public

124. In many cases, of course, the work had long been out of print when the copyright expired.

125. The 1909 Act did protect certain types of unpublished works if they were registered with the Copyright Office and copies were deposited there. Copyright Act of 1909 § 11. Many unpublished works were registered: about 20% of all registrations in fiscal year 1957 were for unpublished works. Benjamin Kaplan, *The Registration of Copyright*, in 1 STUDIES ON COPYRIGHT, *supra* note 108, at 325, 618. The categories of unpublished works eligible for registration essentially covered works that could be publicly performed or exhibited but were not generally distributed to the public in copies. But these works were mostly “unpublished” only under the technical copyright definition of “publication,” and many were no doubt registered as a first step to publication.

126. Pam Samuelson, in reviewing varying conceptions of the term “public domain,” charted the conceptions along two axes: whether material is encumbered by intellectual property rights, and whether that material is publicly available. In her matrix, the unpublished public domain, alone among conceptions of the public domain, is on the “not publicly accessible” and not legally encumbered portion of the axis. Samuelson, *Enriching Discourse*, *supra* note 3, at 820 fig.1.

for use without restriction.¹²⁷ Second, works in the public domain were not *private* in the sense of being shielded from public view or held in confidence; instead, virtually every work in the public domain had been made available to the public. Indeed the two senses of “public” in the “public domain” were closely linked, as it was the act of making a work “public” (as opposed to keeping it private) that resulted, sooner or later, in the work becoming legally open to public use instead of being controlled as private property.

By replacing potentially perpetual common law copyright protection for unpublished works with limited-time federal copyright protection, the 1976 Act vastly increased the size of the legal public domain—the number of works that are, or at some definite point will be, legally free for public use without permission from or payment to any owner of rights in the work. At the same time, changing the nature of protection for unpublished works altered the concept of the public domain. The legal public domain is no longer entirely a subset of all works that have been made public. Instead, many works that have been kept private and as a factual matter are not available to the public are now, as a legal matter, unprotected by copyright law and free for the public to copy, if the public ever gets access to them. The word “public” in the phrase “public domain” still captures the lack of private property rights in those works, but no longer accurately reflects a lack of privacy in them.¹²⁸

127. See 12 THE OXFORD ENGLISH DICTIONARY 780 (2d ed. 1989) (“public,” definition 4a) (“That is open to, may be used by, or may or must be shared by, all members of the community; not restricted to the private use of any person or persons . . .”).

128. Bringing unpublished works into federal copyright protection not only changed the conception of the publicness of the public domain once copyright in these works began to expire. It also expanded the conception of the purposes of federal copyright protection itself. Until 1978, federal copyright was almost exclusively about protecting works that had been disclosed to the public. Indeed, the federal copyright system was sometimes seen primarily as providing incentives for publishing works of authorship, and only indirectly for creating such works. This view made claims of any *privacy* interests in federally copyrighted works difficult. State common law copyright in unpublished works, by contrast, was seen to a significant degree as protecting an author’s privacy interest in preventing unauthorized disclosure of her works, including disclosure of private works such as letters and diaries. Indeed, Warren and Brandeis made much of existing common law copyright protections in arguing for recognition of a right to privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (“The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.”). By extending statutory copyright to cover unpublished works and to provide the exclusive right of first publication, the 1976 Act appears to have brought an author’s privacy into the scope of federal copyright’s concerns. Today, suggestions are sometimes made that a copyright owner who sues for infringement but who herself never intends to publish her work is misusing a federal copyright, which is designed to encourage publication and not to protect privacy. See, e.g., JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 84, 114, 118 (2004) (suggesting that “protecting privacy under the guise of copyright . . . does not serve the legitimate goals of copyright protection, that is, creation and dissemination of creative works”). Similarly, in evaluating claims of fair use, courts have sometimes stated that “the protection of privacy is not a function of the copyright law.” *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003). Such suggestions and statements may insufficiently account for the 1976 Act’s unification of the old

The existence of a new mass of material that is legally in the public domain but generally held in private, by expanding our concept of the public domain, may affect decisions about its legal regulation. One could, for example, conceive of the expiration of copyright in an unpublished work as creating an interest in the free use of that work that might outweigh any interest that the owner of the copy of the work might have in keeping the copy private. On that conception, the law might be thought to require those who own such copies to make them reasonably available to others who want to use them.¹²⁹ Such a view would parallel proposals that have been made for imposing on owners of important works of art an obligation to make those works accessible to the public at certain intervals.¹³⁰ More likely, however, will be attempts to close the gap between the legal freedom to copy and the practical inability to do so from the other direction. Those who own copies of unpublished public domain works may attempt to use contract, or gain the passage of statutes, to restrict the use of those works. I explore these possible attempts in some detail in the next Part. Many courts and commentators have been skeptical about the possibility or desirability of removing works from the public domain and allowing copyright (or copyright-like) ownership of a work that was previously legally open to all. But the desirability and possibility of such removal may differ depending on whether a work that is in the public domain as a legal matter has been made public, as was traditionally the case, or instead has always been kept private. Similarly, the extent to which courts will hold contractual restrictions on using public domain works enforceable may depend on whether those works are both legally

common law and statutory copyright systems. Before 1978, an author would have asserted a state common law copyright claim against unauthorized first publication, and her desire to keep the work private would have been entirely consistent with the generally understood rationales of common law copyright. It is not clear that federal copyright law, having brought unpublished works into its purview in 1978, protects such works only as a spur to their eventual publication, and not out of any concern for the author's privacy. While privacy interests need not determine outcomes in copyright disputes involving unpublished works, they are also not likely to be irrelevant to outcomes in applying doctrines such as fair use and misuse, since federal copyright policy appears to have expanded in 1978 to incorporate to some degree concerns about an author's control over whether to publish her work at all or whether to keep it private. *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (noting that the 1976 Act recognized "for the first time a distinct statutory right of first publication"); *id.* at 554–55 (discussing, in context of fair use, privacy interests implicated in the decision whether to publish a work).

129. Such a requirement has sometimes been imposed in the past when a work is still protected by copyright, and the owner of the copyright is a different party from the owner of the only copy of the work, such that the copyright owner cannot effectively engage in the activities reserved to her by the statute without gaining access to the copy. *See Cmty. for Creative Non-Violence v. Reid*, Civ. A. No. 86-1507(TPJ), 1991 WL 370138, at *1 (D.D.C. Oct. 16, 1991), *order superseded by* Civ. A. No. 86-1507 (TPJ), 1991 WL 378209 (D.D.C. Oct. 29, 1991) (holding that defendant did not have to recreate an original work of art in order to avail himself of his copyright simply because of the plaintiff's assertion of a possessory property right in the work of art and that the defendant was entitled to a limited possessory right of his own, similar to an implied easement of necessity).

130. *See* JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 66–68 (1999).

and factually available to the public or are public domain only in that copyright law no longer forbids their use.

IV. Keeping Control of Unpublished Public Domain Works

Copyright law no longer provides a copyright owner with the right to control the use of older unpublished works. Those who own copies¹³¹ of such works, however, may well want to continue to exercise such control. This Part looks at how copy owners might maintain some control even without copyright protection. Subpart A considers how ownership of the physical copy in which an unpublished work is fixed may allow the owner to control the decision whether to publish the work, particularly in the context of archives, institutions that hold significant numbers of such works. Subpart B then considers the possibility of a new legal regime that would confer on the first publisher of an unpublished public domain work a period of exclusive rights in that work, looking both at whether Congress has the constitutional power to grant such exclusive rights, as well as the arguments for and against such a regime.

A. *Controlling Initial Publication Through Access*

For someone who owns a copy of an unpublished work (such as a letter or diary, the draft of a novel, or a painting), the expiration of that work's copyright ends the owner's ability to use copyright law's exclusive rights of reproduction and distribution to prevent others from making a first publication of the work. But the owner of the only copy of a work can, even absent any copyright protection, decide whether and how to first publish the work. Where a work has never been exposed to the public, ownership of the personal property that embodies the work confers effective control over the work's publication, since publishing the work requires access to the copy. While this is true for any owner of copies of unpublished works, archives probably collectively possess more unpublished private works than any other single type of institution, so this aspect of the new unpublished public domain will likely have the greatest impact on them.¹³² This new public domain may cause some archives to consider restricting access to their collections in order to control the first publication of their material.

1. Motivations for Control.—Traditionally, an archive's unpublished holdings were protected, potentially perpetually, by copyright, but many of

131. By "copies," I mean "material objects . . . in which a work [of authorship] is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 101 (2000). I intend the term to encompass (as does the Copyright Act) "the material object . . . in which the work is first fixed," which in lay terms would constitute the "original," rather than a "copy," and which for many unpublished works will be the only copy extant. *Id.*

132. I include art museums within the term "archives," since many art museums have large collections of unpublished material that is not generally on display to the public.

those works entered the public domain in 2003, and going forward more will lose copyright protection every year. How will extending the public domain to unpublished works affect archives? Many archives, particularly those that are primarily manuscript repositories, may be delighted to have their material disseminated to the public as widely as possible, in accordance with their mission to facilitate access to their collections. The new public domain status of much archival material will make such dissemination much cheaper and easier, by significantly reducing the costs of copyright clearance. As a result, users can more easily disseminate much of the material they find in archival collections. Indeed, many archives may become more active in disseminating their material themselves (particularly in digital form).¹³³ Many archives will likely view this as an unalloyed good.

In many instances, however, an archive will not want to allow uncontrolled wide dissemination of unpublished material. There are two main reasons why any holder of an unpublished work might want to limit its dissemination. First, the holder may be perfectly happy for the work to be released to the public, but she may want to ensure for herself a share of any profit to be made from publicly exploiting the work. Second, the holder may simply want to keep the work secret, for a variety of reasons.¹³⁴ The work might contain information that the holder thinks is private or embarrassing. Or the holder—who might be an author's descendant or executor—might think that the work itself reflects poorly on the author, perhaps because of its quality or its tone or subject matter. Such a holder might wish to control access to unpublished material, entirely or selectively, in order to shape and influence the historical evaluation of those who created or are featured in the material. The actions of Stephen Joyce, who controls the literary estate of his grandfather, James Joyce, offer one example of exerting control over older unpublished material.¹³⁵ Because James Joyce died in 1941, his unpublished works are still protected by copyright, and Stephen “rejects nearly every request to quote from unpublished letters” that the estate controls; in making such rejections, “Stephen’s primary motive has been to put a halt to work that, in his view, either violates his family’s privacy or exceeds the bounds of

133. Museums, for example, often acquire an original work of art but do not necessarily acquire the copyright in that work. The entry of unpublished works into the public domain means that museums can exploit those works in their collection, beyond simply displaying the original, without having to obtain permission from the copyright owner, and many museums may choose to make such works more widely available by, for example, digitizing them and posting them online.

134. See, e.g., SAX, *supra* note 130, at 82 (noting that presidential papers of John Quincy Adams were closed to public access for 127 years after he left office, the papers of Lincoln in the Library of Congress were sealed until 1947, and access to McKinley’s presidential papers was limited for more than 50 years after his assassination).

135. See generally D. T. Max, *The Injustice Collector: Is James Joyce’s Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006, at 34; see also SAX, *supra* note 130, at 138–40 (describing Stephen Joyce’s destruction of letters written to him by his aunt, James Joyce’s daughter, and the reaction to his actions).

reputable scholarship.”¹³⁶ While the estate can currently use the copyright in James Joyce’s unpublished works to refuse their publication, there is little reason to think that Stephen’s interest in controlling those works will change once their copyrights expire. And when that happens, he may well wish to use ownership of copies of those works to control their publication, given that he has worked to obtain the copies of some unpublished materials previously held in archives and has destroyed correspondence to and from James Joyce’s daughter Lucia when he took offense at a biographer’s effort to write about her decades in a mental asylum.¹³⁷ While this may be an extreme example, it is certainly not unknown for authors’ heirs to tightly control unpublished works.¹³⁸

These motivations for keeping unpublished works unpublished often apply even when the holder of the work is an archive. An archive itself may wish to keep documents secret. After all, not all archives are public institutions dedicated to open access to the material they hold. Businesses, trade associations, religious and educational institutions, and others often maintain archives, and those organizations may often wish to control, or prevent, disclosure of their material. A dissertation on the history of Baltimore’s private Bryn Mawr girls’ high school based in part on research in the school’s archive offers an example. To use the archive, the dissertation author signed an agreement stating that “[n]o record, nor any part of a record, may be published or reproduced without the prior written authorization of the School Archivist.”¹³⁹ When the dissertation was accepted for publication, the school objected to the author’s manuscript and declined to permit publication of any of its archival materials.¹⁴⁰ The book could not be published for several years, until the school finally reversed its decision and granted permission.¹⁴¹

Even when an archive does not want to keep an unpublished work secret, it may wish to control public dissemination of the work so as to share in any profits from that exploitation in order to support the archive’s continuing work.¹⁴² The Chicago Historical Society, for example, has a detailed

136. Max, *supra* note 135, at 34, 35.

137. *Id.* at 34–35.

138. *See, e.g., id.* at 36 (noting, among other examples, that T.S. Eliot’s widow “has opposed all biographies of her husband in the forty years since his death, and has withheld the balance of his letters” from publication for almost 20 years since one volume was published).

139. Jennifer K. Ruark, *The History That May Never Be Read*, CHRON. HIGHER EDUC., Apr. 26, 2002, at A16.

140. *Id.*; *see also* Elizabeth F. Farrell, *Historians Join Effort to Get Colleague’s Work Out of Limbo*, CHRON. HIGHER EDUC., May 24, 2002, at A17.

141. *See* ANDREA HAMILTON, *A VISION FOR GIRLS* (2004) (publishing archival research of Baltimore’s private Bryn Mawr girls’ high school); Richard Morgan & Lila Guterman, *Hot Type*, CHRON. HIGHER EDUC., June 7, 2002, at A20.

142. *See, e.g.,* Kenneth D. Crews, *Do Your Manuscripts Have a Y2K+3 Problem?*, LIBRARY J., June 15, 2000, at 38, 40 (“If the library is the copyright holder, it may become the interested party that seeks publication . . . and enjoys the benefits and possible revenue. A library can move easily from champion of fair use to valiant protector of intellectual property rights.”).

fee schedule for the use of reproductions of visual material from its collection, much of which is no longer protected by copyright.¹⁴³ Art museums may want to exploit works in their collections commercially through the sale of reproductions and the familiar variety of decorated paraphernalia. And a university archive in which a previously unknown play by Shakespeare is discovered may well want to reap a share of the likely significant revenue to be made from selling copies of the play. Or an archive might want to control public dissemination of its holdings in order to prevent their use in competition with its own commercial exploitation. For example, the Smithsonian Institution and Showtime Networks recently created a joint venture television network, Smithsonian Networks, for documentaries that rely heavily on the Smithsonian's collections, and gave that network exclusive rights to make such documentaries.¹⁴⁴ This has led the Smithsonian to announce a policy of denying access to its collections to commercial documentarians who wish to rely heavily on the Institution's material in their films, if the filmmakers do not grant Smithsonian Networks a right of first refusal to distribute the film (or perhaps if the film would compete with a Smithsonian Networks film).¹⁴⁵

In addition, even public archival repositories (such as the Harry Ransom Humanities Research Center at The University of Texas) that seek to further historical and cultural scholarship and education through wide dissemination of their holdings may need to control public use of material in their collections in order to satisfy those who supply that material. Such archives routinely acquire material through donation or purchase from the author or her successor. While the archive may own the physical items, the donors (or sellers) often retain rights over the use of that material, again usually either to keep the material private or to benefit from its commercial use.¹⁴⁶ Suppliers may be unwilling to place material with an archive, or may charge a

143. Chi. Historical Soc'y, *Reproduction Fees Schedule*, <http://www.chicagohs.org/research/rightsreproductions/make-a-request>. In addition, as discussed below, the New York Public Library's Digital Gallery makes public domain images available freely for personal use but charges a "usage fee" for any publication of those images to "help ensure that the Library is able to continue to acquire, preserve and provide access to the accumulated knowledge of the world." N.Y. Pub. Library Digital Gallery, *Frequently Asked Questions*, http://digitalgallery.nypl.org/nypldigital/dgabout_faqs.cfm.

144. Edward Wyatt, *Smithsonian-Showtime TV Deal Raises Concerns*, N.Y. TIMES, Mar. 31, 2006, at A11.

145. *Id.* The agreement has provoked substantial controversy. See, e.g., Lorne Manly, *Smithsonian TV Deal Is Attacked*, N.Y. TIMES, Apr. 18, 2006, at B1, B6.

146. See, e.g., Crews, *supra* note 142, at 40 ("[L]ibraries frequently receive manuscript collections under agreements from donors to restrict access, often for a long period of years."). Some nations have given express statutory force to donor restrictions. Section 117 of New Zealand's Copyright Act 1994 provides that if the copyright owner transfers a copy of an unpublished work to certain libraries, archives, or other institutions "subject to any conditions prohibiting, restricting, or regulating publication of the work," even for an unlimited period, then publishing the work in violation of those conditions is actionable as if it were copyright infringement even if the copyright in the work has expired. Copyright Act 1994, 1994 S.N.Z. No. 143, § 117.

prohibitively high price, unless the archive agrees to restrict access to the material.¹⁴⁷ In order to fulfill their obligations to their suppliers, and to enhance their ability to make future acquisitions, archivists will therefore often need to control use of material in their collections.¹⁴⁸

2. *Mechanisms of Control: Denying or Conditioning Access.*—Traditionally, copyright offered archives or their suppliers substantial control in both keeping material undisclosed and participating financially in its public exploitation.¹⁴⁹ Most public uses of any unpublished work in the archive would be within the scope of the work's copyright, so that anyone who wanted to make such a public use—distributing copies to the public, or publicly performing or displaying the work—would need permission from the copyright owner.¹⁵⁰ As a result, archives that wanted to control the public use of unpublished material in their collections could allow researchers relatively unfettered *access* to the archival material while relying on copyright law to restrain the *use* of anything the researcher found.¹⁵¹

But statutory as opposed to common law copyright protection means that archives and other holders of unpublished material can no longer rely *perpetually* on copyright to control public use of that material, because that

147. See, e.g., SAX, *supra* note 130, at 119–20 (discussing archivists' view, despite their dislike of donor restrictions, that accommodating those restrictions is preferable to the donor placing the material with another archive "more acquiescent" to such restrictions or simply destroying the material).

148. In addition, an archive might wish to control the initial publication of its unpublished material in order to *ensure* that the material remains in the public domain. As discussed in the next section, European nations now grant 25 years of copyright protection to works that are first published after their ordinary copyright term has expired. That right does not appear to apply if the work is first published outside of the European Economic Area. As a result, an archive that wishes its public domain works to remain in the public domain as widely as possible would want to ensure that the first publication of the work does not occur in the EEA, to avoid creating a 25-year exclusive right in the material in Europe.

149. While common law copyright protected archives against unauthorized public use of their material by researchers, extending federal copyright to unpublished works in 1978 protected them even more clearly by bringing the works within a detailed, express statute with significant case interpretation (as opposed to common law copyright, which was primarily decisional in nature and generated relatively few court opinions).

150. See 17 U.S.C. § 106 (2000). Not all uses of all unpublished archival material would implicate copyright or require the copyright owner's permission, of course. Some uses within the scope of copyright—such as reproduction that constituted fair use, or performances or displays within the course of much face-to-face classroom teaching—would nonetheless be excused by statutory limitations on the copyright owner's exclusive rights, at least after 1978. See *id.* §§ 107, 110(1). And any facts or unprotectable ideas embodied in unpublished works could be publicly used without infringing copyright. See *id.* § 102(b); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991) (holding that facts may not be copyrighted). But copyright in unpublished works substantially restricted potential use of private works held by archives.

151. As explained in the preceding note, copyright did not offer complete control, as researchers would be free to use the factual information they discovered in the archives, so to the extent that an archive or its donor was concerned to preserve informational secrecy, it could not rely on a practice of allowing relatively open access to its material but controlling any unauthorized public use through copyright law.

copyright now lasts only for the ordinary length of the limited federal copyright term. Today, someone who gains access to an archive's copy of an unpublished letter, story, or play by a long-deceased author would be free under copyright law to print and sell copies of the work, or perform it onstage, without the permission of, or any payment to, the archive or its supplier.

Since the motivations to control public use of older unpublished material may remain, the inability to use copyright to exercise such control after the term expires may well lead archives to seek other means of control. An archive may view access to the physical copies it possesses as the primary opportunity to control use of the works they embody. While copyright might permit anyone to make and distribute copies of an old unpublished work, no one do so without having access to the work, which usually requires permission from the holder of the original copy. Keeping the only copy of a public domain work secret thus allows the copy owner to prevent its publication.

Archives might leverage their control over access to the tangible copies in their possession into control over use of the intangible works embodied in those copies in at least two ways. They might sharply restrict, or in some cases simply eliminate, access to the material. If no one can see the work, no one will be able to use it. Such restrictions may well be sensible for proprietary archives such as those of businesses or even educational institutions, but will likely be unpalatable to many public archives.¹⁵² A strategy likely to be more widely used by archives is allowing conditional access. Instead of denying access to its holdings, an archive would grant access only to researchers who agree to certain conditions. An archive might require a researcher to promise that she will not publicly disclose anything that she finds in the archive without first obtaining the archive's permission (as in the Bryn Mawr school case discussed above).¹⁵³ That contractual obligation to seek permission would give the archive the chance (1) simply to deny permission to publish material that it (or its supplier) wishes to keep secret or (2) to negotiate for a share of the profits that result from the publication.¹⁵⁴

152. The Code of Ethics for Archivists promulgated by the Society of American Archivists states that "[a]rchivists recognize their responsibility to promote the use of records as a fundamental purpose of the keeping of archives," though it also states that archivists "may place restrictions on access for the protection of privacy or confidentiality of information in the records." Soc'y of Am. Archivists, Code of Ethics for Archivists (Feb. 5, 2005), available at http://www.archivists.org/governance/handbook/app_ethics.asp.

153. See *supra* note 139 and accompanying text.

154. The costs to an archive of conditioning access to unpublished material on agreement not to make further use of it without permission would likely be relatively low. Many archives already require prospective users to apply for access and sign an agreement promising to abide by the archive's regulations and, in many cases, to seek permission from any party that holds copyright in material that the archive possesses. So imposing a general obligation to seek the archive's permission before publishing any of the archive's material would simply require revising an existing conditional access agreement. Processing requests from researchers for permission to

3. *Enforceability of Conditional Access Agreements.*—Conditional access agreements seem at least potentially practical as a means for archives to retain some control over public use of unpublished public domain material in their holdings. But would such agreements be legally effective? That turns primarily on whether their enforcement would be preempted by copyright law.

a. *Statutory Preemption.*—Enforcement of archival conditional access agreements seems likely not to be preempted by the copyright statute. Section 301 of the 1976 Copyright Act provides that it exclusively governs, to the exclusion of any state law, “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.”¹⁵⁵ Archival access agreements will generally relate to fixed works of authorship within the subject matter of copyright law, meeting those conditions for preemption. But under existing interpretations of § 301, courts are unlikely to hold an archive’s rights under a conditional access agreement to be “equivalent” to copyright’s exclusive rights.

In judging equivalence, courts have generally looked to whether a cause of action for a right that is allegedly preempted by federal copyright law requires the plaintiff to prove a substantive “extra element” beyond what the plaintiff would have to prove to make out a claim of copyright infringement.¹⁵⁶ If the state law claim involves such an extra element, then the right in question is deemed not to be equivalent to the federal right and the claim is not preempted. Courts generally hold that where the plaintiff’s claim sounds in contract, the plaintiff must show the parties’ bargained-for exchange in order to establish the contract, and that agreement constitutes an extra element that a copyright plaintiff would not have to prove, such that the contract claim is not preempted.¹⁵⁷ Considered more conceptually, this line

publish what they have found in the collection might impose a greater burden, depending on the number and frequency of such requests. But archives might be able to separate the many routine requests that could quickly be granted (for example, requests to publish small amounts of material, or even large amounts of material of little commercial value, as part of a scholarly monograph) from those that would actually require negotiation with the researcher and her publisher (for example, requests to publish a previously unknown Shakespeare play discovered in the archive’s holdings), and the potential profits available in the latter category might well justify the cost of negotiating those agreements. Perhaps the highest cost might be reputational. At least among public manuscript repositories, attempting to limit the dissemination of material in the collection may be seen by users, financial backers, and archival professionals as a betrayal of the institution’s fundamental mission.

155. 17 U.S.C. § 301(a) (2000). The law’s preemptive reach extends to unpublished works and works created before the statute took effect on January 1, 1978 (other than sound recordings fixed before February 15, 1972). *Id.*

156. 3 GOLDSTEIN, *supra* note 9, § 17.2.1, at 17:11.

157. *Id.* § 17.2.1.2, at 17:12 to :13. In *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988), the court found that Louisiana state contract law was preempted insofar as it

of cases can be seen as distinguishing contract rights, which a party can generally enforce only against another party to the contract, as not equivalent to the more property-like exclusive rights of copyright law, which generally run against the entire world. Archival conditional access agreements establish contract rather than property rights and therefore seem less likely to be preempted.¹⁵⁸

b. Constitutional Preemption.—If the Copyright Act’s express preemption provisions do not preclude state contract law enforcement of archival conditional access agreements, the Constitution’s Intellectual Property and Supremacy Clauses still might do so. In a series of cases starting in 1964, the Supreme Court has made clear that a state law dealing with intellectual property is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in creating the federal intellectual property system.¹⁵⁹ The Court’s preemption jurisprudence has largely focused on the preemptive effect of the federal patent system, rather than copyright law, but in the patent context the Court has at least twice considered contractual restrictions on the use of inventions in the public domain, an obvious analog to archival conditional access agreements.¹⁶⁰

(1) *Leveraging*

*Brulotte v. Thys Co.*¹⁶¹ involved patents on machines for hop-picking. The patentee sold a machine to Brulotte for a flat fee and granted a license for use of the machine that required the payment of royalties. The royalty obligation continued for a number of years after the patents embodied in the machine expired, and Brulotte defended against a claim for the royalty payments on the ground that Thys had engaged in patent misuse to extend the

enforced a term in a mass-market software license agreement that prohibited reverse engineering of the software. Preemption there, however, was not based on application of § 301, but on the principle announced in the constitutional preemption cases, discussed below, that a state law that “touches upon [an] area” of federal copyright law may not deny the benefits of federal copyright policy. *Id.* at 269–70 (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964)).

158. By contrast, a state law that granted a limited term of exclusivity to the first person to publish a previously unpublished public domain work would likely be held to grant rights equivalent to copyright and thus be preempted. *See, e.g.*, H.R. REP. NO. 94-1476, at 130–31 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5746 (“Regardless of when the work was created and whether it is published or unpublished, disseminated or undissemated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright.”).

159. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

160. In another case during this period, the Court also found that federal patent law preempted state contract law from estopping a patent licensee from challenging the validity of the licensed patent, but that case did not address any contractual restrictions on using an unprotected invention. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 668–73 (1969).

161. 379 U.S. 29 (1964).

patent beyond its term.¹⁶² The Supreme Court agreed that the obligation to pay royalties after the patent expired was unenforceable because it conflicted with the limited fixed term of patent law.¹⁶³ Key to the Court's reasoning was its view that Thys was, at the time that it sold the machine, using the leverage of its then-existing patent to extend its rights in the patented inventions past the expiration of the ordinary patent term.¹⁶⁴ *Brulotte* has been widely criticized, but has been followed and extended by lower courts.¹⁶⁵

The Court emphasized its understanding of the *Brulotte* decision as one controlling leveraging in *Aronson v. Quick Point Pencil Co.*,¹⁶⁶ its other decision on the limits that federal patent law imposes on state contract law. In that case, Quick Point had agreed to pay Jane Aronson royalties on every unit it sold of a new keychain that she had invented and was seeking to patent; the agreement expressly reduced the royalty rate if a patent had not issued after five years but placed no time limit on Quick Point's royalty obligation.¹⁶⁷ No patent ever issued, and nearly 20 years after the contract was signed Quick Point sought a judgment that state law could not enforce its obligation to continue to pay royalties on the unpatented invention because that would conflict with federal patent law.¹⁶⁸ The Court held that Quick Point was obliged to pay royalties for as long as it sold the keychains.¹⁶⁹ In distinguishing *Brulotte*, the Court explained that "[t]he principle underlying that holding was simply that the monopoly granted *under a patent* cannot lawfully be used to 'negotiate with the leverage of that monopoly'" but that whatever negotiating leverage a pending *patent application* gave a party was not sufficient to hold contracts negotiated with that leverage *per se* unlawful.¹⁷⁰

The leveraging concerns of *Brulotte* and *Aronson* seem unlikely to lead the Court to find archival conditional access agreements unenforceable. With respect to unpublished public domain works, those agreements are unlike the contract invalidated in *Brulotte*, since they would not be negotiated using any leverage that might be provided by a copyright—after all, at the time of the agreement the works at issue are entirely unprotected by

162. *Id.* at 29–30.

163. *Id.* at 32–33.

164. *Id.* at 32.

165. *E.g.*, Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1017–19 (7th Cir. 2002); Boggild v. Kenner Prods., 776 F.2d 1315, 1316 (6th Cir. 1985); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1370–73 (11th Cir. 1983).

166. 440 U.S. 257 (1979).

167. *Id.* at 259.

168. *Id.* at 260.

169. As of 2001, Quick Point was still paying royalties to Aronson. E-mail from Jaye McDaniel, Executive Administrative Assistant, Quick Point, Inc., to author (Sept. 13, 2002, 08:37:28 CST) (on file with author).

170. *Aronson*, 440 U.S. at 265. The Court reserved judgment on what might constitute "abuse" of a pending application. *Id.*

copyright.¹⁷¹ *Brulotte* itself strongly suggests that contracts requiring royalty payments on unpatented devices would be enforceable so long as they were not negotiated during the pendency of any patent protection.¹⁷² To the extent that an archive is exercising any leverage in negotiating an access agreement, that leverage is provided not by any copyright but instead by the archive's ownership of tangible personal property embodying a work of authorship. It is far from clear that federal copyright law requires contracts involving or leveraging tangible property ownership to necessarily yield to concerns about embodied intellectual property; indeed, *Aronson* shows that a contracting party's control over access to intangible information is not automatically enough to constitute improper leveraging.

(2) *Undue Interference with the Public Domain*

Leveraging a federal intellectual property right, however, may not be the only issue at stake in determining whether enforcement of archival conditional access agreements is preempted. *Brulotte* and *Aronson* may reflect a deeper principle, much more explicit in the Court's other intellectual property preemption cases: state law may not unduly interfere with the free exploitation of material that federal law has affirmatively placed in the public domain.¹⁷³ Enforcement of archival conditional access agreements can, of course, be seen as such an interference, raising the possibility that state law enforcing such agreements might be preempted despite the absence of the leveraging disapproved of in *Brulotte*. Language in the earliest preemption cases certainly suggests this result: "[W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article [because that] would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."¹⁷⁴

The Court, however, has steadily retreated from this absolute pronouncement, and in doing so has made very clear that its concern is with the public domain as traditionally understood: material that is legally free for public use *and that is publicly known*. In each case in which the Court held a

171. Leveraging could possibly be a concern if an archival conditional access agreement is entered into by a researcher and an archive at a time when the material is still protected by copyright, and the archive then seeks to enforce the agreement's restrictions on publication of its material at a later date when the copyright has expired and the material is in the public domain.

172. See *Brulotte v. Thys Co.*, 379 U.S. 29, 32 (1964) ("The sale or lease of *unpatented* machines on long-term payments based on a deferred purchase price or on use would present wholly different considerations.").

173. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964); see also notes 178–83 and accompanying text.

174. *Compco*, 376 U.S. at 237; see also *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 269–70 (5th Cir. 1988) (finding Louisiana state contract statute preempted as applied to contract at issue because it "touches upon" federal copyright law and restricts copying allowed by federal law).

state law preempted, the articles protected by the state law had previously been sold to the public, often for many years.¹⁷⁵ Indeed, in several instances the articles had been patented so that a published (though later invalidated) patent also disclosed the invention.¹⁷⁶ Concerns about state law interfering with the public's free use of public domain material are clearly paramount when the material is publicly known. But when material unprotected by federal intellectual property law has not been disclosed to the public, the Court has seen state laws that allow an owner to restrict public access to that material as far less problematic. Trade secret law has that effect, and the Court held in *Kewanee Oil Co. v. Bicron Corp.* that it was not preempted by federal patent law.¹⁷⁷ Having noted that by definition a trade secret "must be secret, and must not be of public knowledge or of a general knowledge in the trade or business,"¹⁷⁸ the Court explained that therefore "the policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection."¹⁷⁹ This clearly reflects a concept of the public domain as encompassing material that is both publicly known as well as legally free to copy.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,¹⁸⁰ the Court's most recent preemption case, presents most clearly the view, evident in *Kewanee*, that preemption principally prevents state law from restricting copying of material that is actually available to the public. In explaining when state law conflicts with federal patent law, the Court spoke repeatedly about information or products "publicly known," or "placed before the public," or "within the public grasp," or "freely disclosed by its author to the public," or "freely revealed to the consuming public," or "freely exposed to the public," or "in general circulation" or "public circulation," or "accessible to all," or "fully disclosed through public sales," or "expose[d] . . . to the public in the marketplace," or "freely available to the public," or "placed in public

175. See, e.g., *Bonito Boats*, 489 U.S. at 144–45 (discussing that the plaintiff placed its boat hull on the market in 1976 and sued for violation of a state anti-copying statute in 1984); *Compco*, 376 U.S. at 234–35 (considering a case where the defendant, *Compco*, copied a lighting fixture after the plaintiff *Day-Brite* began selling it); *Sears*, 376 U.S. at 225–26 (relating that plaintiff *Stiffel* brought pole lamp at issue to market and *Sears* copied it).

176. See, e.g., *Compco*, 376 U.S. at 234 (stating that the district court invalidated the plaintiff's design patent on a lighting fixture that was at issue); *Sears*, 376 U.S. at 225–26 (indicating that the district court invalidated the plaintiff's design and utility patents on the pole lamp that was at issue).

177. *Kewanee Oil*, 416 U.S. at 482, 493. Real property law, which allows owners to exclude third parties from the buildings in which those owners keep copies of public domain works, also has that effect. To the extent that an archive could rely on state real property law to deny third parties all access to its copy of a work without running afoul of federal intellectual property law, allowing such access on the condition that the third parties not engage in activity allowed by copyright law may well also be acceptable.

178. *Id.* at 475.

179. *Id.* at 484; see also *Lear, Inc. v. Adkins*, 395 U.S. 653, 671–72 (distinguishing for purposes of preemption of licensee estoppel doctrine licenses negotiated prior to the existence of any patent and those negotiated during or covering the term of any patent).

180. 489 U.S. 141 (1989).

commerce.”¹⁸¹ The conclusion seems inescapable that preemption restricts state laws that limit use of material that is unprotected by federal patent law *and* actually accessible to the public, but is much less likely to doom a state law governing publicly inaccessible material. As long as the Court takes a similar view of copyright preemption, then state contract law enforcing archival conditional access agreements seems unlikely to be preempted, at least where the works governed by those contracts are not publicly accessible even though they are legally in the public domain.¹⁸²

Conditioning access to the physical embodiment of a public domain work is not an entirely new or unknown phenomenon. Conditional access agreements are perhaps most commonly imposed by art museums. There, the museum typically conditions admission on compliance with its terms and conditions, which often, for example, prohibit photography of items in the collection¹⁸³ or allow photography only for personal, noncommercial use.¹⁸⁴ Many items in these museum collections are in the public domain so that copyright law would not prohibit photographing them, even for commercial purposes. But a museum’s personal property rights in the particular tangible copies that it owns, as well as its real property rights in the facility in which those copies are displayed, allow it to exclude the public from access to its artwork. That right to exclude seems generally to have been assumed to include the right to condition access by requiring an admittee to the museum to agree not to engage in some reproduction, distribution, and public display that copyright law would not prohibit.

An art museum’s conditional access agreement seems quite analogous to an archive’s. In both cases, the owner of tangible personal property embodying a public domain work grants access to that property only to those who agree not to make certain uses of that work. To the extent that art museums’ fairly widely used terms and conditions of admission have not raised copyright preemption problems, archival conditional access agreements should similarly not be preempted.¹⁸⁵ However, no significant

181. *Id.* at 153, 156–57, 159, 161–62, 164–65.

182. *Cf.* Zimmerman, *supra* note 3, at 370–71 (noting that a conception of a “mandatory” public domain which Congress and states could not restrict would not include material kept in “seclusion” and not made available to the public under no express contractual restriction not to reveal the material).

183. *See, e.g.*, Art Inst. of Chi., General Information, http://www.artic.edu/aic/visitor_info/geninfo.html (prohibiting photography of loan exhibitions).

184. *See, e.g., id.*; Metro. Museum of Art, Visitor Information, <http://www.metmuseum.org/visitor/index.asp> (“Still photography is permitted for private, noncommercial use only in the Museum’s galleries devoted to the permanent collection. Photographs cannot be published, sold, reproduced, transferred, distributed, or otherwise commercially exploited in any manner whatsoever.”).

185. Even if the conditional access agreements were preempted, a museum could, of course, prohibit photography of works still protected by copyright either by exercising its own rights if it holds the copyright or as a way of avoiding claims of secondary liability for infringement by photographing museum visitors. In addition, a museum could presumably continue to prohibit flash

contemporary litigation appears to have considered the validity of such conditions on museum admission. Indeed, to some extent, typical museum conditions seem potentially more subject to preemption than an archive's conditions. An art museum has generally invited the public at large to enter the museum and view the works on display therein. Enforcing a contract between the museum and every admittee that restricts the use of copies that an admittee makes of those works thus interferes with the copying of material that (1) federal copyright law leaves free for copying and (2) has been freely exposed to the public. This is precisely the body of material that the Supreme Court in *Bonito Boats* emphasized is at the core of its preemption concern. Because archives are usually not open to the general public, conditioning access to archival material with restrictions on the subsequent use of that material will generally limit copying only of material that, unlike an art museum's collection, has not been made freely available to the general public.¹⁸⁶ The Court's concerns to limit state interference with the federal public domain—as traditionally understood—thus seem much less strong in the case of the archive than of the art museum.

4. *Effectiveness of Conditional Access Agreements.*—Even if archival conditional access agreements are not preempted, they will provide owners of copies of unpublished works with less effective protection than copyright. Such agreements will bind only those who enter into them—the archives and the researchers who seek access to the unpublished material—and not anyone else. Indeed, this reduced scope of protection is one reason why such agreements are likely not to be found preempted by the copyright statute: they do not create any rights against the world. As a result, once the material governed by the access agreement is published, anyone else would be free to make, sell, and display copies of the work, or to publicly perform the work, without any permission from or compensation to the archive that holds the original. The archive, through its access agreement, may make the initial decision as to whether to publish and may participate in any profit earned from the initial publication, but it will be unable to control use of the work after its publication.

This limited reach of a conditional access agreement also raises the question of whether these agreements will be effective even if they are legally enforceable. What if a researcher signs such an agreement to gain access to unpublished archival material in the public domain and then proceeds to publish that material without permission? The publication will make the work available to the public generally, and copyright law will allow the public to use the work without payment, even if the archive objects. The

or tripod photography even of public domain works, since those restrictions might be aimed at regulating museumgoers' experience in the galleries and protecting the physical copies themselves.

186. The situation would obviously differ if the archive had, in fact, put some of its material on display for the general public.

agreement will give the archive legal rights against far fewer people and more limited remedies against those people. The archive will only have a breach of contract claim against the publishing researcher, rather than copyright claims against anyone who copies, distributes, performs, or displays the work by means of the researcher's publication.¹⁸⁷ And because the archive's claim against the researcher will be for breach of contract, the archive will be limited to contractual remedies rather than copyright remedies; perhaps the most notable differences are the availability in a copyright claim of statutory damages and routine injunctive relief. In many ways, the unpublished public domain work in such a situation is like a trade secret. The owner of a trade secret may have a claim against a party that wrongfully publishes the secret information (or others in concert with her), but once the information has been published, anyone else is free to use that published information.¹⁸⁸ So while conditional access contracts can give archives some control over the use of unpublished public domain works in their possession, that control may be substantially less than they enjoyed before the copyright in those works expired.

Of course, archival conditional access contracts may in many instances be quite practically effective, even though they offer more limited protection than copyright and even if they are legally unenforceable due to preemption. Archives will often have an important extralegal sanction against any researcher who violates an access agreement: the archive could deny the researcher any further access to any of its material. Many scholarly researchers have long-term interests in a particular area, and so may well have a continuing need for access to archival material. Such researchers would presumably be reluctant to alienate an archive that holds a large amount of potentially useful material, for fear of being barred from further access to the archive in the future. Where ongoing access is important to a researcher, the threat of future exclusion often will likely be sufficiently detrimental to induce the researcher's compliance with an archive's conditional access agreement.¹⁸⁹

Finally, an archive may have the practical ability to control use of unpublished public domain material even without a conditional access agreement, depending on the nature of that material. In particular, archives may easily be able to control publication of nonwritten works, such as works of visual art and mechanically recorded works. Many archives (and especially museums) contain significant amounts of such material:

187. The archive might possibly also have a claim against the publisher for inducing the researcher to breach her agreement with the archive.

188. *See, e.g.,* *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 706 (7th Cir. 2006) (holding that a trade secret that becomes public knowledge is no longer a trade secret).

189. This may suggest that if archival conditional access agreements are legally unenforceable because they conflict with federal law, it may be desirable to consider ways to keep archives from inserting such unenforceable conditions in their agreements with researchers and relying on their *in terrorem* effects.

photographs, films, sound recordings, drawings, paintings, prints, and so forth. While written material could be effectively copied using just a pencil and paper to transcribe its words, most nonwritten material would require more sophisticated copying techniques to produce a commercially usable copy. As a result, an archive could generally allow a researcher to view such works that are in the public domain but restrict the use of copying technologies, and thereby use its ownership of the original copy to largely preserve its control over public dissemination of the work.¹⁹⁰ Letting researchers freely consult such collections while barring them from using cameras or other recording devices would often confer significant control over the unpublished public domain works in those collections.

5. *Promoting Dissemination Through Conditional Access Agreements.*—As a policy matter, it is far from clear that refusing to enforce archival conditional access agreements would lead to greater access to archives' collections. In some cases, archives that find they cannot successfully impose conditions on access might simply not allow access to their material. While this seems unlikely in the case of public manuscript repositories, it seems much more probable in the case of private archival holdings.¹⁹¹ In addition, some people who would otherwise donate material to archives might choose not to do so if they cannot effectively impose any conditions on access to or use of the material. This would likely lead to such material being far less available to those interested in it, since private holders will usually be less equipped, and probably less inclined, to grant access to their collections. Indeed, in some cases, the owners (particularly if they are related to the creators of the material) may decide simply to destroy the material rather than taking the risk of losing control over whether to publish it.¹⁹²

190. For works put on general public display, such restrictions would likely take the form of conditions that many museums already impose, as discussed above, restricting photographing or other copying of works on display to those who copy only for personal, noncommercial use. See *supra* note 184 and accompanying text; see also Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 315 (2003) (suggesting that technological protection measures could allow the owner of an “only copy” of a work such as a painting in which copyright has expired to continue to control access to the work, and that the work should therefore not be regarded as in the “public domain” because that term should be understood to mean “the collection of unprotected works readily available”).

191. Even public repositories, though, might bar public access to newly public domain portions of their collections until the archive itself has had a chance to review the material in order to determine whether it contains anything of value that the archive might wish to exploit.

192. See, e.g., Kaplan, *supra* note 29, at 9 (noting that if papers “could be given to libraries only at risk of precipitate disclosure to the world, prospective donors might prefer to keep them locked up, or to burn them”); see also SAX, *supra* note 130, at 97 (noting, in considering whether non-official judicial papers should be publicly available, that “[i]f . . . the papers are considered a sort of public property, . . . then the individual who does not want such material made public will not create it”).

The limited reach of archival conditional access agreements may also distinguish them from certain digital conditional access agreements that have been viewed with some skepticism in the past decade. When works of authorship are disseminated in digital form, they can easily be accompanied by contractual restrictions on access to or use of the work. These contracts often take the form of “clickwrap” agreements in which the user must click on an “I Agree” button on screen in order to indicate assent to the presented contract terms before being able to gain access to the work. Such contracts may require the user to agree to refrain from using the work in ways that would be entirely legal under copyright law. For example, the contract might prohibit the user from reusing factual data contained in the work that is entirely outside the scope of copyright protection,¹⁹³ or it might prohibit uses of the copyrighted work that would be permitted by copyright law as fair uses,¹⁹⁴ or it might prohibit use of the work even after the term of copyright protection has expired. While some courts have enforced such contractual restrictions against claims of preemption by copyright law,¹⁹⁵ the enforceability of such terms is still unsettled, and the desirability of such enforcement has been stridently contested.¹⁹⁶ If the critics of digital conditional access agreements are right that enforcing such contracts is a bad idea, is enforcing an archival conditional access agreement a bad idea for the same reasons, since it also bars a user from activities that copyright law would freely allow?

The way in which archival agreements are deployed, and their normative implications, differ substantially from digital access agreements. Digital agreements can be integrated with every digital copy of a work that is widely publicly disseminated, in such a way that the work cannot be accessed without assenting to the agreement. As a result, the contract terms can bind each of the thousands or millions of persons who comes in contact with a copy of the work. While the terms may take the form of a contract, the effect of the terms is much broader than the conventional contract. By contrast, an archival access agreement would not bind anyone other than the publisher of a public domain work once the work is actually published. Any member of the public could acquire a copy of the newly published work and use it in any way, regardless of any terms between the archive and its researchers or their

193. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (addressing a contract barring use of uncopyrightable telephone directory data).

194. See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323 (Fed. Cir. 2003) (addressing a contract barring reverse engineering of computer program to gain access to program elements unprotected by copyright law).

195. See, e.g., *id.*; *ProCD*, 86 F.3d at 1449.

196. For a sampling of academic critique of shrinkwrap licensing, see, for example, Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999); Maureen O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995); and Jerome H. Reichman & Jonathan A. Franklin, *Privately-Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999).

publishers.¹⁹⁷ The lack of any attempt to impose conditions on the general public once the work is disseminated sharply distinguishes the archival conditional access agreement from the more controversial and problematic digital conditional access agreement.

B. Controlling Use After Publication: A Publication Right?

Putting older unpublished works in the public domain means that if those works *are* eventually published, copyright law will not prevent further use of them. Publishers might therefore conceivably be reluctant to invest in publishing these works, because someone else may simply copy the work and compete with the publisher to supply copies to meet any demand. Those who own copies of unpublished works, and those interested in commercially publishing them, might therefore call for Congress to offer some protection against such competitive copying. Any such call would find support in the recent amendment of European copyright law to provide exactly such protection. Could Congress protect works first published after their copyright term expires? Should it? This subpart examines the new European law and then considers whether Congress has the power to offer such protection, and if so whether U.S. law should offer it.

1. The European Union's Publication Right.—In 1993, the European Union adopted a directive to harmonize the term of copyright protection throughout Europe.¹⁹⁸ As a general matter, the directive requires copyright protection in unpublished works to last for 70 years after the author's death, or in some cases 70 years after the work's creation.¹⁹⁹ However, the directive also requires protection for unpublished public domain works upon their publication:

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.²⁰⁰

197. The archive could, of course, require the publisher to issue the work digitally under the terms of a digital conditional access agreement, but *that* agreement, imposed on the buyer of every digital copy, should be analyzed for enforceability separately from the enforceability of the archive's agreement with the researcher who later publishes the work.

198. Council Directive 93/98, *supra* note 114, 9–13 (EC).

199. Article 1(1) provides that for literary and artistic works, protection lasts for 70 years after the death of the author, “irrespective of the date when the work is lawfully made available to the public.” *Id.* art. 1(1), at 11. Subsection 6 provides that for works whose term is not measured from the date of the author's death (for example, anonymous or pseudonymous works protected under Article 1(3) for seventy years from the date on which the work “is lawfully made available to the public”), protection shall terminate if such works “have not been lawfully made available to the public within seventy years from their creation.” *Id.* art. 1(6).

200. *Id.* art. 4, at 12.

Although there is no real legislative history of this requirement to create a “publication right,” it appears to have been intended to harmonize the member states’ differing approaches to protecting older unpublished works upon publication.²⁰¹ Member states were to implement the provision by July 1, 1995, and many have done so.²⁰²

Essentially, the directive requires EU members to grant 25 years of copyright protection to the first person to lawfully publish an unpublished work that has previously entered the public domain. The right is acquired by “publishing” the work in the traditional copyright sense, but also by publicly performing or displaying the work (which constitute communicating it to the public), and the right appears not to be available if the work was publicly performed or displayed during its original copyright term, even though it was not technically “published.” At least in the United Kingdom implementation of this provision, the “lawful” publication necessary to obtain the publication right must be made with the consent of the owner of the copy in which the work is fixed.²⁰³ The directive’s limitation of protection to the author’s economic rights means that the publication right need not confer any moral rights protection.²⁰⁴

The existence of this new Europe-wide exclusive right in previously unpublished public domain works might prompt American publishers to press for a similar right in the United States. After all, Europe’s adoption of a basic copyright term of 70 years after the author’s death was cited as a principal motivation for Congress to extend the U.S. copyright term in 1998.²⁰⁵ Congress argued that it was acting both to harmonize the term of copyright protection with a major U.S. trading partner and to protect the interest of U.S. copyright owners, as Europe would not protect works in the sixth and seventh decades after the author’s death if the work’s country of origin did not do so.²⁰⁶ Similar arguments could be made concerning the publication right. In particular, the directive is silent as to the application of the publication right to non-European publishers,²⁰⁷ and at least in the United

201. See 1 COPINGER AND SKONE JAMES, *supra* note 113, § 17-02, at 900 (describing term variance among countries and the need to harmonize term in order to remove a “potential barrier to completion of the internal market”). For a discussion of the varying term lengths, see *supra* notes 104–09 and accompanying text.

202. See 1 COPINGER AND SKONE JAMES, *supra* note 113, § 17-02, at 876–77 (citing enactments in the United Kingdom, Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Spain, and Sweden, but not noting any implementation in France, Greece, Iceland, Liechtenstein, Luxembourg, or Portugal).

203. Copyright and Related Rights Regulations, S.I. 1996/2967, pt. II, reg. 16(3) (U.K.).

204. See, e.g., *id.* reg. 17(1) (excluding moral rights from publication right in the U.K.).

205. See H.R. REP. NO. 105-452, at 4 (1998).

206. See *id.* (discussing the “rule of the shorter term” and its potential implications for U.S. intellectual property in the European Union).

207. LADDIE ET AL., *supra* note 100, § 11.42, at 530 (“[T]he Directive certainly does not require member states to refrain from granting publication right to nationals of other countries, provided their country grants an equivalent right.”).

Kingdom, the directive has been implemented to protect only publishers who are nationals of a nation of the European Economic Area.²⁰⁸ If the United States wishes to convince European states to extend the publication right in Europe to works published by American nationals, it may need to extend similar protection in the United States to European nationals. Adopting a publication right in the United States could thus be a first step to securing equivalent protection for U.S. publishers in Europe.

These arguments, of course, were available when Congress considered the Sonny Bono Copyright Term Extension Act, and yet no attempt appears to have been made at that point to adopt a publication right. This was not due to a mere oversight of unpublished works, as the initial term extension bill would have extended by 10 years the minimum term under § 303 for older unpublished works, so that their copyrights would not have expired until at least 2012.²⁰⁹ Testimony from the Register of Copyrights, scholars, and librarians convinced the Senate Judiciary Committee to drop this extension because the extreme difficulty of clearing copyright in most older unpublished works meant that “the public will not realize sufficient benefit from extended protection for these older unpublished works to justify precluding public access to those works beyond 2003.”²¹⁰ But while Congress did consider unpublished works (and indeed extended by 20 years the minimum term of protection if such works were published before 2003), it is perhaps not surprising that it did not consider Europe’s new publication right. After all, at the time no unpublished works had yet entered the public domain in the United States, and would not do so for several more years.²¹¹ Now that those who own copies of older unpublished works or who seek to publish them must deal with the works’ public domain status, it seems quite possible that they will ask Congress to consider providing a publication right along the lines of the European right.²¹²

2. *Congressional Power to Protect.*— Any proposal for a publication right in the United States would raise the question of whether Congress could constitutionally grant a period of exclusive rights to the first publisher of a work in which copyright has already expired. The Supreme Court’s decision in *Eldred v. Ashcroft*²¹³ provides the basic two-part framework for answering

208. S.I. 1996/2967, pt. II, reg. 16(4).

209. S. 483, 104th Cong. § 2(c) (1995) (amending 17 U.S.C. § 303).

210. S. REP. NO. 104-315, at 14 (1996).

211. In addition, it was not clear that any European nations were prepared to extend the publication right to non-European nationals on the basis of reciprocity, as they were already doing for the additional 20 years of ordinary copyright protection.

212. As Diane Zimmerman has noted, even academic views that material in the public domain should be subject to exclusive control are not unknown. Zimmerman, *supra* note 3, at 306–08.

213. 537 U.S. 186 (2003).

that question.²¹⁴ First, does the Constitution's Copyright Clause empower Congress to enact such a publication right? If so, would Congress's particular enactment of a publication right be a rational exercise of the copyright power?

In this section, I analyze a publication right under this framework. The *Eldred* Court's approach led it to a very broad construction of the copyright power, one that is largely consistent with its prior Copyright Clause jurisprudence.²¹⁵ A Court following *Eldred* and interpreting the Copyright Clause with its traditional breadth might well, although the outcome is far from certain, uphold a publication right as constitutional. I consider three possible constitutional objections to a publication right: that it violates the Clause's "limited Times" language, that Congress has no power to remove works of authorship from the public domain once they have entered it, and that the publication right would not benefit "Authors" as required by the Clause. For each objection, *Eldred* directs attention not only to the constitutional text, but, where relevant, to historical practice, and to judicial precedent.

a. Limited Times.—One possible constitutional objection to a publication right might be that adding any additional period of exclusivity to the ordinary copyright term already enjoyed by an unpublished public domain work violates the Clause's "limited Times" restriction.

(1) *Text*

The *Eldred* decision squarely suggests that this objection is not likely to be well-founded, since the Court there upheld as within Congress's power the addition of time to the copyright term for works already in existence and protected by copyright, at least as long as such extension was not an attempt to provide the perpetual protection that the Constitution forbids. The Clause restricts Congress to granting rights only for "limited Times," but *Eldred*'s reading of that phrase as simply requiring protection to be for some period

214. I do not consider here whether, if a publication right is within Congress's Copyright Clause power, the grant of such a right would be subject to First Amendment review under the *Eldred* view that copyright law may require such review if Congress has "altered the traditional contours of copyright protection," 537 U.S. at 191, or whether a publication right would survive such scrutiny. In addition, I am not considering whether Congress could grant a publication right pursuant to its Commerce Clause power if the Court were to determine that it could not do so under its Copyright Clause power. See, e.g., Paul J. Heald & Suzanna Sherry, *Implied Limits on Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119; Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004).

215. See R. Anthony Reese, *Copyright Term Extension and the Scope of Congressional Copyright Power: Eldred v. Ashcroft*, 7 J. WORLD INTELL. PROP. 5, 10–14 (2004) (arguing that the *Eldred* Court's reading of the constitutional "limited Times" prescription as "imposing only minimal limits" on congressional power to enact copyright laws is "largely consistent with the overall trend of Supreme Court interpretation of the Copyright Clause").

that is restricted in duration would probably encompass protection that lasts for two such periods: one, from the work's creation until 70 years after the author's death, and a second for (perhaps) 25 years from the work's publication. The phrase "limited Times" does not clearly require that the bounded period be only a single, uninterrupted stretch of time. And a publication right does not seem to approach perpetual protection, which *Eldred* recognized as beyond the scope of Congress's power because of the "limited Times" language. Given that the *Eldred* Court found no reason to view the Sonny Bono Copyright Term Extension Act's additional twenty years of protection as designed "to evade the 'limited Times' prescription" and provide perpetual protection, it seems unlikely to view a single 25-year post-publication period of exclusive rights in a previously unpublished work as designed to do so.

(2) History

The historical record would likely refute any objection that a publication right for a work that has entered the public domain would result in protecting a work for an "excessive" duration (assuming that a Court were willing to establish any particular duration as excessive). Going forward, a publication right in a previously unpublished public domain work, together with the protection given before the copyright expired, would often provide a shorter total term of protection for a work than would have been available to that work for most of U.S. history. Consider, for example, a work written in 1800, by an author who died in 1870, and first published in 1970. The work would have been protected by common law copyright for 170 years, and by federal statutory copyright for 95 years, for a total of 265 years. Contrast a work written in 2000 by an author who dies in 2070 and is first published in 2170. If the publication triggers a 25-year publication right, then the work would have been protected for a total of 165 years—140 years between its creation and the passage of 70 years after its author's death, and 25 years after its publication.²¹⁶ Thus, in terms of the total duration of legal protection for an unpublished work, the grant of a publication right might be seen as entirely consistent with historical practice.

Historical practice also indicates that Congress can protect unpublished works indefinitely and can then further protect such works when they are first published long after their creation. The Copyright Clause was

216. Even if one considers the period in which the work is legally in the public domain but unpublished and presumably not publicly accessible, the total term of protection for a work published 170 years after its creation would, under the current system with a publication right added, be 195 years, as compared to 265 years for the same work under pre-1978 law. See 1964 REVISION BILL, *supra* note 45, at 175 (remarks of Irwin Karp, Authors League of America) (noting that "there are many works published at the present time which have enjoyed protection for literally twice or three times the duration of life-and-fifty years under our present system, which combines common law and statutory copyright" and giving example of Frank Carpenter's *Carp's Washington*, written during the Civil War and published in 1960).

traditionally understood to allow Congress to grant a limited term of federal copyright protection to any previously unpublished work, as part of a system in which an unpublished work could be protected in perpetuity. The indefinite, potentially perpetual protection for unpublished works was typically a matter of state law. But starting in the first copyright act in 1790, Congress itself protected some unpublished as well as published works, and seems to have protected the former without time limitation. The 1790 Act created a cause of action for the unauthorized publication of “any manuscript”²¹⁷ without imposing any limitation on how long ago the work had been created or any formalities on the enjoyment of this protection, in sharp contrast to the time-limited protection granted to published works only if detailed formalities were strictly observed.²¹⁸ This provision remained in federal law each time the copyright act was revised, until 1909,²¹⁹ so for nearly 120 years Congress viewed its constitutional copyright power as authorizing it to protect unpublished works for as long as they remained unpublished. And until the 1976 Act took effect and granted federal copyright protection to all existing unpublished works, it was well understood that one could obtain federal copyright, for the full statutory term, in a previously unpublished work—even a work created a very long time ago by a long-dead author—by publishing the work and complying with the statutory formalities.

b. Removing Material from the Public Domain.—A second possible objection to a publication right is that it would give one person exclusive rights over a work that had already entered the public domain and become free for anyone to use and that removing material from the public domain in that way is beyond Congress’s power. *Eldred* does not directly address that objection, but a court might read the constitutional text, historical practice, and judicial precedent as confirming Congress’s power.

217. This provision apparently did not protect all works that could acquire federal copyright. For example, at least one case interpreted the term “manuscript” to exclude a painting. *Parton v. Prang*, 18 F.Cas. 1273, 1277 (C.C.D. Mass. 1872) (No. 10,784).

218. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 125–26 (repealed 1831). Authorization for publication could be made either by the author or by the proprietor of the manuscript, but protection extended (until 1891) only if the author or proprietor was a citizen or resident of the United States. The question of whether a U.S. assignee of a nonresident author could claim the protection of the manuscript was unsettled. See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 125–26 (1879). This provision apparently provided an additional remedial avenue against unauthorized publication, rather than preempting state protection. See Brown, *supra* note 11, at 1071.

219. See Act of Mar. 3, 1891, ch. 565, § 9, 26 Stat. 1106, 1109; Act of Dec. 1, 1873, ch. 3, § 4967, 18 Stat. 959, 960; Act of July 8, 1870, ch. 230, § 102, 16 Stat. 198, 215; Act of Feb. 3, 1831, ch. 16, § 9, 4 Stat. 436, 438 (authorizing injunctive relief, in addition to the suit for damages provided in the 1790 Act).

(1) *Text*

The Copyright Clause contains no express textual restriction against Congress granting rights in works that have entered the public domain. The textual inquiry into whether Congress has the power to do so would probably focus on two issues and would arguably support the publication right. First, the Copyright Clause has long been interpreted, beyond its express language, to allow Congress to protect only “original” works. It might be argued that at the time a publication right is granted, the work to be protected is no longer “original,” having been created at least decades, and often more than a century, earlier. That argument seems unlikely to prevail and bar a publication right given the *Eldred* Court’s reading of the originality requirement and rejection of a similar argument in the term extension context. *Eldred* stated that originality was simply a threshold requirement for a work to receive any copyright protection at all and had “no bearing” on the constitutionality of the length of that protection.²²⁰

Second, the Copyright Clause’s preambular requirement that Congress act “to promote the Progress of Science,” as interpreted by *Eldred*, would perhaps be met by a publication right. *Eldred* suggested that the preamble requires Congress to adopt a copyright *system* that promotes progress, and that it is generally for Congress to evaluate a law’s progress-promoting function. The Court appears to have rejected the argument that the preamble means that Congress can act only to “stimulate the creation of new works”²²¹ and to have accepted as constitutional a congressional view that a system that grants some protection to works already in existence can also promote progress as required by the Copyright Clause.

The publication of long-unpublished works can fairly easily be seen as promoting progress in this view; indeed, all U.S. copyright statutes from 1790 on have offered protection in order to encourage such publication. Publication makes a work much more widely available than would otherwise be the case, and that public availability is at the core of the interest in progress embodied in the Copyright Clause. In fact, for almost all of our legal history, Congress reserved federal copyright protection primarily for published works, and made publication the key operative act in obtaining such protection making clear the centrality of dissemination of works of authorship to its view of the progress of science and useful arts. Today, Congress could no doubt believe that where a work remains unpublished after its copyright has expired, some period of exclusivity would increase the likelihood that the work would eventually be published and that such publication would promote progress.

220. *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003); *see also* *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 117–18 (D.D.C. 2004) (holding that the originality requirement was not violated by a law granting copyright to foreign works that had fallen into the public domain).

221. 537 U.S. at 189.

(2) *History*

The *Eldred* Court, in examining the history of Congress's exercise of its copyright power, could point to what it viewed as "an unbroken congressional practice" of extending existing copyrights when revising copyright duration upward as evidence that the Copyright Clause included the power to extend existing copyrights.²²² History offers less explicit support for a publication right that would remove material from the public domain than it did for term extension.²²³ In *Eldred*, the Court could point to at least three undisputed instances, over a long period of time, in which Congress had taken precisely the action under challenge: it had extended the term of protection for existing, unexpired copyrights at the same time that it extended the term for subsequently created works. By contrast, an express publication right for public domain unpublished works would be without exact precedent in prior legislation. (In large part, of course, that is because the opportunity to enact such legislation has never previously arisen: until 2003, the entry of unpublished works into the public domain had essentially never occurred in the United States.)

Historical precedent for Congress granting rights in a work that has previously entered the public domain is less clear. But history does reveal congressional practices that may suggest that Congress's power does extend to granting rights in works that had previously entered the public domain. The first copyright act in 1790 granted protection to works that had been previously published, which may have included works unprotected by any copyright law or works in which any prior copyright protection had expired.²²⁴ To some extent, though, any federal protection for such works under the 1790 Act should perhaps be best viewed as unique given the transition between colonial, revolutionary, confederation, and federal systems that occurred in the preceding two decades.

The *Eldred* Court seemed to consider private legislation as relevant to the historical inquiry into congressional power, and Congress also enacted several private laws in the nineteenth century extending copyright protection beyond the ordinary term.²²⁵ Five nineteenth-century private laws fairly clearly provided protection to works that had previously entered the public

222. *Id.* at 200.

223. When Congress has extended the copyright term, it has always limited the extension to works whose copyrights had not yet expired and has not sought to remove material from the public domain by applying the extension retrospectively. Thus, at least in the term extension context, the unbroken practice has been not to remove material from the public domain.

224. Act of May 31, 1790, ch. 15, § 1 ("[F]rom and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the recording the title thereof in the clerk's office . . .").

225. These laws are described in more detail in Tyler Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 46-49 (2001).

domain.²²⁶ In three instances, in 1849, 1874, and 1898, Congress enacted private bills that provided copyright for works whose authors had failed to comply with the formalities then required to secure or renew copyright protection.²²⁷ In these cases, the work had under ordinary copyright principles entered the public domain due to noncompliance, but Congress's action allowed the author to recover exclusive ownership of the work. In two other laws, Congress provided copyrights for two works that had initially been published under the order of Congress, apparently without securing copyright protection for them upon initial publication; these acts were apparently designed to provide compensation to the authors' relatives.²²⁸ In each of these instances, Congress protected by copyright a work that had already entered the public domain under ordinary copyright law.²²⁹ While Congress acted only once in the nineteenth century, in 1831, to generally extend the term of copyright in works whose term had not yet expired,²³⁰ Congress acted several times to grant copyright in individual works that had passed into the public domain. While this latter historical practice had a narrower impact than the 1831 extension relevant in *Eldred*, it does evidence a congressional view that

226. Three other laws concerned *Rowlett's Tables of Discount or Interest*, by John Rowlett, which was apparently first registered for copyright protection in 1802. Congress granted two additional 14-year terms of protection for the work in 1828 and 1843. Act of May 24, 1828, ch. 145, 6 Stat. 389 (extending Rowlett's copyright for 14 years); see also Act of Mar. 3, 1843, ch. 140, 6 Stat. 897 (extending Rowlett's copyright for an additional 14 years). An 1830 act clarified the notice requirement imposed on Rowlett in the original 1828 extension. Act of Feb. 11, 1830, ch. 13, 6 Stat. 403. It is unclear whether the work's copyright had been renewed in 1816 and therefore whether the copyright had expired when Congress offered additional protection in 1828. The 1828 law does provide, however, that "it shall be lawful for any person or persons who may heretofore have published copies of [Rowlett's] book, or of parts thereof, to sell such as may have been heretofore published," suggesting that the book could lawfully have been published because it was in the public domain before the private act passed. Act of May 24, 1828, ch. 145, 6 Stat. 389. It is possible that the proviso refers to copies that had been printed and held for sale in anticipation of the expiration of the work's renewal copyright in 1830.

227. Act of Feb. 19, 1849, ch. 62, 9 Stat. 763 (granting relief to an author who originally filed his copyright in the wrong district); see Act of June 23, 1874, ch. 534, 18 Stat. 618 (granting relief to an author whose copyright registration included an incorrect title for his work); see also Act of Feb. 17, 1898, ch. 29, 30 Stat. 1396 (declaring an imperfect copyright valid).

228. Act of May 24, 1866, ch. 99, 14 Stat. 587 (providing copyright in William L. Herndon's *Exploration of the Valley of the Amazon* to Mrs. William L. Herndon); Act of Jan. 25, 1859, ch. 16, 11 Stat. 557 (providing copyright in Henry R. Schoolcraft's *History, Statistics, Condition, and Prospects of the Indian Tribes of the United States* to Mistress Henry R. Schoolcraft).

229. To the extent that patent practice is deemed relevant to the question, Justice Stevens's dissent in *Eldred* identified fifty-six instances in the nineteenth century in which Congress by private bill granted patent protection to an invention that had entered the public domain. *Eldred*, 537 U.S. at 235 (Stevens, J., dissenting).

230. As noted above, Congress also appears to have twice acted by private bill to extend the copyright in one particular work in which the term of protection may not have expired. See Ochoa, *supra* note 225, at 46–49.

the copyright power allowed restoration and that a work's public domain status was not irrevocable.²³¹

In the twentieth century, Congress acted much more broadly to provide copyright protection to works that had already entered the public domain.²³² In 1919 and 1941, Congress authorized the President to provide copyright protection to foreign works that had entered (or would enter) the public domain in the United States for failure (due to war conditions) to comply with required formalities, provided that the copyright owners did subsequently comply.²³³ And in 1993 and 1994, to implement U.S. obligations under NAFTA and the TRIPS Agreement, Congress enacted laws that provided copyright protection to works of foreign origin that had entered the public domain in the United States due to the copyright owner's earlier failure to comply with formalities.²³⁴ The current statute has thus *automatically* restored copyright protection to a great many works that were previously in the public domain in the United States, often for many years.²³⁵ And those public domain works were often being exploited here, as the statute recognizes in providing conditions for notice to, and grace periods for, parties who were using the works in reliance upon their public domain status.²³⁶ To the extent that congressional practice in the twentieth century bears on the determination of the meaning of the Copyright Clause, that practice may support the view that the clause sometimes empowers Congress to remove works from the public domain for a limited time.

The current statutory restoration provisions offer perhaps the least guidance on the historical inquiry relevant under *Eldred* because they are so recent. But those provisions have provided an avenue for judicial

231. Justice Stevens's dissent in *Eldred* makes clear that he would likely hold any grant of protection in a work that has entered the public domain as beyond Congress's copyright power. *Eldred*, 537 U.S. at 239–40 (Stevens, J., dissenting).

232. One twentieth-century private law, enacted in 1971, granted copyright protection in editions of Mary Baker Eddy's *Science and Health* that had already entered the public domain, but the law was held unconstitutional as a violation of the Establishment Clause. *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1154 (D.C. Cir. 1987).

233. Act of Sept. 25, 1941, ch. 421, 55 Stat. 732 (allowing the President to protect works by foreign nationals published abroad for the duration of the "present emergency"); Act of Dec. 18, 1919, ch. 11, 41 Stat. 368 (allowing the President to protect works by foreign nationals that had been published abroad during World War I).

234. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514(a), 108 Stat. 4809 (1994) (implementing TRIPS and restoring copyrights in all types of works); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 334, 107 Stat. 2057, 2115 (1993) (implementing NAFTA and restoring copyrights in motion pictures only). These provisions are codified at 17 U.S.C. § 104A (2000). For a detailed discussion of the scope and interpretation of Section 104A, see William Gable, *Restoration of Copyrights: Dueling Trolls and Other Oddities Under Section 104A of the Copyright Act*, 29 COLUM. J. L. & ARTS 181 (2005).

235. 17 U.S.C. § 104A.

236. *Id.* The 1919 and 1941 laws also provided relief to those who had used the works before copyright was restored. Act of Dec. 18, 1919, ch. 11, 41 Stat. at 368; *see also* Act of Sept. 25, 1941, ch. 421, 55 Stat. at 732.

interpretation of the scope of Congress's copyright power over works that have entered the public domain, because their constitutionality has been challenged in two recent cases.²³⁷ In both cases, courts have so far upheld the restorations as legitimate exercises of Congress's power. The district courts in both cases relied in large part on the historical evidence of the 1790 Act and the twentieth-century wartime acts.²³⁸ In *Luck's Music*, the D.C. Circuit relied primarily on the *Eldred* decision and the parallels between the arguments rejected in that case and the arguments advanced against the restoration acts.²³⁹ The court concluded that the challengers "are wrong that the [Copyright] Clause creates any categorical ban on Congress's removing works from the public domain."²⁴⁰ Essentially, the court concluded that the challengers "completely fail to adduce any substantive distinction between the imbalance (if it be that) in tacking 20 years onto a copyright term about to expire in (say) a year, and extending protection to material that has fallen into the public domain."²⁴¹ Because *Eldred* read the Copyright Clause to grant Congress the power to take the former step, the D.C. Circuit concluded that the Clause similarly empowers Congress to take the latter step.²⁴² To the extent these decisions hold that the Copyright Clause allows Congress to grant exclusive rights in works that have already entered the public domain, they could support Congress's power to grant a publication right.

It is important to recognize, though, that the historical precedents for granting exclusive rights in works that have entered the public domain differ in important ways from a publication right, and those differences may in some ways weaken, and in some ways strengthen, the support that Congress's historical practice lends to an interpretation that the Copyright Clause permits enactment of a publication right.

Virtually all of the previous restorations, whether by private bill, by wartime acts, or by amendments designed to comply with international obligations, have restored copyright to works that were in the public domain in the United States not through expiration of their ordinary maximum possible

237. *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1263 (D.C. Cir. 2005), *aff'g* *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004); *Golan v. Gonzalez*, No. CIV.01-B-1854(BNB), 2005 WL 914754, at *1 (D. Colo. Apr. 20, 2005). The district court's decision in *Golan* has apparently been appealed, but no appellate decision has yet been issued.

238. *Luck's Music*, 321 F. Supp. 2d at 113–16; *Golan*, 2005 WL 914754, at *5–11, 12–14. The *Luck's Music* court also rejected arguments that restoration would not promote the progress of science and that it was forbidden by the requirement that copyright extend only to original works. *Luck's Music*, 321 F. Supp. 2d at 117–18.

239. For example, the court noted the argument that copyright restoration would not provide any incentive to create with respect to the works in which protection was granted (since they had already been created before the copyright was restored). But the court read the *Eldred* decision to indicate that despite the lack of incentive, Congress *can* grant protection to works already produced, as it did in granting an additional 20 years of protection in the extension act approved in *Eldred*. *Luck's Music*, 407 F.3d at 1263–64.

240. *Id.* at 1263.

241. *Id.* at 1265.

242. *Id.*

copyright term, but rather for failure to comply with the formalities necessary to obtain an initial or renewal copyright. Thus, under the restoration acts, the works that copyright law retrieved from the public domain would enjoy at most a total copyright term that was no greater than they would have enjoyed if their owners had properly and timely complied with the required formalities.²⁴³ Under a publication right, however, an unpublished work would have enjoyed its full potential term under then-applicable copyright law, and then gain an additional term of protection.²⁴⁴ Thus, a court might conclude that the historical record demonstrates only that Congress's copyright power allows it to grant the ordinary term of copyright to works that have entered the public domain through what Congress deems to be excusable or justified failure to comply with required formalities, but that the power does not allow granting protection to a work that properly acquired and maintained federal copyright protection and entered the public domain through the normal process of expiration of such protection.

On the other hand, another way in which the publication right differs from all previous grants of copyright in public domain works might lead the Court to find a publication right constitutional even if it were to find, contrary to the lower court decisions so far, that the current statutory restoration provisions are outside the scope of Congress's power and are unsupported by the limited prior practice of private and wartime restorations. In all of the earlier instances of restoration, the works affected were in the public domain because they had been *published* (usually without accompanying fulfillment of the required formalities). As a result, removing the work from the public domain meant ending the public's right to use material that it in fact could have used (and in many cases was using), because copies had been offered to the public. Indeed, Congress's routine protection in past and current restoration provisions of those who had used works before the copyright was revived recognizes that restoration could interfere with the activities of people who were both legally entitled to use the work and practically able to do so.²⁴⁵

243. In fact, these works would likely have been protected in total for less than the maximum possible term of protection, since the restoration acts do not appear generally to have allowed copyright owners to "recoup" the time during which their works were in the public domain due to noncompliance with formalities; instead, they allowed the owners to enjoy the *remainder* of their ordinary term of protection.

244. Of course, it may be somewhat difficult to determine the baseline for computing an unpublished work's "full term" of ordinary protection. Before 1978, the full potential term would have been indefinite and potentially perpetual protection under common law copyright, plus a maximum term of 56 years of federal statutory protection. For a work that remained unpublished as of 2003, even a grant of a 25-year publication right would result in a much shorter term of total protection than was earlier available.

245. *See, e.g.*, 17 U.S.C. § 104A(c)–(d) (2000) (requiring publication or service of a notice of intent to enforce against reliance parties); Act of Feb. 19, 1849, ch. 62, 9 Stat. 763 (granting copyright protection to the author of an almanac but noting that the Act did not affect the rights of those who had previously printed, published, or sold the almanac); Act of May 24, 1828, ch. 145, 6

The publication right, however, would apply only to previously *unpublished* works. While these works are in the public domain as a legal matter, free for use without any permission, they are not necessarily in the public domain in the sense of actually being accessible for anyone to use. They generally exist in a single copy so that anyone who wished to use the work would need to obtain that copy, or access to it, and the person who owns the copy would generally be free to deny such access. To the extent that a publication right would keep the public from using a work after its copyright term expires, it will not necessarily restrict any use that would actually take place if the work remained technically in the public domain, since the work would not necessarily be available for anyone to use. The right would not generally interfere with any third-party activity undertaken in reliance on a work's public domain status, since by definition no one had engaged in any public exploitation of the work before its publication.²⁴⁶

Historical practice thus offers no precise precedent of Congress withdrawing material from the public domain in the way that a publication right would. But history does show Congressional actions that could support an interpretation of the Copyright Clause that would permit Congress to grant a publication right.

(3) *Judicial Precedent*

The Supreme Court has sometimes expressed concern about the constitutionality of laws that would allow the recapture of material from the public domain (though those expressions have not always involved copyrighted works). Most significantly, in *Graham v. John Deere Co.*,²⁴⁷ the Supreme Court, in discussing the scope of Congress's patent power, noted that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access

Stat. 389 (extending copyright protection to an author but exempting previously printed copies of the work from protection).

246. A publication right could, of course, interfere with the expectation that all of an author's works will be in the public domain 70 years after an author's death. But usually only someone with access to a copy of the work will be able to undertake any preparations to use the work in anticipation of the seventieth anniversary of the author's death, and a publication right that turns on lawful publication, and defines lawful as derived from lawful access to a copy of the work, would not interfere with that party's activity. In any event, the expectation that all of an author's works will expire 70 years after her death is not absolute, even in the absence of a publication right. This expectation seems weakest as to an author's works that have not been (and might never be) disclosed to the public. The expectation does not hold today for any author who published any work before 1978. In addition, any work that an author produces for hire will generally expire at a different time from her other works, as may any joint works of which she is a co-author. And where an author bases a work on some underlying work, that underlying work's copyright may often last for more than 70 years after the author's death and restrict what use can be made of the author's derivative work, even though it enters the public domain at that point. *See, e.g., Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979) (holding that a film that had entered the public domain, but which derived from a play still under statutory copyright, could not be exhibited without consent of the play's copyright holder).

247. 383 U.S. 1 (1966).

to materials already available.”²⁴⁸ Any challenge to a publication right might argue that *Graham* is equally applicable to the copyright context and thus bars Congress from granting exclusive rights in unpublished public domain works and thereby removing them from the public domain.

More recently, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,²⁴⁹ the Court interpreted Section 43(a) of the Lanham Act with a strong concern that rights against unfair competition not interfere with works of authorship in the public domain. The Court said that when a copyright expires, the right to copy the work, with or without attribution, passes to the public, such that imposing a right under unfair competition law against misattribution of such a work “would create a species of mutant copyright law that limits the public’s federal right to copy and to use expired copyrights.”²⁵⁰ And the Court concluded that “[t]o hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.”²⁵¹

The Supreme Court’s concerns about intrusion into the public domain, however, have all involved public domain material that is in fact publicly accessible.²⁵² With respect to copyright law, that makes perfect sense, since traditionally only published works have generally been in the public domain. Only with the new unpublished public domain has copyright protection expired in a substantial amount of material that has not been publicly disseminated. Because unpublished works have not been made available to the public, their new “public domain” status differs substantially from the status of publicly available public domain material that the Supreme Court has previously shown an interest in protecting against exclusive control. As a result, even if the Court were to decide that conferring copyright protection on previously published public domain works—as Congress did for foreign works in the 1990s—is unconstitutional, it might nonetheless decide that Congress could create a limited exclusive right in the first publisher of a previously unpublished public domain work.

The effect of granting a publication right in unpublished works would differ significantly from the effect of restoring copyright in published works. Such a right would not “restrict free access to materials already available”²⁵³

248. *Id.* at 6.

249. 539 U.S. 23 (2003).

250. *Id.* at 33 (internal quotations and citation omitted).

251. *Id.* at 37.

252. The cases quoted and cited by the *Dastar* Court on the public’s right to copy public domain material all involved items that had been sold to the public by the party seeking to prevent others from copying. See *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 25–26 (2001) (outdoor sign stands); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 144–45 (1989) (boat hulls); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 226 (1964) (pole lamps). And the material at issue in *Dastar* itself had been sold on videocassette to the public for some time before the defendant copied the work and offered it for sale. *Dastar*, 539 U.S. at 26.

253. *Graham*, 383 U.S. at 6.

or remove works from the public domain as traditionally understood as works legally and factually available for use. And, as noted above, it would not generally interfere with any activity undertaken in reliance on a work's public domain status.

In addition, a publication right would differ from the attribution right rejected in *Dastar*. A publication right, after all, would involve express legislation by Congress, while the *Dastar* Court was motivated in part by a desire not to interpret ambiguous language in the Lanham Act in a way that would significantly interfere with the public domain expressly created by the Copyright Act. To the extent that the *Dastar* decision was based on a view that Congress does not have the power to grant an attribution right along the lines of that contended for by the plaintiffs there, the Court seemed to rest that conclusion on the fact that such a right would interfere with the public's freedom to copy indefinitely, and thus be akin to "a species of perpetual . . . copyright." A 25-year publication right would obviously restrict use of previously public domain material for a much shorter time than would an indefinite and potentially perpetual trademark-based right to attribution.

In sum, while the text, history, and judicial precedents in no way definitively answer the question of whether the Copyright Clause gives Congress the power to remove a work from the public domain, the Court could arguably find such a power consistent with all three sources.²⁵⁴

c. Grant of Rights Not to the Author.—

(1) *Text*

The third likely objection to a publication right as beyond Congress's power stems from the Copyright Clause language allowing Congress to secure to "Authors . . . the exclusive Rights in their . . . Writings."²⁵⁵ A publication right would obviously inure not to an unpublished work's author, who will necessarily be long dead, but to someone who publishes the

254. By contrast, if Justice Breyer adheres to his dissenting views in *Eldred*, he would rather clearly find a publication right beyond Congress's power. In *Eldred* he rejected claims that the Sonny Bono Copyright Term Extension Act could be justified as providing incentives for republishing older works as "inconsistent with the basic purpose of the Copyright Clause." *Eldred*, 537 U.S. at 260 (Breyer, J., dissenting). The Clause, he wrote, "assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence." *Id.* This view, he wrote, "den[ies] Congress the Copyright Clause power to base its actions primarily upon [the] empirical possibility" that on occasion additional copyright protection might help resurrect a long-lost work. *Id.* A publication right might be distinguished from the perpetuation of the copyright that Justice Breyer directly addressed, since the right would be directed to encouraging *initial* publication of a work that has never before been disseminated, rather than to encouraging the republication of a work that was once published, but which has long since gone out of print. But Justice Breyer's position seems clear that any dissemination advantages that might accrue from exclusive control rather than public domain status are beyond Congress's power.

255. U.S. CONST. art. I, § 1, cl. 8.

author's work long after it was created. The Supreme Court has provided very little interpretation of the word "Author" in the Copyright Clause, beyond explaining that it means "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."²⁵⁶ The recipient of a publication right, though, would clearly not come within even the Court's broad reading of the term "Author."

(2) *History*

Eldred's command to look to history may, however, provide support for the publication right that the plain meaning of the word "Author" in the text of the Copyright Clause does not. Congress, after all, has often granted copyright protection to persons other than the actual human creator of a work, the person usually understood in the lay sense as the work's author, the person to whom the work owes its origin.²⁵⁷ From 1790 through 1977, federal copyright protection in a work of authorship was obtained not by the act of creating a work, but rather by complying with the statutorily prescribed formalities—principally by publishing the work with a proper copyright notice.²⁵⁸ Copyright acts from 1790 forward expressly contemplated that a person other than the author, having obtained the common law copyright from the author, could comply with the formalities and that that person, whom the statutes referred to as the "proprietor," would thereby receive the statutory copyright in her own name.²⁵⁹ Thus, for nearly 170 years, Congress exercised its Copyright Clause power by granting exclusive rights not directly to the author, but rather to someone—usually someone who published the work—who could trace a claim to those rights back through a chain of title to the author.

The history of renewal copyright from at least 1831 to 2005 provides another example of unquestioned congressional grants of exclusive rights under the Copyright Clause to persons other than an "Author."²⁶⁰ From 1790

256. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The Court has also indicated that Congress's inability to grant copyright to works that are not "original" stems in part from the Clause's language allowing Congress to protect only the work of "Authors." See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346–47 (1991). As noted above, the *Eldred* Court's approach to originality suggests that as long as the work was original when it was created, Congress can grant or extend rights in it, even though the work has already been created, and in a sense is no longer "original" at the time of the grant. See *supra* note 220 and accompanying text.

257. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) ("As a general rule, the author is the party who actually creates the work . . .").

258. Those formalities varied over time but typically required registration and deposit before publication, after publication, or both, as well as the publication of copies of the work with proper copyright notice.

259. See, e.g., *Patents, Trade-marks, and Copy-rights*, ch. 3, § 4952, 18 Stat. 945, 957 (1873) (repealed 1909); Act of July 8, 1870, ch. 230 § 86, 16 Stat. 198, 212 (repealed 1873) (stipulating that an author's "assigns" can acquire copyright); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (repealed 1870) (same); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831) (same).

260. The renewal provisions of the 1790 Act are ambiguous on this score. They required that a work's author or authors be alive at the end of the initial term in order for the copyright to be

on, when a work's initial copyright term expired, a second term of protection was in most cases available (upon compliance with renewal formalities). Starting in 1831, the statute specified that the renewal term vested in the author if she was then living. If the author was not alive when the time came to renew, however, the statute provided that the renewal copyright would vest in the author's surviving spouse and children.²⁶¹ This renewal copyright was not simply an extension of the time period of the initial copyright that inured to the benefit of whomever happened to own that copyright when the initial term expired. Instead, it was what courts came to describe as a "new estate"—a new grant by Congress of exclusive rights, separate from the initial copyright and unencumbered by any transfers of that initial copyright.²⁶² The exclusive rights in a work in its renewal term did not necessarily vest in the actual "Author" of the work, as a strict reading of the Copyright Clause would seem to require. Instead, they often vested by statute in the author's surviving family members or, under later acts, in the beneficiaries of the author's will or her estate.

Congress has thus engaged in a consistent practice of granting exclusive rights under the Copyright Clause not just directly to the author, as the text's express language might be read to dictate, but also in many cases to parties with some connection, direct or indirect, to the author. In the renewal context, the grantee's relationship with the author was often a familial one of marriage or parenthood. In many cases, though, the party obtaining an initial-term federal copyright up until 1978 was simply someone who could trace her interest in the work back to the author through a chain of title. The author might have expressly transferred the right to take out the federal copyright, though some courts took the position that the transfer of the author's original copy of her work—the manuscript of a song or story, for example, or the canvas on which a painting had been made—was *presumed* also to transfer to the recipient the right to obtain a copyright in the work.²⁶³

renewable, but provided that if that was the case and if the formalities were followed, the copyright "shall be continued to him or them, his or their executors, administrators or assigns" for the renewal term. Act of May 31, 1790, ch. 15, § 1. Whether this allowed the renewal term to be granted to someone other than an author is unclear from the text, and there are no cases on that issue.

261. Act of Feb. 3, 1831, ch. 16, § 2. The 1870 revision retained this provision. Act of July 8, 1870, ch. 230, §§ 88, 198, 212. In 1909, the statute was amended to provide that if the author left no surviving spouse or child when the time came to renew, the renewal term could vest in the author's executor or, in the absence of a will, her next of kin. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080. The 1976 act continued this provision for works published before 1978. 17 U.S.C. § 304(a) (1976 & Supp. I 1977) (current version at 17 U.S.C. § 304(a)(1)(C) (2000)).

262. *See, e.g.*, *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951) ("A copyright renewal creates a new estate, and the few cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright.").

263. *See* *Pushman v. N.Y. Graphic Soc'y, Inc.*, 39 N.E.2d 249, 251 (N.Y. 1942) ("[A]n artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting."). With respect to works of fine art, New York altered this presumption

If Congress were to grant a publication right to the first person to publish a previously unpublished public domain work, vesting that right in someone other than the author would arguably be only a somewhat more attenuated instance of the principles at work in these earlier instances of copyright grants to nonauthors. The party acquiring the publication right would do so by publishing the work, which would require possessing the copy in which the work is embodied (or obtaining permission from the party in possession of that copy). Because the manuscript originated with the author herself, the current possessor is at the end of a chain of title that begins with the author. That chain might be very short: the author herself may have conveyed copies of her unpublished works directly to an archive, which many years later itself publishes the work (and thereby claims the publication right).²⁶⁴ Or the chain might be very long, with the copy having changed hands many times before reaching its current possessor.²⁶⁵ But that, of course, could have been equally true in the case of any person who secured the copyright in any work first published before 1978—the copyright could well have initially vested in someone very far removed from the author through a long series of intermediate assignments and transfers.

While these historical precedents offer support for grants of protection to non-authors who can trace their rights back to authors, the Court might find a publication right distinguishable, and the historical practice thus less relevant. The owner of the copy of an unpublished public domain work, who would be able to claim the publication right by publishing, would generally be a person or institution farther removed from the actual author than were the usual renewal beneficiaries when renewal was available. And while the proprietor of a manuscript protected by common law copyright could obtain a statutory copyright by proper publication, such a proprietor was someone who had succeeded to the original author's common law copyright. By contrast, someone who possesses the original copy of an unpublished work may be able to trace ownership of the copy back to the author, but ownership of the copyright may well have been separately disposed of (prior to its expiration). The most common instance will involve letters. Generally, the

by statute in 1966. See Gard, *supra* note 26, at 702 & n.78. The 1976 Act also adopted a contrary position with respect to federal copyright. 17 U.S.C. § 202 (2000).

264. The author may have expressly transferred not only her copy of the work, but all rights and interests of any sort attaching thereto, or the transfer of the copy may have been silent as to anything beyond the ownership of the chattel. But, as noted above, that could also have occurred in pre-1978 situations in which the federal copyright was obtained by someone other than the author who complied with the statutory formalities. See *supra* note 260 and accompanying text.

265. Indeed, it may not be easy to determine the proper owner of copies of older unpublished works. See, e.g., *Chamberlain v. Feldman*, 89 N.E.2d 863, 864 (N.Y. 1949) (discussing conflicting findings in trial and appellate court over whether Mark Twain's manuscript of the story *A Murder, a Mystery and a Marriage* had ever been transferred by Twain); *Polygram Records, Inc. v. Legacy Entm't Group, LLC*, 205 S.W.3d 439, 441–46 (Tenn. Ct. App. 2006) (discussing ownership of acetate recordings of live performances of Hank Williams and The Drifting Cowboys made, and later discarded, by the radio station that broadcast the performances).

author of a letter is deemed to have transferred ownership of the physical embodiment of the letter to the recipient, but to have retained ownership in the literary (or other) works embodied in the letter.²⁶⁶ While the recipient may have donated the letter to an archive, the author may at death have disposed of all of her copyright interests, including those in the letter, to a literary executor. If the archive, by publishing the letter after its copyright expires, acquires a period of exclusive rights in the letter, the grant of rights by Congress is arguably to a party that cannot trace its interest back through any chain of title to the author's *copyright* interest. Thus, while history offers substantial evidence of congressional grants under the Copyright Clause to non-authors, the Court might nonetheless conclude that the beneficiaries of a publication right are too far removed from the authors of the covered works to justify the right by reference to historical practice.

In sum, even though a publication right would grant exclusive rights in a work of authorship to someone other than the work's author, it is possible, though by no means certain, that the Court would conclude that such a grant would be within the scope of Congress's power under the Copyright Clause, given the historical practice of vesting copyrights themselves in persons other than actual "Authors."²⁶⁷

d. Would a Publication Right Be a Rational Exercise of Power?— If the Copyright Clause includes the power to grant a limited term of exclusivity to the first publisher of a previously unpublished public domain work, then it is likely that a statute granting a publication right along the lines of the EU right, or perhaps more narrowly, would be a rational exercise of that power. As discussed below, it is certainly possible that in some instances, the costs to publish a previously unpublished work might exceed the return to be made if the publisher faces competitive copyists, so that publishers would choose not to make the work available to the public. In such instances, granting a limited exclusive right would encourage publication and thereby further the Copyright Clause goal of promoting progress.

Indeed, the publication right would likely be a more rational means of encouraging the publication of previously private works than was the pre-1978 combination of indefinite protection for unpublished works and a post-publication term of copyright. As discussed above, copyright in old unpublished works can hinder their initial publication because of the difficulty of

266. *E.g.*, *Salinger v. Random House, Inc.*, 811 F.2d 90, 94–95 (2d Cir. 1987); *Baker v. Libbie*, 97 N.E. 109, 111–12 (Mass. 1912).

267. Again, Justice Breyer's *Eldred* dissent indicates that he would likely view a publication right that vested in a *publisher* or *copy owner* (and not an author) as beyond the scope of the copyright power. *Eldred v. Ashcroft*, 537 U.S. 186, 261 (2003) (Breyer, J., dissenting) (suggesting that a reading of the Copyright Clause as requiring public domain status, rather than exclusive control, as a means of increasing dissemination of older existing works finds "textual support in the word 'Authors,' which is difficult to reconcile with a rationale that rests entirely upon incentives given to publishers perhaps long after the death of the work's creator").

identifying and locating the copyright owner to obtain permission. Indeed, these difficulties convinced Congress not to extend § 303's minimum term as part of the Sonny Bono Copyright Term Extension Act.²⁶⁸ The publication right, though, would impose no such hindrance, at least to the extent that the right can be acquired by lawfully publishing the work and that lawful publication merely requires that the publisher obtained access to the copy of the work lawfully (not, for example, by theft or fraud) from the owner of that copy. One would not need to identify and locate any copyright owners in order to publish a public domain unpublished work, or to obtain the publication right in the work. Instead, one would generally only need to deal with the lawful owner of the *copy* of the work—the party with whom a publisher would need to deal even in the absence of a publication right.

In sum, while the pending challenges to the 1994 restoration of copyright in foreign works may provide more insight into whether the Copyright Clause gives Congress the authority to grant copyright-like protection to works that have already entered the public domain, a publication right in previously unpublished public domain works might very well be a rational exercise by Congress of authority that it enjoys under the Copyright Clause.

3. *Should A Publication Right Be Granted?*—For a publisher, the potential downside to the expiration of copyright in unpublished works is that the publisher will not enjoy copyright protection when it publishes such a work. Competitors and others will be free to copy and use the newly published work without the publisher's permission. Publishers might therefore be reluctant to invest in publishing and marketing a previously unpublished public domain work for fear that if the work becomes popular, others will release competing editions at a lower price and reduce the publisher's ability to recoup its investment.²⁶⁹ This, of course, resembles the classic public goods problem that copyright is designed to address. Copyright will no longer be available to protect the publisher's investment, but a publication right, like that adopted in the European Union, would offer such protection. The publisher's problem, however, may be much less acute for unpublished public domain works than for works of authorship generally. This section first considers the costs facing someone who wishes to disseminate a public

268. See H.R. REP. NO. 105-452, at 7 (1998) (“These older works by definition have not been subject to commercial exploitation, so that the benefit from extending the term of protection for this category of works do not outweigh the detriments from limiting public access to these often historically significant works.”); S. REP. NO. 104-315, at 14–15 (1996) (explaining amendment of bill to eliminate original 10-year extension of § 303(a)'s minimum term).

269. Indeed, this concern was expressed when the Copyright Office first proposed giving unpublished works a definite term of protection. See, e.g., FURTHER DISCUSSIONS, *supra* note 17, at 27 (remarks of John Schulman) (noting that some unpublished works by authors who died decades earlier “will never be published because the term of protection [under the early version of what became § 303] will be too short”); *id.* at 28 (remarks of John Schulman) (asking, “[W]ho is going to publish [an unpublished] work when there is only one year to go on the copyright?”).

domain work and then considers whether additional legal protection such as a publication right is needed to enable disseminators to recover those costs.

a. Costs of Dissemination.—Copyright itself is, of course, designed to keep third parties from free riding, for a limited time, on at least two separate costs involved in disseminating works of authorship: the author's investment in creating the work and the publisher's investment in making and selling copies of the work. For unpublished public domain works, publisher may need to recoup these same costs and possibly two additional investments: investments in preserving a work and in discovering it.

As to the cost of creation, any unpublished public domain work will have been created a very long time ago by an author who is now dead. While the resources that the author invested in creating the work may therefore often be irrelevant in deciding whether to publish the work today, in some cases a publisher will in fact still essentially have to pay indirectly to cover the long-dead author's costs of creation, by paying to acquire the copy of the work. Although the author is dead, her expectation of a return on her investment will have passed together with her copy of the work, by inter vivos transfer, will, or intestacy. This will be most clear where the author (or her heirs) sold the copy, as the sale price will likely have reflected the return that the parties thought could be earned on the investment in creating the work. Thus, when a publisher pays the owner of the copy of a work for access to the copy in order to publish the work, the publisher often is in effect paying for the author's creation of the work.

A publisher may also need to earn enough revenue from the work's publication to compensate intermediate activity between its creation and its publication. An archive or other institution may have invested in acquiring, cataloging, and preserving the work so that it continues to exist in order to be published. For works such as motion pictures on early nitrate film, an archive's preservation and storage costs might be relatively high. Similarly, a researcher may have invested in searching through large amounts of unpublished material in order to discover an unpublished work worthy of publication. In at least some instances, the archive and the researcher might seek compensation for their investments through the returns from publishing the work.

Finally, actually publishing the work will involve costs. In the case of print publication, these potentially include editing and manuscript preparation, typesetting, printing, binding, shipping, and marketing. Print publication, though, may not be the most relevant type to consider. After all, demand for the unpublished authorship of most people who died more than 70 years ago will not, standing alone, justify traditional print publication. For the vast majority of such works there will of course be no market even for a single commercial publication of the work, let alone competing publications: the letters, diaries, sketches, paintings, and ditties of ordinary people dead for over 70 years will almost surely be of little interest on their

own. A much smaller audience, though, might well be interested in that material, particularly for scholarly or educational purposes, and online dissemination, with potentially lower costs than traditional publication, might make it cost effective to meet that smaller demand.²⁷⁰ For example, an archive that holds wartime letters and journals of many Civil War soldiers might not be able to afford simply to publish its collection in print, given the costs and the likely small demand, but the audience might be sufficient to justify posting its collection online.

The Internet may thus facilitate disseminating unpublished works to the much smaller audience for such works than traditional publication would allow, but Internet dissemination is not costless. Electronic versions of the works must be prepared, and the party posting the works may bear costs to acquire and maintain the computer servers and online access necessary for making the material available.²⁷¹ The online publisher might therefore wish to prevent others from copying the previously unpublished material that it posts online so that it can seek to earn revenue from the posted material to cover its costs; it might do so by charging for access to the site, or by displaying advertisements on the site.

The ability of others to freely copy a previously unpublished public domain work could diminish the publisher's returns and therefore the publisher's ability to cover any costs it might have for the creation, preservation, discovery, or publication of the work. This is the concern that publishers would put forward in seeking a publication right.²⁷²

b. Is Protection Needed to Recoup These Costs?— There are good reasons to think that additional legal protection against competitive copying is not generally necessary to encourage the publication of unpublished public domain works. First, the nature of these works suggests that in many instances the first publisher will not be seeking significant, if any, compensation for its costs, at least not beyond the marginal cost of producing each copy. In many instances, after all, the party disseminating the work will

270. See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, at 171, 173 (describing how online retailers' reduced storage and production costs have increased the availability of nonmainstream entertainment products).

271. Distributed computing can also reduce the costs of disseminating materials online: a publisher need not bear the expense of maintaining its own Web site at which the material is available, but could instead release the material over peer-to-peer networks, harnessing the computer resources of those interested in the material for its dissemination. Educational institutions have already pursued this course with instructional materials, and the BBC has contemplated it for an archive of its television holdings for noncommercial use. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1382–83 (2004) (citing examples).

272. While publishers would also benefit from unpublished works entering the public domain because of the resulting reduced clearance costs for some material that they publish, they might well be more concerned about concentrated potential losses from first publishing a public domain work than about distributed potential gains from easier copyright clearance.

be a publicly supported or not-for-profit institution—a library, archive, historical society, university—that generally makes much information available without charging for it and relies on other sources of financial support for this work. Many of these entities arguably do not need the incentive of new protection to disseminate unpublished public domain material, and indeed might decline to take advantage of such protection if it were available, preferring instead to allow the widest possible dissemination of the material. For example, the New York Public Library has recently made a database of over 275,000 images digitized from its collections, primarily images in the public domain, available online at no charge for personal, research, and study uses, as part of the library’s “traditional mission . . . to select, collect, preserve and make accessible ‘the accumulated wisdom of the world.’”²⁷³ The creation of this digital image database was supported through grants.²⁷⁴

In other instances, though, a prospective publisher of an unpublished public domain work will indeed seek to earn a commercial return on the publication, and will therefore be concerned about a potential competitor’s ability to copy the published work and free ride on the first publisher’s costs. As an initial matter, it is important to note that the first publisher’s relevant costs here are only those which a competitive copier would not herself need to incur, since those are the only costs on which a copier could conceivably free ride.²⁷⁵ For a printed publication, for example, any copying competitor would have to incur costs for printing, binding, and shipping copies of the work, and these costs would limit the extent to which the copier could undersell the first publisher.²⁷⁶ But in some circumstances the copier might indeed be able to free ride on some of the first publisher’s investments, such as the expense of acquiring the work, preparing it for publication (by, for example,

273. N.Y. Pub. Library Digital Gallery, About NYPL Digital Gallery, <http://digitalgallery.nypl.org/nypldigital/dgabout.cfm>; accord Sarah Boxer, *The Public Library Opens a Web Gallery of Images*, N.Y. TIMES, Mar. 3, 2005, at E1.

274. See Dan Carnevale, *New York Public Library Opens Vast, Free Database of Photos and Manuscripts*, CHRON. HIGHER EDUC., Mar. 11, 2005, at 33 (noting \$7 million grant from Atlantic Philanthropies).

275. See generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031 (2005).

276. Similarly, for online dissemination, a copier faces the same expenses as the first publisher for the Web server space and Internet access necessary to disseminate the work. In either medium, a competing copier might have lower costs than the first publisher for these inputs, but if the copier’s costs are lower because the copier is more efficient, then the copier’s cost advantage is competitive, not a result of free riding.

Technology may reduce many of these costs for both the first and any subsequent publisher. For example, a publisher might reduce shipping costs by selling through online retailers rather than through physical outlets and might reduce printing, storage, and remaindering costs by producing copies only as needed using print-on-demand technologies. See, e.g., JASON EPSTEIN, *BOOK BUSINESS: PUBLISHING PAST, PRESENT, AND FUTURE* 28–29 (2001) (discussing print-on-demand machines); Bob Tedeschi, *E-Commerce Report*, N.Y. TIMES, Apr. 11, 2005, at C8 (reporting that BookSurge “has created proprietary software programs that automate the printing process to the point where even single-copy print orders are profitable, even though the book’s final price is comparable to that of books produced through traditional means”).

typesetting for print publication or scanning for online posting), and marketing it.

If the publisher of a public domain work has had to pay for access to the work, a competing publisher, in the absence of copyright protection, would not have to incur this cost, creating an opportunity for free riding. In many instances, though, the first publisher will not have to pay anything to the author's successors, or to those who preserved or discovered an unpublished public domain work. Often no author's descendant or transferee is seeking payment for access to the copy of the work. Many such copies, for example, have been donated to an archive willing to preserve them and make them available, without any demand for compensation for the transfer of the copies or subsequent use of the works. In addition, many archives and researchers will not seek direct compensation from a publisher for their investments in collecting, preserving, or discovering unpublished works. The archive may have other sources of funding (public or private) to support a mission of making its holdings as widely available as possible, and the researcher often undertakes her work as part of her academic employment for which she is already paid. As a result, in many instances, publishers will face costs only to disseminate the work, and not to acquire it.

As for the costs of preparing a work for publication, technology may lower those costs so that the publisher will only need to earn a lower return on its investment. For example, the archive that wishes to post its collection of Civil War letters will need to prepare electronic versions, but the cost of scanning documents is likely to be relatively low. Indeed, many archives will create electronic copies of their collections for preservation purposes, and those copies might easily be used for dissemination as well at little or no additional cost. Transcribing handwritten documents would be more time-consuming and costly, but technology may also dramatically lower costs here by allowing for distributed production. As Project Gutenberg²⁷⁷ and Wikipedia²⁷⁸ have demonstrated, the Internet allows small groups of widely scattered people to aggregate small contributions of time and labor to the production of a much larger product.²⁷⁹ An archive could post scanned images of handwritten Civil War letters and journals and encourage interested viewers to transcribe them into typed text and submit the text for posting.

While technology and the nature of the demand for the works at issue can help reduce a publisher's costs, it will generally not eliminate them. But even for those costs that remain—and which a copier would not also have to incur—copyright law, while not protecting the publisher directly against the copying of the work, may still substantially reduce the degree to which a

277. Project Gutenberg, <http://www.gutenberg.org>.

278. Wikipedia, <http://en.wikipedia.org>.

279. See, e.g., Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 *YALE L.J.* 369, 381 (2002) (discussing "production by persons who interact and collaborate without being organized on either a market-based or managerial/hierarchical model").

competitive copier can free ride on the first publisher's investments. In most instances a publisher will be able to complicate the task of a competitive copier by publishing an "enhanced" version of the public domain work and using copyright law to protect the new and original enhanced content. For example, letters and journals of Civil War or World War I soldiers will rarely be sufficiently interesting to publish on their own. Rather, a publisher is far more likely to publish excerpts and quotations from them as an integral part of an edited collection, a scholarly article or monograph, or a popular history or biography. Copyright law will protect the value added in the selection and arrangement or transformation of the materials, and in the criticism and commentary on them. So a copier could freely use the quoted material, but that is unlikely to have much independent value. Even for works that do have commercial value standing alone—such as the newly discovered unpublished Mark Twain play or a novel such as *The Bondwoman's Narrative*—the publisher is likely to include new, copyrightable material in its edition. This is, of course, what many publishers have long done with *published* public domain works, such as literary classics, which are often issued in new translations, or with new scholarly introductions or supplementary material such as explanatory footnotes, glossaries, appendices, and so forth.²⁸⁰

Publishing an enhanced version of a public domain work hinders competitive copying by driving up costs in at least two ways. First, the copier must identify and remove the copyrightable new material from the first publisher's edition, which in the case of material such as footnotes and illustrations, which are integrated with the text, will at least prevent the copier from merely directly reproducing the first publisher's edition and will probably require the copier to go to the expense of her own transcription or typesetting. This will increase the copier's direct costs, and it may also lengthen the lead-time period in which the first publisher is the exclusive seller of copies of the work. Second, while some potential customers will prefer a cheaper, unenhanced version, many will no doubt be willing to pay a small premium for enhancements of the type included in the first publisher's version, so the copier will face a smaller potential market if it sells only an unenhanced version. As a result, the copier can either sell an unenhanced version, and forego those customers who want the enhancements, or it can compete with the first publisher by creating its own enhancements, and the cost of doing so will reduce the amount by which the copier can undersell the first publisher.

280. See, e.g., Bill Goldstein, *Publishers Give Classics a Makeover*, N.Y. TIMES, Feb. 10, 2003, at C9 (describing how publishers compete when designing and marketing literary works that are in the public domain); Bridget Kinsella, *The Classics Are Coming*, PUBLISHERS WKLY., Aug. 21, 2000, at 25 (noting Modern Library's launch of new series of classics with new introductions by contemporary authors); Judith Rosen, *Classic Strategy, Classic Sales*, PUBLISHERS WKLY., Oct. 6, 2003, at 16 (describing how publishers are overhauling past editions of classic publications to increase sales).

Copyright for value-added versions of unpublished public domain works will also often protect online disseminators. In many cases, the value of such online material resides not in particular individual items but in the collection of those items. As long as an archive's selection and arrangement of the material it posts is original and minimally creative, copyright would prevent others from copying that selection and arrangement, allowing the archive to prevent a third party from merely copying and reposting the entire collection of material (as opposed to any individual item). And in many cases, online publication, like print publication, will include independently copyrightable enhancements that a competitor may not freely copy.

Even in the absence of any legal rights to exclude copiers, publishers may enjoy certain practical protections against them, such as lead time, access to the original of the work, and free publicity. The first publisher will often enjoy a significant lead time before competing copies appear.²⁸¹ For many unpublished public domain works, such lead time may be all the protection a publisher needs, as there may be sufficient demand for a work to justify publishing it once but not so much demand as to attract copiers to produce competing editions. By being first, the initial publisher can so satisfy the existing demand that competitors will be unlikely to enter the market with competing copies. Even where there is substantial demand for a work, being first will provide a publisher with an opportunity to be alone in the market and to earn revenues that could pay for any costs that first publisher might face but that a competitor would not. And in the case of truly commercially valuable works, such as a previously unknown play by Shakespeare, the first-mover advantage will extend to a number of markets. For example, prior to publishing Shakespeare's play in print, the initial publisher can sell an advance copy of the text to a theatrical producer, an audiobook producer, and a film studio so that each can produce its own stage, audio, or film version earlier than any of its competitors in those markets, who would have to wait for the print publication in order to produce competing versions.

Having exclusive access to the original copy of a work will in some instances give a first publisher an advantage over competitors even after the work is published. Where a work is purely textual, competitors can easily copy it to produce their own edition, but that will not always be the case where the work is, for example, visual. Take the example of a previously unpublished painting, which the first publisher photographs from the original and distributes in print as a poster and as part of a coffee table book. If a competitor that wishes to produce its own poster or book cannot obtain

281. The discussion assumes that competing publishers cannot get access to the unpublished work before the first publisher disseminates it. This would no doubt be the case where the owner of the copy of the work charges for access to it, as a publisher would presumably pay for *exclusive* access. The publisher would enjoy no lead-time advantage where the work is in a publicly open archive without any restrictions on access, but of course in that situation a publisher would also not face any costs of acquiring the work that a competitor would not face.

access to the original painting, it will have to reproduce the painting from the first publisher's printed version, and inevitably will face some degradation in quality, making its version less competitive against the first publisher's.²⁸²

The first publisher's marketing expenses might seem to be the investment most susceptible to free riding by a competitor. If the first publisher spends money to develop public awareness of, and stimulate demand for, the newly published work, a competitor who sells her own copies of the work can benefit from that awareness and demand to the detriment of the first publisher, without paying for her own marketing.²⁸³ Even here, however, the free riding problem may not be as great in practical terms as it might seem. If an old unpublished work has independent commercial value, its discovery and publication is likely to be a newsworthy event that will result in a good deal of free publicity for the first publisher. For example, the discovery of a previously unknown Shakespeare play, or a draft alternative ending to *Pride and Prejudice*, would certainly attract significant media attention. This would reduce the amount of money the first publisher would need to spend to create public awareness and demand, thereby reducing the scope of any free riding by competing copiers. Where the work itself is not so noteworthy, the publisher, as discussed above, is likely to produce an enhanced edition of the work, and the publisher's marketing expenses will promote that particular version. Since a competitor cannot copy the first publisher's enhancements, it will only partially be able to free ride on any demand created by the first publisher's marketing, since its competing copy will not be a perfect substitute.

Overall, then, considering the potential costs of first publishing a previously unpublished public domain work, as well as the existing limitations on the extent to which competitors will be able to free ride on the first publisher's expenditure of those costs, the need for additional protection for first publishers seems relatively weak.

4. *Disadvantages of Protection.*—Granting exclusive rights to the first publisher of a previously unpublished public domain work would also have significant costs. The most obvious disadvantage of protection would be increased transaction costs for potential users of older unpublished works. The current life-plus term, together with its presumptions about an author's date of death, makes it relatively simple to determine whether an unpublished work is in the public domain. In most cases, one need only determine whether the author has been dead for 70 years (or when the work was

282. Of course, if a previously unpublished work is made available in digital format, making copies may not produce any degradation in quality.

283. Copyright law to some extent allows third parties to free ride on a first publisher's marketing efforts for copyrighted works. For example, if a copyright owner's marketing of a book about a teenage wizard learning magic and fighting evil creates demand for additional books and movies on that theme, other publishers can free ride on that demand by supplying works that elaborate the same (uncopyrightable) idea in their own expression.

created) and whether the work was never published before 2003.²⁸⁴ The publication right would further complicate such determinations: even if a work meets those criteria and therefore has entered the public domain, it could subsequently have been published and therefore currently be protected against use by the publication right. An apparently unpublished work's apparent public domain status under the ordinary rules could not be relied upon in deciding whether to use the work, and instead a user would have to investigate whether the work had been published any time in the previous 25 years (assuming the U.S. publication right followed the European term). One of the main benefits described above of the unpublished public domain—and indeed of the life-plus term system generally—would thus be diminished, and the increased costs of clearing rights in older works would no doubt keep some uses of those works from being made.

Another disadvantage of the publication right is that it may lead copyright owners to delay the first publication of a work that is near the end of its copyright term. One who owns the copyright in a work written by an author who died 60 years ago would today have an incentive to publish the work promptly and enjoy at least 10 years of exclusivity in the work. But if a 25-year publication right is available, the owner might choose to wait 10 years until the copyright expires, then publish the work and enjoy 25 years of exclusivity.²⁸⁵

A publication right will also involve administrative costs. In addition to any costs related to any formalities that might be required for protection, as discussed below, there will be litigation costs for administering the system. Given that a publication right would be an entirely new feature of U.S. copyright law, it is likely that any statutory grant of such a right will raise numerous questions that will have to be decided by judicial interpretation and possible amendments to the statute. Indeed, commentators have already raised substantial questions about the provisions of the United Kingdom's implementation of the publication right in its law.²⁸⁶

In addition, adopting a publication right will not substantially increase international harmonization, for at least two reasons. First, the publication right applies to works that have entered the public domain, but substantial international disharmony already exists as to when a work enters the public domain. Even in the simplest case of a literary work by a single identifiable human author, the term of protection varies widely. In some countries the

284. If the work is one made for hire, then the user will need to determine when the work was created, rather than when the author died.

285. See 1 COPINGER AND SKONE JAMES, *supra* note 113, § 17-34, at 914; LADDIE ET AL., *supra* note 100, § 11.36, at 526; see also FURTHER DISCUSSIONS, *supra* note 17, at 28 (remarks of John Schulman) (asking, "Who is going to publish a[n unpublished] work when there is only one year to go on the copyright?").

286. See, e.g., LADDIE ET AL., *supra* note 100, § 11.46, at 531 (concluding that the United Kingdom's implementation of the publication right is "defective and invalid on several points").

copyright lasts for life plus 50 years (as required by Berne and TRIPS),²⁸⁷ in some for life plus 70 years,²⁸⁸ in some for life plus 100 years,²⁸⁹ and in at least Australia, as noted above, for as long as the work is unpublished.²⁹⁰ And for many categories of works, including sound recordings, films, photographs, and works made for hire, the discrepancies in term are even more substantial.²⁹¹ Second, even for works that are broadly or universally in the public domain, a U.S. publication right could offer protection identical to that in the European Union, but it would take U.S. law out of harmony with other countries that offer no protection for works first published after the ordinary copyright term expires (including important English-speaking markets such as Canada) and would not create harmony with those that offer a longer term of protection for such works. The lack of any standard in international copyright law for protecting such works makes it unlikely that any uniformity will be achieved in the near future with respect to such protection, so that any change in U.S. law will not meaningfully advance international harmonization of term of protection for unpublished public domain works.

5. *Properly Limiting Any U.S. Publication Right.*— The Supreme Court may well determine that Congress has the power to grant anyone who first publishes a previously unpublished public domain work a limited term of exclusive copyright-like rights in that work.²⁹² But the case for granting a publication right seems quite weak, suggesting that Congress should not do so and should instead continue to allow anyone to use an unpublished work once it enters the public domain. If Congress were to grant such a right,

287. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 (1994); Berne Convention for the Protection of Literary and Artistic Works, art. 7, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Copyright Act, 1997 S.C., ch. 24, § 6 (Can.) (providing basic term of copyright of author's life plus 50 years).

288. *See, e.g.*, Council Directive 93/98, *supra* note 114, art. 1(1), at 11 (directing that copyright length in the European Union shall be for the life of the author plus 70 years).

289. *See, e.g.*, Ley Federal de Derecho de Autor [L.F.D.A.][Copyright Law], as amended, Diario Oficial de la Federación [D.O.], art. 29, 24 de Diciembre de 1996 (Mex.) ((providing for copyright term of author's life plus 100 years).

290. *See supra* note 104.

291. *See, e.g.*, Reese, *supra* note 215, at 22 (2004) (comparing the duration of U.S. and European copyright protections for various types of works).

292. A different approach that Congress might adopt would track to some degree a claim for misappropriation. The law could, instead of providing a publisher with the strong exclusive rights of copyright law, protect a publisher only in cases in which free riding by a competitive copier reduces the return on publishing an unpublished work so much as to significantly threaten the incentive to publish. *See generally* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997). Alternatively, Congress might consider granting limited rights in particular typographical arrangements of public domain works, as the United Kingdom and other commonwealth nations have done.

though, given the at best “uneasy case” for it,²⁹³ the statute should carefully circumscribe the right to insure that it goes no further than necessary to address the potential free rider problem and to limit the disadvantages that it will create.

As an initial matter, the right should be available only when the work at issue has never before been published *or* publicly performed or publicly displayed. Because of the narrow traditional definition of publication discussed above, many works may have been commercially exploited by performance or exhibition without ever technically having been published. Because the owners of such works have already taken advantage of (common law) copyright law’s exclusivity to attempt to earn revenue on those works, the case for allowing them to use the publication right to again enjoy a period of commercial exclusivity is particularly weak.²⁹⁴

Even for those works that have never been publicly disclosed, the right should be limited. Most importantly, the right should not arise automatically upon publication, since as discussed above, many of those who engage in such publication will not wish to have any exclusive rights in the work that could impede its further dissemination. Instead, those who want the protection of the publication right should have to affirmatively act to secure it (just as one had to affirmatively act to secure copyright protection in the United States for almost 200 years). Those who seek a publication right should be required to register their claim of protection with the Copyright Office within a short period after publication and should be required to provide notice of their claim of protection whenever copies of the work are distributed or displayed.²⁹⁵ These registration and notice requirements would ease somewhat the transaction costs imposed by the publication right, particularly if the registrations are fully searchable on the Copyright Office Web site (as copyright registrations are today).

A publication right claimant should also be required to deposit with the Copyright Office not only a copy of the work as published, but also a copy of the work as originally created by the author, if the claimant is publishing an enhanced version of any kind. This will allow others to use the public domain work itself once the publication right expires without having to engage in difficult determinations about which elements of the work are the original

293. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 350–51 (1970) (concluding that the general case for copyright protection is weak and arguing against its extension).

294. This is consistent with the EU’s directive, which grants the publication right only when someone “for the *first time* lawfully publishes or lawfully communicates to the public” a work. Council Directive 93/98, *supra* note 114, art. 4, at 12 (emphasis added).

295. Such registration provisions could be modeled on current U.S. copyright law but made mandatory, and the notice provisions could be modeled on those that existed in the 1976 Act as originally adopted. These requirements should apply to all claimants of the publication right, whether U.S. or foreign nationals, since the Berne Convention and the TRIPS Agreement would not forbid the imposition of such formalities as a condition for enjoying the protection of the right.

author's (that reenter the public domain after the publication right expires) and which elements are enhancements created by someone other than the author (that remain protected by copyright even after the publication right expires).

The length of the publication right would also need to be considered. While harmony with the European Directive would suggest a term of 25 years, competitive necessity might not justify so long a term. To the extent that many published works go "out of print" in a much shorter period, publishers likely decide whether to publish a work based on the projected returns in that much shorter period, which would suggest that a shorter term, perhaps of 10 years, might sufficiently protect first publishers against competitive copiers.

Finally, the scope of the publication right's exclusivity should be limited to match the asserted justification for the right, which is to prevent competitive copiers from underselling the first publisher and thereby discouraging initial publication of public domain works. Accordingly, the publication right might prevent third parties only from reproducing and distributing copies or phonorecords substantially identical to those issued by the first publisher, and perhaps from transmitting the work online. The case for protection does not appear to justify a broader right equivalent to copyright that would allow the publisher to exclude others generally from publicly performing the work or creating derivative works based on it. The symphony that wishes to perform an unpublished work by George Gershwin (which would enter the public domain in 2008), the theater troupe that wants to stage a previously unknown Shakespeare play, and the film studio that wishes to make a film of the Shakespeare play will all have to invest significant authorship of their own and will not simply be free riding on the first publisher's investment in producing and distributing copies of the work. While allowing the first publisher to extract payment from those who wish to perform or prepare derivative works based on the newly published work would in some instances no doubt increase the first publisher's revenues, it is not at all clear that this increase is necessary to induce the first publication. If it is not, then leaving others free to make such uses without the copyright owner's permission would often allow the public to enjoy more performances and adaptations of the work sooner, and at a lower cost, than would be the case if the publication right conferred all of the same exclusive rights as copyright.

V. Conclusion

Bringing unpublished works into the federal copyright system of limited terms is one of the few ways in which Congress has contracted the scope of copyright law in recent years. Doing so has already placed a substantial amount of material in the public domain, lowering the cost of making that material available to the public and of using it in the creation of new works of authorship. Perhaps more significantly, it has changed the nature of the

public domain by, for the first time, ending copyright's legal restrictions on works that have not been publicly disclosed. The change may well mean that older unpublished works will be more widely used, but it may also lead to attempts to use alternative mechanisms to maintain some control over them. Owners of copies of unpublished public domain works may well be able to continue to exercise control over whether to publish those works, but allowing control over such works once published appears unnecessary to induce publication or to increase cross-border uniformity of copyright law.