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Ameliorating the Effects of Term Extension (c) 2003

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Ameliorating the Effects of Term Extension © 2003

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On January 15, 2003, the U.S. Supreme Court ended speculation and debate about the constitutionality of the 1998 expansion of the term of copyright to existing works. In *Eldred v. Ashcroft*,¹ the Court upheld Congressional authority to determine the “limited times” for which copyright may be available as provided in the U.S. Constitution and thus upheld the change in copyright duration from life plus fifty to life plus seventy. Just because the span of years for protection was expanded and applied retroactively, does not mean that it ceases to meet the limited times restriction contained in the Constitution. There is little way to view this decision as other than a major setback for the library and scholarly community.

This article discusses the *Eldred* decision briefly and then raises some potential ways of ameliorating the effects

of term extension, especially for digital works and for analog works that libraries want to digitize. For example, the **Copyright Term Extension Act (CTEA)** added a new provision to the library exemptions that will help libraries for works still under copyright but for which the author has been deceased for fifty years or more. Additionally, there are a number of efforts

underway to create open source archives into which authors will deposit digital copies of their work, which then may be freely used by others. Finally, there is a legislative proposal that would require copyright holders to file a form and pay a nominal \$1 fee in order to maintain the copyright in the work beyond fifty years after the author's death.

The *Eldred* Decision

The **Sonny Bono Copyright Term Extension Act (CTEA)**² was signed into law on October 27, 1998, and it extended the term of copyright from life of the author plus fifty years to life plus seventy years. *Eldred* did not challenge the basic twenty-year term extension for newly created works, but rather the retroactivity provision, which applied to all works still under copyright. The *Eldred* appeal addressed only two issues: the retroactivity of term extension and whether a law that extended the term of copyright is immune from free speech challenges under the First Amendment. Based solely on year of publication, only works published before 1923 in the United States are clearly in the public domain. For works published between 1923 and 1964, the work had to be renewed for copyright after its first twenty-eight years. If the works were not renewed, they are now in the public domain. If they were renewed, then the copyright will extend for ninety-five years after the date of first publication. In fact, it will be the end of 2018 before any other published work enters the public domain, and then only if there are no further extensions of the term for existing works.

Although *Eldred* was the named plaintiff in the case, other parties include a nonprofit Internet distributor of rare books, a sheet music distributor, a choir director and a film preservation company. **Mr. Eldred**, the owner of **Eldritch Press**, takes public domain works,

digitizes them, adds hypertext references and then makes the freely available on the Web.³ Plaintiffs sued for a declaratory judgment that the **CTEA** was unconstitutional. The federal district court ruled against **Mr. Eldred** and upheld the constitutionality of term extension.⁴ Along with the other plaintiffs, he appealed to the Court of Appeals for the District Columbia, which agreed with the district court.⁵ Several library associations filed *amicus* briefs in the case on the side of *Eldred* for the Supreme Court appeal.⁶

In an opinion authored by **Justice Ruth Bader Ginsburg**, the U.S. Supreme Court held that Congress acted properly when it voted to extend the term of copyright even retroactively, as Congress has done on several other occasions. Moreover, extensions to existing copyrights are still for limited times, and it does not mean that such terms cease to be limited times if they are later expanded.

On the second issue, the Court held that the D.C. Circuit Court of Appeals spoke too broadly when it declared that copyrights were “categorically” immune from First Amendment challenge. *Eldred* claimed that the **CTEA** was a content neutral regulation of speech, which failed heightened scrutiny, the so-called mid-level test for determining the constitutionality of a statutory provision. The Court refused to apply strict scrutiny, the highest-level test or even heightened scrutiny to the First Amendment claim. Instead, it applied the lowest-level test, rational basis, and found that this act of Congress, even applied retroactively, satisfied the rational basis test. Although the library community would have preferred the Court to declare that heightened or strict scrutiny should be used, the fact that the Court struck down the broad language of the court of appeals, which would have immunized copyright statutes from free speech challenges, was a positive result.

The majority pointed out that the term of copyright had been extended several times before and applied retroactively to works still under copyright. What was missing from the analysis was the fact that each of the other expansions of the term of copyright had come about as a part of a total revision of the Copyright Act, so the underlying policy considerations were actually addressed by Congress. The **CTEA**, in contrast, was only an extension of the term and not a total revision of the Act.

There were two strong dissents in this case. **Justice Paul Stevens** argued that Congress had exceeded its authority in enacting the **CTEA** because it ignored the policies that favor the public domain and the limited times provision of the Copyright Clause of the Constitution. **Stevens** pointed out that economic reward to the copyright holder is a secondary consideration; benefit to the public is the primary reason that Congress was given the power to enact copyright laws. Publishers had argued that ex-

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here does not exist in a single, integrated system. Yet key components, such as single sign-on network identification and content and document management systems that can store content for enterprise-wide access, are becoming more common in research libraries and the institutions that surround them.

In addition to these components, standards-based DRM technology, license management, and usage tracking and reporting components need to be added. With regard to the former, the rise of *rights expression languages* — ways to express content rights in detail that could theoretically be understood by multiple DRM systems — is an encouraging development towards the ideal of publishers submitting content along with rights descriptions to libraries, which would

then package them in their own DRM schemes. Finally, license management systems already exist, from vendors like **Macrovision**, for software in corporations, and there is little reason to suggest that these systems cannot be adapted for use in institutional digital content licensing.

It's possible to conceive of systems that use DRM technology to control and track content usage in research environments in ways that are, on balance, as valuable to institutions as they are to publishers. Factions in the library, publishing, and technology industries will need to come together to make it happen. Perhaps one day we will find common ground between institutional research libraries and DRM after all.

Thanks to **Gail Dykstra of Dykstra Research** for her help with this article.

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tending the term of copyright contributed to the preservation of older works, which **Justice Stevens** found to be a particularly specious argument. Are not libraries and archival collections more likely to preserve works in the public domain than they are to go through the cumbersome permissions process to preserve works that are still under copyright? Additionally, many copyright owners evidence little interest in preserving their works for which demand has waned. Older films are often turned over to the Library of Congress for preservation; the copyright owner apparently has little interest in doing so, even though the copyright term on these films has not expired.

Justice Stephen Breyer disagreed with the majority opinion and stated that the **CTEA** should be reviewed under the heightened scrutiny standard. He found, however, that the statute failed even the rational basis test for three reasons. First, the significant benefits bestowed by term extension are private and not public benefits. Second, the **CTEA** seriously threatens to undermine the expressive values that the Copyright Clause embodies. Third, there is no justification for term extension in any significant Copyright Clause-related objective.

Justice Breyer also stated that the claim that the **CTEA** was enacted to ensure international uniformity was very weak as was the concern about incentives to create copyrighted works. As he reasoned, a deceased author is not motivated by a longer copyright term to create additional works. Moreover, the purpose of copyright is to encourage the creation of copyrighted works not to promote their dissemination, which is what term extension does. He also recognized the difficulties that will be encountered by libraries and other users of copyrighted works during the additional twenty-year term. **Justice Breyer** cited economic studies, which indicate that only two percent of the works are still economically viable between the fifty-fifth and seventy-fifth year of the copyright term. Likely, an even smaller percentage will be viable from the seventy-fifth to the ninety-fifth year. Accordingly, for less than two percent of the works still under copyright, all users will face the prospect of seeking permission and paying royalties. The management of permissions for this two percent of works will be difficult and expensive, and the royalties on top of this could be quite high.

In the opinion, the Court made clear that it was not determining the correctness of the underlying policy for this particular term extension. Rather, it focused on the power of Congress to do so. The opinion concluded that Congress is the body to consider the policy issues for legislation — not the Court.

The New Library Exemption — § 108(h)

The **Copyright Term Extension Act** contains a little-used provision that has the potential to be of tremendous benefit to libraries. In addition to tacking on twenty years to the copyright term, it expanded the library exemption

by adding a new §108(h) to the Copyright Act. The intent of the expansion was to ease the effects of term extension on libraries, archives and nonprofit educational institutions. In order to meet the requirements of §108(h), a library or archives must satisfy several requirements in addition to qualifying as an eligible entity under §108(a). Section 108(a) details three criteria that a library or archive must satisfy to be eligible for all of the library exemptions. First, any reproduction and distribution must be done without direct or indirect commercial advantage. Second, the collection must be open to the public or to nonaffiliated researchers doing research in a specialized field. Finally, each copy reproduced and distributed must contain the notice of copyright that appears on the work, or if there is none, use a legend stating that the work may be protected by copyright.

Section 108(h) permits a library, archives or a nonprofit educational institution, during the last twenty years of a published work's term, to reproduce, distribute, display or perform in either facsimile or digital form, a copy of a work for purposes of preservation, scholarship or research. In order to do this, however, the library must by reasonable investigation determine that (1) the work is not subject to normal commercial exploitation; (2) a copy cannot be obtained at a reasonable price; or (3) in accord with the regulations promulgated by the Register of Copyrights, the copyright owner provides notice that either of the above conditions apply. The exemption provided by this subsection, however, does not apply to any subsequent uses by users other than that library. All U.S. works that are still under copyright whose authors have been deceased fifty years or more are eligible for reproduction under this section. Thus, works from 1952 and earlier may be eligible for reproduction under §108(h).

The Copyright Office then developed rules under which owners or their agents could file notice that the published work is subject to normal commercial expectation or could be obtained at a reasonable price.⁷ It also developed a form for such notices.⁸ The information required on the notice includes: (1) title of the work (or, if untitled, a brief description of the work); (2) author(s) of the work; (3) type of work (for example, music, motion picture, book, photograph or sound recording); (4) edition; (5) year of first publication; (6) year the work first secured federal copyright through publication with notice or registration as an unpublished work; (7) name of the copyright holder; (8) copyright renewal registration number; (9) the person or entity identified who owns the rights; (10) the person or entity that the Copyright Office should contact concerning the notice; and (11) the person or entity that libraries and archives may contact concerning the work's normal commercial exploitation or availability at a reasonable price. The fee for filing the notice is \$50 plus \$20 for each additional work. Despite the rule-making activity of the Copyright Office and the posting of forms on its Website, not a single notice had been filed by the late spring 2003.

Interestingly, there is little legislative history for this portion of the **CTEA**. For example, there is no definition of important terms such as "reasonable investigation" or "normal com-

mercial exploitation" although reasonable investigation was defined for §108(c) in the House Report that accompanied the Act. A reasonable investigation includes consulting commonly known U.S. trade sources, contracting the copyright holder, if known, and seeking to purchase a copy of the work from an authorized reproducing service.⁹ For this subsection, however, a reasonable investigation would also likely require checking with the Copyright Office to determine whether a publisher or other copyright holder had filed notice.

This subsection is broader than §108(c) which relates to the replacement of published lost, stolen, damaged, deteriorating or obsolete works, because their reproduction is not solely limited to replacement or preservation. Normally one assumes that preservation involves a work in a library's collection, but there is no requirement that the work reproduced under 108(h) currently is in the collection of the library, nonprofit educational institution or archives. Thus, this subsection can serve as a collection building section for scholarship and research in addition to preservation, at least for those works that meet the requirements of §108(h).

When the **CTEA** was passed, §108(h) was touted as applying to "orphaned" works where the publisher had disappeared and no one had an interest in further commercial exploitation. On the other hand, with the production of books on demand, even out-of-print works can be produced quickly.¹⁰ Does this mean that an eBook that may be available on demand now constitutes normal commercial exploitation?

Librarians testified in the Copyright Office rule-making proceeding that if a copyright owner could not make a copy of a work available, either directly or through an agent, then the presumption should be that libraries can take advantage of the exemption.¹¹ "... It would be a perversion of the exemption if a copy of a work exists only in a library, but the owner, who does not have physical copy, nevertheless declares it is subject to normal commercial exploitation or can be obtained at a reasonable price."¹² Under §108(c) the library's reasonable investigation to determine whether a copy is available at a fair price applies only to unused copies, but §108(h) is silent as to whether a library or archives must seek even a used copy prior to taking advantage of the exemption. Since the copyright owner receives royalties only on the first sale of a work, the second-hand or resale market provides no away to calculate a "reasonable price." Library associations stated that, "Only if the owner is actually marketing a work it physically possesses, or recently placed sufficient numbers of copies into commerce, could the owner accurately declare that the statutory test has been met."¹³ The Copyright Office rules did not embody this approach, however.

Another important difference between §108(h) and the other preservation provisions is that the work may be reproduced in either digital or analog format. Moreover, the subsection does not permit a library to make up to three copies, as do §108(b) and (c) but instead "a copy." In all likelihood, a library would be much more likely to reproduce the work in digital for-

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mat after it had satisfied the requirements of the section since the work obviously would be of sufficient importance to that library or it would not have engaged in the time-consuming reasonable investigation. The library may even mount the reproduced work on the Web since there is no restriction that it be used only within the premises of the library.

Why have no publishers filed notice under this section? Why have so few libraries used this section to ensure that older works are available in libraries across the country? Little is known about how this will actually operate under this subsection, but it is unlikely there will be additional explanation or amendment of the law concerning this section until it begins to be used by a significant number of libraries that encounter problems that can be documented.

The Open Archives Movement

The open archives movement also has significant impact on term extension, especially for scholarly works. There are a number of efforts to make works freely available on the Web. **Project Gutenberg** is the oldest producer of free electronic books and also includes music. There are now over 6,250 eBooks available for viewing through a Web browser or downloadable to a computer. Most eBooks are in plain text, but many are also in other formats including HTML. Further, there are also compressed (zipped) versions of most files available. The contents are searchable by author, title, subject and language.¹⁴

Another such project is "*ibiblio*," a project of the **University of North Carolina-Chapel Hill** and the **Center for the Public Domain** which bills itself as a "conservancy of freely available information, including software, music, literature, art, history, science, politics, and cultural studies." It is a collection of contributor-maintained collections on the Web, which uses the open source model to "encourage users to help shape the way information is managed and accessed in the 21st century." *ibiblio* is a collaborative project with several components identified as: (1) expanding and improving the distribution of open source software; (2) continuing the **University of North Carolina's** programs to develop an online library; (3) hosting and fostering projects that expand transparency and openness into new areas; (4) creating, publishing and distributing research on open source communities; (5) expanding and improving the creation and distribution of open source software; and (6) serving as a model for other open source projects. The success of *ibiblio* is reflected by the fact that it receives over 1.5 million information requests daily.¹⁵

The **Los Alamos e-Print Archive** is a tremendously successful project to mount scientific articles in various versions and make them freely available on the Web. Begun by **Paul Ginsparg** in 1992 at Los Alamos, the main site has been moved recently to **Cornell University**.¹⁶ The original goal was to design a quality-controlled archive and distribution source for physics research. The project has now expanded to include mathematics and computer science

research articles. One unique feature of the **e-Print Archive** is that scientists can post successive drafts of their papers. This creates the ability for scientists around the world to comment on the paper and research results, facilitates collaboration and improves the quality of scientific information. It has attracted many of the top physicists in the world and has approximately two million visitors per week. Attempts to duplicate the success of the **e-Print Archive** have encountered copyright problems, yet have resulted in some of the projects described below.¹⁷

An important free source for free access to scientific articles is **PubMed Central**, which may be described as a digital archive of life sciences journal literature managed by the **National Center for Biotechnology Information** at the **U.S. National Library of Medicine**.¹⁸ It was established to provide barrier-free access to primary research reports in the life sciences. Additionally, it serves as a host for scientific publishers and organizations to archive, organize and distribute their research articles at no cost to the user. The archiving of this material will guarantee availability to researchers in the future. Copyright in the individual items remains with the publisher, author or the scholarly society. Both peer-reviewed and non-peer reviewed reports and articles are accepted, but the contents are clearly marked to indicate the peer review status of an item. **PubMed Central** also has relationships with foreign-learned societies and repositories. Any journal currently indexed by the major abstracting and indexing services is eligible for inclusion in **PubMed Central** along with those that have on their editorial boards at least three scientists who hold research grants from major funding agencies.¹⁹

The **Budapest Open Access Initiative (BOAI)** arose from a 2001 meeting of the **Open Society Institute**. The aim of the gathering was to hasten the progress of international efforts to make research articles in all academic fields freely available on the Internet. The result of the meeting was the **BOAI**, which represents statement of principle, strategy and commitment. Signatories to the **BOAI** include hundreds of individuals and organizations worldwide who represent researchers, universities, laboratories, libraries, foundations, journals, publishers, learned societies and kindred open-access initiatives.²⁰ The **BOAI** states that those works that "scholars give to the world without expectation of payment" should be freely accessible online without cost to the user. The **BOAI** recognizes that scholarly authors have rights and concerns about open access. It suggests that the only constraint on reproduction and distribution of these scholarly works should be author control over the right to be properly acknowledged and cited.²¹

SPARC, the Scholarly Publishing and Academic Resources Coalition, is an alliance of universities, research libraries, and organizations that was begun in June 1998. **SPARC** was built as a response to problems, even dysfunction, in the scholarly communications system that has significantly harmed scholarship and crippled libraries in their abilities to ensure the availability of scholarly journal literature. The purpose of **SPARC** is to serve as a catalyst

for action to help create systems that expand the dissemination of information and use of that information in the networked world. **SPARC** focuses on "enhancing broad cost-effective access to peer-reviewed scholarship" by incubating competitive alternatives to high-priced commercial journals, and publicly advocating fundamental changes in both the system and the culture of scholarly communication.²² Today, membership in **SPARC** numbers approximately 200 institutions in North America, Europe, Asia and Australia. It has already initiated new journals²³ that comport to the mission of **SPARC** and has encouraged new nonprofit players to enter the market. **SPARC** has been endorsed by the **Association of American Universities**, **Association of American University Presses**, **Association of College & Research Libraries**, the **Big 12 Provosts** and the **National Association of State Universities & Land Grant Colleges**, just to name a few.²⁴

There is also a European **SPARC** called **SPARC Europe**, which is an alliance of European research libraries, library associations and research institutions that support increased competition in scientific journal publishing. It is very similar to the American **SPARC**, but it is tailored to the European research and library communities. A collaborative effort between the two organizations is planned.²⁵

The **Public Library of Science** focuses on open access to scientific and medical literature around the world. It is a non-profit organization of scientists who believe that open access will benefit scientific progress, education and the public good. The project foresees the establishment of public libraries of science that will both archive and make available the content of scientific articles. Further, it will encourage new ways to "search, interlink and integrate the information that is currently partitioned into millions of separate reports and segregated into thousands of different journals, each with its own restrictions on access."²⁶ The plan is to substitute the payment of subscription fees for journals for what amounts to page charges. The cost would be borne by the scientist or his organization as an upfront charge of approximately \$1,500 per article. Although the individual scientist would own the copyright in the article unless it were produced under a grant which prohibited copyright ownership, or if the scientist were a government employee, by placing the article in the archive, the author agrees to free access, reproduction, etc.

Scientists around the world have been writing to publishers by circulating an open letter urging publishers to allow research reports that have appeared in their journals to be distributed freely by these online public libraries of science. The response from the international scientific community is reported to have been "overwhelmingly positive," and 30,499 scientists from 182 countries have now signed the open letter. The **Public Library of Science** reports that some publishers have begun to provide freer access to published research but not to the extent that it advocates. Thus, it believes that it must assume the role of publisher and has established a nonprofit publisher "operated by scientists, for the benefit of science and the pub-

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lic, and will begin publishing journals in the second half of 2003."²⁷ It has announced publication of *PLoS Biology* for October 2003 and *PLoS Medicine* for 2004.

Institutional Repositories

Another way to ameliorate the effects of term extension is to create and manage university repositories, which will consist of digital copies of works by faculty and researchers on their campus. Institutional repositories are defined as "digital collections capturing and preserving the intellectual output of a single or multi-university community."²⁸ Individuals within the institution produce working papers, technical reports and other forms of scholarly work, which may or may not be published, but in the prepublication stage, the work has considerable value to other faculty members and researchers as well as to the institution. In fact, institutional repositories can serve as a complement to traditional methods of scholarly communications.²⁹ More important in certain disciplines such as science and technology, these works are sometimes referred to as "gray literature" because they are difficult to locate and hard to manage and preserve.³⁰

Faculty members at academic institutions all over the world are posting their research online, most often on their own Websites, but there are also departmental Websites and disciplinary repositories. Researchers want to share the results of their work and many believe that making their works available online is the best way to expand exposure to their work³¹ and to stimulate conversation and discussion about their writings by others in their discipline. There are also benefits to the college or university in creating such repositories. "Institutional repositories, by capturing, preserving, and disseminating a university's collective intellectual capital, serve as meaningful indicators of an institution's academic quality."³² A repository thus described differs from other digital libraries, which tend to be subject or thematic in nature. Instead, "... institutional repositories capture the original research and other intellectual property generated by an institution's constituent population active in many fields. Defined in this way, institutional repositories represent an historical and tangible embodiment of the intellectual life and output of an institution."³³

An institutional repository may contain: (1) teaching materials to include syllabi, examinations or other materials that the faculty or department wished to preserve; (2) student works such as papers, projects, and the like as well as electronic portfolios; (3) works about the institution such as annual reports, histories, planning documents, etc.; (4) computer programs;

(5) data sets; and (6) visual works such as video recordings, photographs and art works. In other words, virtually any digital work that a university wants to preserve and make available can be placed in the institutional repository.³⁴

Librarians may play the critical role in creating and maintaining such a repository. The role clearly is more than custodial and evinces a desire to help mold the future of scholarly communications from traditionally published works to more dynamic works. This is an expansion of the traditional role of libraries but one which university and college libraries are uniquely qualified to fill.³⁵ Faculty will likely dedicate themselves to the content layer of the repository, but someone has to manage the technical and organization aspect, and that is likely to be the university library.³⁶ Libraries can be expected to: (1) provide document preparation expertise which will include document format control and archival standards, etc.; (2) help and encourage authors to contribute their research to the repository; and (3) provide expertise to increase access to and usability of the data such as metadata tagging, authority controls, and the other content management requirements;³⁷ and (4) establish guidelines for the campus community on what works should be deposited and how to accomplish this. Certainly, individual authors would own the copyright in their individual contributions to the repository, but the collective work or database will surely possess sufficient originality to qualify for copyright protection on its own.

Enhancing the Public Domain

An additional way to ease the effects of term extension is to strengthen and augment the public domain. There are two recent developments which have significant potential to enhance the public domain. They are aimed at increasing the amount of material in the public domain in the face of the changes wrought by the **Digital Millennium Copyright Act** and the **CTEA**.

The most comprehensive is the development of the **Creative Commons**,³⁸ launched in 2001. The brainchild of **Professors Larry Lesser of Stanford and James Boyle at Duke**, the **Commons** encourages creators to place their works in the public domain. Should the author/creator not want to go that far, it encourages him/her to grant broad rights to the public through nonrestrictive licenses. The purpose of the **Creative Commons** is to increase the amount of raw source material available online, as well as to make access to it easier and at lower cost.

It has never been authoritatively determined whether one can even place a work in the public domain. Under earlier laws, copyright registration and notice were required in the United States; thus publication of the work without registra-

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- Johnson, *supra* note 29.
- Id.
- Id.
- See generally *id.*
- Crow, *supra* note 30.
- Id.
- Id.
- See <http://www.creativecommons.org>.
- Id.
- Id. The Creative Commons website contains this statement. "Notice: We do not license works for money or help collect royalties. We recommend that you visit the Copyright Clearance Center <http://copyright.com>."
- See <http://creativecommons.org/projects/founderscopyright/oreilly>.
- H.R. 108-2601. The proposed Act is also referred to as the Eric Eldred Act.
- See <http://www.petitiononline.com/eldred/petition.html>.

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tion or notice resulted in dedicating the work to the public domain. With the elimination of these formalities of copyright under the **1976 Copyright Act**, it is not easy to put a work in the public domain since copyright attaches immediately upon creation of an original work and fixation in a tangible medium of expression. Whether and how to revoke this automatic protection has been the basis of scholarly debate, but if it can be done, it certainly would require an affirmative act to revoke copyright.

The **Creative Commons** recognizes this controversy but attempts to create a method to deed works to the public domain. It has also developed metadata that can be used in order to associate these works with their status as a public domain work. **Eric Eldred's Eldritch Press** has deeded all of its publications to the public domain through the **Creative Commons**.³⁹

Later this year the **Commons** will work to build an "intellectual works conservancy," described as being similar to a land trust or nature preserve to ensure that works in the public domain are not claimed by private parties. Authors will be encouraged to place their works in this public trust. Whether this action works remains to be seen, thus, the licensing alternative may be more successful.

The licenses offered by the **Creative Commons** are free and machine-readable.⁴⁰ They may be used for creative works such as Websites,

scholarly works, music, film, photography, courseware, etc., but not for computer software. The blank forms are available on the **Creative Commons** Website. The primary idea is to permit owners to hold onto their copyrights but to publicize the fact that their works are available for free, which should result in greater online sharing. The licenses permit greater use of the work than would be allowed under traditional fair use. For example, a license might permit all non-commercial uses while prohibiting only commercial ones without a specific license from that commercial user. This would permit the copyright holder to commercialize a work and earn income from commercial uses. The owner determines what rights he/she will grant. Some will permit others to use their work in any way as long as they receive attribution, i.e., credit for authorship. Other authors may allow use and distribution of verbatim copies of their works, but not allow any derivative works to be created without their permission, or the author might permit derivative works to be created but insist that users share royalties with him on a fifty-fifty basis.

One of the most interesting licenses that the **Creative Commons** offers is called the **Founders' Copyright**. It permits the copyright holder to claim copyright for fourteen years just as was done by the **Founding Fathers** in the **1790 Copyright Act** or for twenty-eight years as provided under the **1909 Act**. During the period of copyright claimed by the author, the **Commons** will list the works along with the projected date at which the work will enter the

public domain. The cost of this license is \$1. **O'Reilly & Associates**, a publisher of commentary about technology and society, has several hundred titles under the **Founders' Copyright**; they are listed on the **Creative Commons** Website.⁴¹

The second development is the proposal by **Eric Eldred** (plaintiff in the term extension case) in the **Public Domain Enhancement Act**⁴² that would give copyright owners unfettered rights for fifty years after the author's death. In order to obtain the additional twenty years of protection, the owner would be required to file a notice of continuation and pay a \$1 fee or tax at the expiration of the fifty years.⁴³ As cited in *Eldred*, it is estimated that for works published between 1923 and 1942, the first twenty years affected by the **Copyright Term Extension Act**, only two percent have any lasting commercial value. Therefore, the owner of the copyright would be unlikely to pay the \$1 continuation of copyright fee for ninety-eight percent of the works still under copyright. Thus, a huge amount of material would pass into the public domain if this were enacted.

The proposal is favored by individuals and groups that encourage a strong public domain, but it is opposed generally by the copyright owner community. There are also concerns about whether this proposal runs contrary to international treaties. One of the provisions of the **Berne Convention** is that a member country may not require any formalities to perfect the copyright. Requiring the filing and payment of the nominal fee could be viewed as such a

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Finally, the House passed the bill, and it was signed into law on November 2, 2002.

What the TEACH Act covers

The **TEACH Act** applies to "the performance of a nondramatic literary or musical work or *reasonable and limited portions* of any other work [and to the] [d]isplay of a work in an amount comparable to that which is typically displayed in the course of a live classroom session." This means that distance educators can use commercial works, as long as they are "reasonable and limited." The best way to determine that is to look at the principles of Fair Use.

The **TEACH Act** amends Section 110(2) to eliminate the "face-to-face" requirement of the educational performance exception. The new exception is available only to accredited non-profit educational institutions, and the performance must only be received by enrolled students. In order to avoid problems, the act defines accredited institutions: "Accreditation for post-secondary institutions shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures."

The act only applies to non-profit educational institutions. This means that for-profit institutions such as the **University of Phoenix** are not covered by the **TEACH Act**. The exclusion of for-profit institutions was a key demand of the content owners. After all, these institutions are set up to obtain a profit for their owners and stockholders. Since businesses and companies are not permitted to transmit copyrighted material, it makes sense that a for-profit educational institution would not be either. These institutions can only transmit materials if they obtain a valid license from the copyright holder.

In order for the **TEACH Act** to apply, the transmission must be "[m]ade by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session." The class must be a "regular part of the system-

atic mediated instructional activities," and the transmission must be received by students officially enrolled in the course for which the transmission is made or governmental employees in the course of their duties.⁵ In other words, for educators to use a performance, it must be related to the content of a for-credit course.

One important part of the **TEACH Act** concerns the responsibilities that are laid upon the institutions. The exception only applies if the school creates and maintains policies regarding copyright. The school must provide educational sessions and informational material that explain copyright law. There must also be a notice to students that materials used in connection with the course may be subject to copyright protection.⁶

The schools also have certain responsibilities for the transmissions under the **TEACH Act**. There must be technology in place to reasonably prevent students from retaining the work for longer than the class session, and the technology must not allow students to pass on the work to others. In addition, the institution must not interfere with technological measures used by copyright owners to prevent retention or unauthorized further dissemination.⁷

There are several categories of works that are excluded by the **TEACH Act**. This includes works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital network." This makes sense, since otherwise these kinds of instructional works would be effectively unprotected. The **TEACH Act** also excludes performance or display of copies "not lawfully made and acquired," since it would not serve the public purpose to reward people for violating copyright.

Under the act, it is possible for faculty members to convert analog works to digital formats under certain circumstances. For example, a performance that is contained on a VHS tape could be digitized for transmission provided that a digital version is not available, or if the digital version is secured by a technological measure that prevents use in distance education. You may not convert more than you would be allowed to transmit under Section 110(2).

One issue that is not specifically addressed by the law concerns handouts and other types of readings. Although this issue is not covered

available indefinitely with little storage charge, these works may always be viable commercially, but it is not clear that there will be any demand for them. Perhaps public demand should be the key issue as opposed to potential commercial exploitation.

A remaining concern is whether copyright owners will again push for an extension of the term of copyright as the year 2018 approaches. If so, let us hope that we find a way to deal with this and exempt works for which there is little public demand. Otherwise, copyright protection has the potential to become perpetual due to repeated extensions of the term for existing works. If this happens, then libraries and their users, scholars and researchers will be the losers once again in the attempt to balance the rights of users with those of copyright owners.

Endnotes

1. 17 U.S.C. Section 107.
2. 17 U.S.C. Section 110(1).
3. Old Title 17 U.S. Code Section 110(2).
4. I attended the conference "*Intellectual Property in the Digital Age*," held at the University of Wisconsin on May 6-8, 2001. This conference took place two days after the agreement was made. Most of the participants in the negotiation attended this conference, and the historic agreement was one of the biggest topics.
5. 17 U.S.C. Section 110(2).
6. Based on this provision of the law, I have the following notice posted on the front page of my online library science course: "The course and its components are copyright 2001-2003 Bryan M. Carson. This course also makes legal use of some copyrighted materials pursuant to Title 17 U.S.C. Sections 107 and 110. Copyrighted materials may not be reproduced without permission by the copyright holder."
7. This is a reference to the Digital Millennium Copyright Act, 17 U.S.C. Section 1201 et. seq.
8. Kenneth Crews, New Copyright Law for Distance Education: The Meaning and Importance of the **TEACH Act**. http://www.copyright.iupui.edu/teach_summary.htm
9. David L. Lange. "Theory and Practice in Copyright." Presentation at "*Intellectual Property in the Digital Age*," Madison, Wisconsin, May 8, 2001.

in the act, according to **Kenneth Crews** the provision on display in quantity similar to the live classroom "would suggest that occasional, brief handouts—perhaps including entire short works—may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law."⁸

Crews' interpretation is also based on the Fair Use provisions in section 107 that relate to multiple copies for classroom use. Fair Use provisions apply to handouts and other types of materials you use in class. According to Intellectual Property expert **David Lange**, Fair Use still applies to transmissions, even in the absence of the **TEACH Act**.⁹ Of course, in order to be protected, you should not use more materials in either an in-person class or a distance education class than Fair Use allows. However, it appears that you can do the same things with handouts in a distance education class that you would be able to do in a face-to-face class.

Conclusion

The **TEACH Act** is an attempt to bring copyright law into harmonization with the technological and social advances of distance education. The act amends section 110(2) of the copyright law to allow "reasonable and limited" portions of performances to be transmitted via technological means to distance education students.

In order to use the distance education exception contained in the **TEACH Act**, educators must do the following:

- ✔ Transmit only legal copies of non-dramatic, literary, or musical works (or reasonable portions of other works).
- ✔ Transmit only to classes you teach as part of the university's curriculum.

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formality, or it might be determined that formalities apply only to the initial acquisition of the copyright by the author/creator. But **Berne** requires only a minimum fifty-year standard, so it may be permissible to require registration of the work for the term beyond the fifty years.

Conclusion

With no published work entering the public domain before the end of 2018, the concern about the vitality of the public domain is real. This article has discussed some proposals as well as § 108(h), which will help to ameliorate the effects of this twenty-year extension of the term of copyright. Since digital works can remain