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*, 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 forty 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) 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 removed 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 them freely available on the Web. 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. Along with the other plaintiffs, he appealed to the United States Court of Appeals for the District of Columbia, which agreed with the district court.

Several library associations filed amicus briefs in the case on the side of *Eldred* for the Supreme Court appeal.

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 the 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 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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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 reduced 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 tackling an extra 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 legending 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 be defined as reasonable in determining 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. It also developed a form for such notices. 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 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. 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 commercial exploitation" although reasonable investment was defined for §108(c) in the House Report that accompanied the Act. A reasonable investigation includes consulting commonly known U.S. trade sources, contacting the copyright holder, if known, and seeking to purchase a copy of the work from an authorized reproducing service. 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 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) is currently in the copyright 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. Does this mean that an eBook that may be available on demand now constitutes normal commercial exploitation?

Librarians testified that 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. "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 copies, nevertheless declares it is subject to normal commercial exploitation or can be obtained at a reasonable price." Under §108(h) 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 way to calculate a "reasonable price." Library associations stated that, "Only if the owner is actually marketing a work it physically possesses, or recently placed in sufficient number of copies into commerce, could the owner accurately declare that the statutory test has been met." 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 form... continued on page 30
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that 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 research 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 avail-
able in libraries across the country? Little is
known about how this will actually operate un-
der this subsection, but it is likely 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 sig-
ificant impact on term extension, especially for
scholarly works. There are a number of ef-
forts to make works freely available on the Web.
Project Genesis is the oldest producer of free
electronic books and also includes music.
There are now over 6,250 eBooks avail-
able 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 com-
pressed (zipped) versions of most files avail-
able. The contents are searchable by author, title,
subject and language.

Another such project is “ibidlio,” 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, mus-
ic, literature, art, history, science, politics, and
cultural studies.” It is a collection of contribu-
tor-maintained collections on the Web, which
uses the open source model to “encourage us-
ers to help shape the way information is man-
gaged and accessed in the 21st century.” ibidlio
is a collaborative project with several compo-
nents identified as: (1) expanding and improv-
ing the distribution of open source software; (2)
continuing the University of North Carolina’s
programs to develop an online library; (3) host-
ing and fostering projects that expand transpar-
ency and openness into new areas; (4) creating,
publishing and distributing research on open
source communities; (5) expanding and improv-
ing the creation and distribution of open source
software; and (6) serving as a model for other
open source projects. The success of ibidlio is
reflected by the fact that it receives over 1.5 mil-
lion information requests daily.

The Los Alamos E-Print Archive is a
tremendously successful project to mount sci-
entific 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 Univer-
sity.18 The original goal was to design a qual-
ity-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 success-
ive drafts of their papers. This creates the abil-
ity for scientists around the world to comment
on the paper and research results, facilitates col-
laboration and improves the quality of scientific
information. It has attracted many of the top
physicists in the world and has approxi-
mately 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 be-
low.

An important free source for free access to
scientific articles is PubMed Central, which
may be described as a digital archive of life sci-
ences journal literature managed by the Na-
tional Center for Biotechnology Information
at the U.S. National Library of Medicine.19 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, orga-
nize 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 re-
mains with the publisher, author or the schol-
arly society. Both peer-reviewed and non-peer
reviewed reported and articles are accepted, but
the contents are clearly marked to indicate the
peer review status of an item. PubMed Cen-
tral 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 their edi-
torial boards at least three scientists who hold
research grants from major funding agencies.

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 commit-
ment. Signatories to the BOAI include hun-
dreds of individuals and organizations world-
wide 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 ac-
cessible online without cost to the user. The
BOAI recognizes that scholarly authors have
rights and concerns about open access. It sug-
ests 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.

SPARC, the Scholarly Publishing and
Academic Resources Coalition, is an alliance of
universities, research libraries, and organi-
izations that was begun in June 1998. SPARC
was built as a response to problems, even dys-
function, in the scholarly communications sys-
tem 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 ac-
cess to peer-reviewed scholarship” by incu-
bating competitive alternatives to high-priced
commercial journals, and publicly advocating
fundamental changes in both the system and the
culture of scholarly communication.21 Today,
membership in SPARC numbers approximately
200 institutions in North America, Europe, Asia
and Australia. It has already initiated new jour-
nals21 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 Librar-
ies, the Big 12 Provosts and the National As-
sociation of State Universities & Land Grant
Colleges, just to name a few.

There is also a European SPARC called
SPARC Europe, which is an alliance of Euro-
pean research libraries, library associations and
research institutions that support open com-
petition 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.

The Public Library of Science focuses on
open access to scientific and medical literature
around the world. It is a non-profit organiza-
tion of scientists who believe that open access
will benefit scientific progress, education and
the public good. The project foresees the estab-
lishment of public libraries of science that
both archive and make available the content of
scientific articles. Further, it will encourage new
ways to “search, interlink and integrate the in-
formation that is currently partitioned into mil-
liors of separate reports and segregated into
thousands of different journals, each with its
own restrictions on access.” The plan is to
substitute the payment of subscription fees for
journals for what amounts to page charges. The
costs would be borne by the scientist or his orga-
nization as an upfront charge of approximately
$1,500 per article. Although the individual sci-
entist would own the copyright in the article
unless it was produced under a grant which
prohibited copyright ownership, or if the scien-
tist 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 writ-
ing 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 “over-
whelmingly 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 ex-
tent that it advocates. Thus, it believes that it
must assume the role of publisher and has es-
abled a nonprofit publisher "operated by
scientists, for the benefit of science and the pub-
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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." 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. 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.

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 work and to stimulate conversation and discussion about their writings by others in the 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." 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."

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.

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 universities and college libraries are uniquely qualified to fill. 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. 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; 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, launched in 2001. The brainchild of Professors Larry Lessig 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 registration was sufficient to establish copyright. Under the new law, publication may suffice to establish copyright, but some practitioners recommend registration in those situations where copyright is being asserted.

Professor Lessig believes that the world of the Commons is in its infancy, and that different works will require different permissions. He is considering creating a "ClicksRipping" button that will allow users to download audio and video files directly from the Internet. He has already established a "Creative Commons" page on the World Wide Web, and is currently working on a "Creative Commons" website, which will be available to the public in 2004. The goal is to establish a "Creative Commons" website that will enable users to access a wide variety of creative works, including books, music, art, and video. The website will provide a platform for creators to share their works, and for users to access and download them.

Endnotes

3. See the Eldridg Press Website at http://209.11.144.65/ eldridgpress/. This Website contains the following statement: "Here are free accessible books. Read them and go in peace."
5. 255 F.3d 849 (D.C. Cir. 2001).
8. See Copyright Office Website, at http://lcweb.loc.gov/copyright/.
12. Id.
13. Id.
17. See the Xerox collection at http://www.xerox.com/.
26. Id.
27. Id.
28. See generally id.
30. Id.
31. Id.
32. See http://www.creativecommons.org.
33. Id.
34. Id.
35. 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.
36. H.R. 108-2601. The proposed Act is also referred to as the Eric Eldred Act.
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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 metadatta 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 Act42 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 are covered 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] display 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 provision 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 systematic 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. 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. There must also be notice to students that materials used in connection with the course may be subject to copyright protection.

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.

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 institutional 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 violatong 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 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.”

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 in 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. 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.

Ameliorating the Effects...

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(b), which will help to ameliorate the effects of this twenty-year extension of the term of copyright. Since digital works can remain 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

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. Code 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.

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