

PUBLIC CHOICE THEORY, THE CONSTITUTION, AND PUBLIC UNDERSTANDING OF THE COPYRIGHT SYSTEM

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I. INTRODUCTION

Samuel Clemens—better known as Mark Twain—is recognizable in the history of copyright law for tirelessly advocating to dramatically extend copyright’s term.¹ In his early life, however, Clemens enjoyed inexpensive books drawn from a broad public domain,² which he and others celebrated as a public good that encouraged literacy.³ What caused this shift in Clemens’ beliefs, and why did the legislature eventually choose to expand copyright’s term and diminish the public domain? This Article explores these themes by examining the interface of public choice theory, copyright policy, and constitutional law in light of new survey evidence on the public’s understanding of basic copyright doctrine.

The United States Constitution permits Congress to create a utilitarian copyright system, whereby law promotes the public good by advancing learning and knowledge.⁴ Authors are incentivized to create new works through the promise of a copyright, but the breadth of this encouragement must not unduly encroach on the citizenry’s interest in a robust public domain.⁵ This Article draws on a host of academic fields to develop a cohesive narrative explaining the ever-increasing scope of copyright and addresses a void in the literature by analyzing real-world impediments to reversing this trend and discussing potential remedies.

The analysis finds that copyright’s expansion has diverged from the Constitution’s utilitarian mandate, and this issue can only be corrected through reform activities by the electorate. The citizenry is unfortunately ill-equipped to effect this change; new survey evidence establishes the public lacks the basic understanding of copyright policy necessary to recognize the problem and advocate for reform. Proposals to remedy the situation are then presented.

The first substantive part of this Article introduces public choice theory, a field in which economic methods are used to explain the behavior of public actors. Section II continues by discussing the interplay between public choice theory and copyright laws, and describing why

¹ Siva Vaidhyanathan, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 36–37 (2001); Derek Khanna, *Guarding Against Abuse: The Costs of Excessively Long Copyright Terms*, 23 COMM.LAW CONSPECTUS 52, 68 (2014).

² Vaidhyanathan, *supra* note 1, at 36–37; *see also* Ashley Packard, *Copyright Term Extensions, the Public Domain and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 25 (2002).

³ Vaidhyanathan, *supra* note 1, at 36–37; *see also* Ivan K. Fong, *Law and New Technology: The Virtues of Muddling Through*, 19 YALE L. & POL’Y REV. 443, 448 (2001).

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ *Threshold Media Corp. v. Relativity Media, LLC*, No. cv 10–09318, 2013 WL 11287701, at *6 (C.D. Cal. Mar. 15, 2013).

rationally behaving legislators have chosen to continually expand the protections afforded copyright owners.

Section III explains why the ever-broadening scope of copyright protection runs afoul of the constitutional requirement that these laws “promote the progress of science and the useful arts.”⁶ Drawing from a variety of fields including history, economics, and legal theory, this portion of the Article establishes that Congress is limited to passing laws in satisfaction of this constitutional mandate, and at present, the legislature is exceeding its authority. The Section closes with an analysis of the courts’ refusal to engage in substantive judicial review of this extra-constitutional activity.

The following Section IV discusses why the only path to copyright reform is advocacy by the electorate and why such advocacy is impossible if the citizenry is insufficiently educated about copyright. Specifically, if the public does not realize that copyright law should “promote the progress of science and useful arts,” it cannot be motivated to action when copyright falls short of this threshold.

The article then presents the first academic survey to quantify the public’s understanding of basic tenets of the U.S. copyright system. The multiple-choice questions found low levels of understanding with regard to three principles of copyright law: (1) copyright serves utilitarian goals (7.8% of respondents answered correctly), (2) all works eventually fall into the public domain (9.2% correct), and (3) the public has unfettered access to works in the public domain (44.1% correct). Premised upon this low level of understanding, it is unlikely the public will protest the continued divergence from copyright’s utilitarian goals absent a deviation from the status quo.

Section V concludes the Article with a series of proposals to effect copyright reform in the face of an uninformed populous. The first subsection uses the study of public goods, collective action, and public choice theory to describe means to encourage individuals and corporations to participate in activities to correct the copyright regime. The Section finishes by drawing on the field of behavioral economics to propose additional strategies to effect reform.

II. PUBLIC CHOICE THEORY

Public choice theory posits that government officials behave in a manner that maximizes their personal gain, rather than furthering the public’s interests.⁷ The theory is consistent with historically accepted approaches to economic analysis, but diverges from traditional assumptions in political science, including the belief that political actors work primarily to benefit their constituency.⁸ Public choice adherents have, in simplified terms, implemented basic economic tenets into political science analysis.⁹ The following Section discusses public choice theory’s

⁶ U.S. CONST. art. I, § 8, cl. 8.

⁷ GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* 16 (2002).

⁸ TULLOCK ET AL., *supra* note 7, at 4; *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 296 (1988); David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 651–52 (1997); *but see* J. Mark Ramseyer, *The Puzzling (in)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 744 (1994).

⁹ D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1029 (2011); TULLOCK ET AL., *supra* note 7, at 5.

intersection with the legislative process and how this informs the understanding of an ever-expanding copyright system.

Democratically elected legislators depend on reelection to make a living.¹⁰ To this end, they are incentivized to take actions that will appeal to the electorate¹¹ under the assumption that popular policies are rewarded with votes.¹² The incentive to pass popular legislation should not be confused with motivations to pass laws representing sound policy.¹³ That distinction may create perverse incentives when enacting statutes. This phenomenon shows itself in situations where the public lacks sufficient knowledge to recognize good policy—as is discussed in Section IV with regard to the public’s lack of understanding about copyright law.

Legislators also further their personal interests by amassing large campaign funds, which increase their chance of reelection.¹⁴ Politicians are thus incentivized to promote policies that appeal to special interest groups in order to satisfy potential donors.¹⁵ Of course, a legislator would not back a statute that represents a significant and apparent detriment to the electorate, as this risks antagonizing voters and losing future elections. Special interest laws are therefore most likely to pass where the costs are distributed over a large, diffuse section of the citizenry.¹⁶ Similarly, legislation is expected to favor special interests where the benefits are highly concentrated in a small group, as the preferred parties are able to overcome free-rider problems endemic in large groups¹⁷ and lobbying costs are likely outweighed by future gains.¹⁸

It should not be ignored that the literature contains a significant body of criticism of public choice. The theory has been attacked for misplacing assumptions of hyper-rationality in the decisions of public actors despite research establishing that not all parties behave in their own interest.¹⁹ This criticism is notable in light of the ever-growing body of behavioral economics

¹⁰ TULLOCK ET AL., *supra* note 7, at 6.

¹¹ Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99, 121 (2004).

¹² TULLOCK ET AL., *supra* note 7, at 6.

¹³ See Barry Friedman, *Discipline and Method: The Making of the Will of the People*, 2010 MICH. ST. L. REV. 877, 916–17 (2010).

¹⁴ Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2159 (1996).

¹⁵ McDonnell, *supra* note 11, at 121; Rachel Sachs, *The New Model of Interest Group Representation in Patent Law*, 16 YALE J. L. & TECH. 344, 348 (2014); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991).

¹⁶ Dan M. Kahan, *The Economics-Conventional, Behavioral, and Political-of “Subsequent Remedial Measures” Evidence*, 110 COLUM. L. REV. 1616, 1648 (2010); Sachs, *supra* note 15, at 344, 349 (2014). Conversely, legislation that creates a large, but diffuse, benefit for society is unlikely to pass where a small, concentrated cost will befall a small group. Farber & Frickey, *supra* note 15, at 72.

¹⁷ Mancur Olson, THE LOGIC OF COLLECTIVE ACTION 21 (1965)

¹⁸ McDonnell, *supra* note 11, at 121; Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 356 (1999); see also [redacted]; Olson, *supra* note 17, at 22, 33–34, & 43–44.

¹⁹ Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the Sec at Sixty*, 15 CARDOZO L. REV. 909, 915 (1994).

literature, which describes expected displays of irrationality.²⁰ Similarly, others posit that public choice unduly oversimplifies the motives of public actors to suit the theory.²¹

Recognizing the existence of these criticisms (and a host of others),²² the Author does not—and has no need to—present public choice as an over-arching theory of public actors and their motivations. As argued by two public choice critics, Farber and Frickey, while “public choice cannot support the sweeping empirical generalizations needed to justify grand theory, it does provide fruit for more particularized inquiries about the formation of public policy.”²³ It is in this limited scope that public choice is discussed herein.²⁴

Regarding the formation of copyright policy, application of public choice is apropos. As presented in the following subsections, the theory has significant descriptive and predictive value for copyright legislation. With this in mind, this Article uses public choice to evaluate and explain current copyright policy.

A. The Copyright Laws

The United States’ copyright system is a utilitarian regime intended to benefit the public by expanding the scope of knowledge and culture.²⁵ To this end, encouraging creation of new works of authorship is the historically recognized goal of copyright law.²⁶ This narrow target is mandated by a unique constitutional grant of congressional power, which identifies a policy goal to be attained (*i.e.*, “the Progress of Science and useful Arts”) and the manner to achieve this end (passing copyright laws).²⁷ This provision is referred to as the “Intellectual Property Clause” or the “IP Clause.”

The constitutionally mandated advancement of public knowledge is achieved using a reward system whereby an author is financially incentivized to create new works for public consumption.²⁸ A statutory *quid pro quo* is provided whereby the author is granted a limited monopoly to exploit their authorship and the public is granted access to the work and unfettered

²⁰ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

²¹ Susan Block-Lieb, *Congress’ Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 830 (1997).

²² See Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1309 n.127 (1993); see also Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 180–81 (1996); Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1140 (2002).

²³ FARBER & FRICKEY, *supra* note 15, at 117.

²⁴ The Author takes no immediate position on the global application of public choice theory. No such position is necessary for purposes of this Article.

²⁵ ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 14 (7th ed. 2006).

²⁶ *Golan v. Holder*, 565 U.S. 302, 344–346 (2012) (Breyer, J., dissenting).

²⁷ E. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 3 (2002); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1153 (2000).

²⁸ *Golan*, 565 U.S. at 345–346 (Breyer, J., dissenting) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 212, n.18 (2003)).

usage thereof when it enters the public domain.²⁹ Works are guaranteed to eventually become part of the public domain by the constitutional requirement that copyrights exist for a “limited Time[.]”³⁰

While this arrangement benefits the author, Congress has stated that this benefit is as an incentive and not a reward or natural property right.³¹ Consistent with its utilitarian mandate, the term of copyright’s limited monopoly theoretically maximizes the reward for creation of new works without unduly delaying their entrance to the public domain.³²

B. Public Choice and Copyright

Scholars agree that the copyright industry satisfies public choice theory’s requirements for disproportionate influence by small factions.³³ Content owners (*e.g.*, those in the entertainment and publishing industries) represent a concentrated group of homogenous interests that benefit when copyright’s protections expand.³⁴ As the scope of those rights broaden, these parties’ intellectual property assets increase in value, making lobbying a rewarding enterprise.³⁵

The beneficiaries of the public domain and access to works of authorship (*i.e.*, the general public) represent an enormous group of heterogeneous interests.³⁶ Denial of access to copyrighted works is a cost dispersed across a large swath of the citizenry and—for works that would fall into the public domain many years from now—across multiple generations.³⁷ In such a situation, minimal lobbying against the expansion of copyright is expected. Individuals will rationally abstain from contributing to collective action (*e.g.*, lobbying) because they expect to obtain the benefit of the collective action (*e.g.*, laws protecting the public’s general interest) regardless of if they contribute.³⁸ Unfortunately, where all actors engage in free-riding, no one will contribute to the collective action, and nothing is achieved.³⁹

This set of circumstances predicts significant lobbying to broaden copyright’s protections with little counter-pressure to protect the interests of the general public. The continuing expansion

²⁹ *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539, 578 (E.D. Pa. 2005); *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 622 (N.D. Ga. 1993).

³⁰ U.S. CONST. art. I, § 8, cl. 8.

³¹ See H.R. REP. NO. 1494, at 2 (1892); H.R. Rep. No. 2222, at 7 (1909).

³² Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1367 (2012).

³³ Sachs, *supra* note 16, at 352 (2014).

³⁴ Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1154 (2007); Sachs, *supra* note 16, at 346 & 352 (2014).

³⁵ See Elizabeth Williams, *Copyright Law’s Over-Protection of Cyber Content: Digital Rights Management*, 12 INTELL. PROP. L. BULL. 199, 202–203 (2008); David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1799 (2013).

³⁶ Elkin-Koren, *supra* note 34, at 1154.

³⁷ Sachs, *supra* note 16, at 352 (2014).

³⁸ See, *e.g.*, Norman R. Williams II, note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 975 n.56 (1994).

³⁹ See, *e.g.*, Williams, *supra* note 38, at 975 n.56.

of the rights afforded copyright holders shows this expectation to be true.⁴⁰ The initial term for a copyright in 1790 was 14 years with the possibility of a 14 year extension.⁴¹ By the early 1900s, the term had doubled to 28 years with a 28 year possible extension,⁴² and at present, copyrights last for the author's life plus 70 years.⁴³

The multifold extension of copyright's term is good for content owners, but it is sub-optimal when evaluating aggregate social welfare.⁴⁴ As fully discussed in a subsequent Section, there are strong arguments that the current scope of protection is not consistent with the Constitution's utilitarian mandate that copyright laws "promote the progress of science and the useful arts."⁴⁵ Restated, content producers (e.g., authors) are overly incentivized to create new works when viewed in light of the societal cost of delaying a work's entry into the public domain.⁴⁶ This situation is attributable to the rationally strong influence of content owners, as compared to rationally weak advocacy by the general public.

It is notable that occasional, unexpected shows of public strength do occur in this space; legislation expanding the scope of copyright protection does not always pass unchallenged.⁴⁷ A recent example of public outcry in response to expansionist intellectual property proposals is the protest over the Stop Online Piracy Act (SOPA) and its counterpart, the Protect IP Act (PIPA), in 2012.⁴⁸ Unfortunately, responses such as these rare⁴⁹ and are unlikely to arise to challenge each attempt to expand copyright protections.

III. EVALUATING THE CONSTITUTIONALITY OF COPYRIGHT LAWS

Building upon the above discussion of public choice theory and the disproportionate influence wielded by content owners, this Section argues that this state of affairs has caused the copyright system to come unmoored from its utilitarian, constitutional mandate. The initial Sub-Sections explain why constitutionally sound copyright legislation "must promote the progress of

⁴⁰ See Petition for a Writ of Certiorari at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); see also John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1403 n.11 (2009).

⁴¹ Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790).

⁴² Copyright Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-1081 (1909).

⁴³ 17 U.S.C. § 302(a).

⁴⁴ Sachs, *supra* note 16, at 352 (2014); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 198; Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 871 (2001).

⁴⁵ See *infra* Section III(C).

⁴⁶ *Id.*; Derek Khanna, *Reflection on the House Republican Study Committee Copyright Report*, 32 CARDOZO ARTS & ENT. L.J. 11, 49-50 (2013); Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 280-282 (2009).

⁴⁷ See Sachs, *supra* note 16, at 355-56 (2014).

⁴⁸ Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go from Here*, TECHPRESIDENT (Jan. 25, 2012), <http://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here>.

⁴⁹ Daniel N. Yannuzzi, *Developments In Intellectual Property Law Are Creating New Opportunities And Partnerships That Are Changing The Business And Landscape Of Litigation And Licensing*, 2013 WL 571331, at *7 (Aspatore 2013).

science and the useful arts.” The following parts describe the present copyright system’s failure to satisfy its mandate and the courts’ unwillingness to address the problem through judicial review.

A. The IP Clause as a Limitation on Congressional Power

The Constitution’s IP Clause is the only grant of congressional power that includes a specific statement of legislative purpose—namely, the promotion of science and the useful arts.⁵⁰ Intended uses of other constitutional grants of power are, at best implied.⁵¹ The IP Clause’s declaration of utilitarian purpose was included to “encourage the production of useful [works]”⁵² and subsequent “public exploitation” thereof.⁵³ This statement embodies two competing concerns; authors must be incentivized, but without unduly encroaching on the public’s interest in a robust public domain.⁵⁴

Recent precedent proffers that laws can also “promote the progress” by encouraging the dissemination of works.⁵⁵ This is not a traditional goal of copyright⁵⁶ as it is in patent law.⁵⁷ Historical references to dissemination cite it as a positive externality arising from the generation of incentives to create—not a goal unto itself.⁵⁸ To the extent dissemination is presented as a part of utilitarian copyright, it is not representative of the traditional aims of the regime.⁵⁹

The utilitarian goals of domestic law contrast with a variety of other justifications for intellectual property. Continental Europe’s copyright laws largely espouse a natural rights theory⁶⁰ based on the Locke’s idea that humans are morally entitled to the fruits of their labor.⁶¹ Others

⁵⁰ Heald & Sherry, *supra* note 27, at 1153.

⁵¹ William Hubbard, *Inventing Norms*, 44 CONN. L. REV. 369, 380 (2011).

⁵² EATON S. DRONE, A TREATISE THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 209 (1879) (internal quotation marks omitted).

⁵³ *Golan v. Gonzales*, No. 01-1854, 2005 WL 914754, at *2 (D. Colo. Apr. 20, 2005), *aff’d in part, remanded in part*, 501 F.3d 1179 (10th Cir. 2007).

⁵⁴ *Threshold Media Corp. v. Relativity Media, LLC*, No. cv 10–09318, 2013 WL 11287701, at *6 (C.D. Cal. Mar. 15, 2013).

⁵⁵ *Golan v. Holder*, 565 U.S. 302, 326 (2012).

⁵⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (Copyright “is intended to motivate the creative activity of authors and inventors.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim [of copyright] is . . . to stimulate artistic creativity for the general public good.”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“The Copyright Act was intended to promote creativity.”); Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990) (a seminal work in copyright, stating that the law “is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”); Robert E. Shepard, *Copyright’s Vicious Triangle: Returning Author Protections to Their Rational Roots*, 47 LOY. L.A. L. REV. 731, 759 (2014) (referencing the “novel principle” that dissemination is a goal in copyright).

⁵⁷ Sean B. Seymore, *The Null Patent*, 53 WM. & MARY L. REV. 2041, 2045 (2012); J. Jonas Anderson, *Nontechnical Disclosure*, 69 VAND. L. REV. 1573 (2016); *Brenner v. Manson*, 383 U.S. 519, 533 (1966).

⁵⁸ *J.L. Mott Iron Works v. Clow*, 82 F. 316, 318–19 (7th Cir. 1897) (“The object of [copyright] was to promote the dissemination of learning, by inducing intellectual labor in works.”); *Ansehl v. Puritan Pharm. Co.*, 61 F.2d 131, 133 (8th Cir. 1932); Donald P. Harris, *An Unconventional Approach to Reviewing the Judicially Unreviewable: Applying the Dormant Commerce Clause to Copyright*, 104 KY. L.J. 47, 77 (2016) (“[D]issemination contributes to authors’ incentives; absent this, dissemination for the sole benefit of disseminators is outside the goal of copyright.”).

⁵⁹ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁶⁰ *Golan v. Holder*, 565 U.S. 302, 348 (2012).

⁶¹ Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 245 (2011).

extrapolate Radin’s theory of property and personhood⁶² into copyright, asserting that authors inherently own creations arising from their personality.⁶³ While the justifications for these theories may be furthered by the U.S. copyright system, such effects are secondary to the regime’s utilitarian mandate.⁶⁴

Looking to the IP Clause as a whole, the Supreme Court holds it to be “both a grant of power and a limitation,” such that copyright laws passed thereunder must “promote the progress.”⁶⁵ Regardless, some commenters argue that the Clause’s statement of purpose bears no legal significance and presents no limitation on Congress’ power to legislate.⁶⁶ Beyond disagreeing with the Supreme Court, this argument runs into issues when confronted with the below-discussed history of the Clause and basic tenets of constitutional construction.

1. History of the IP Clause

The original intent behind the IP clause is not easy to glean. Notes and records from the 1787 Constitutional Convention provide no direct evidence of the rationale underlying the Clause.⁶⁷ Further, the provision’s goals cannot be derived from the papers of any single author because it comprises portions of several proposals.⁶⁸ Despite these limitations, historical analysis supports the conclusion that the IP Clause circumscribes Congressional power by requiring that copyright laws “promote the Progress of Science and useful Arts.”

In a 2006 article, Dotan Oliar concluded that—based on a review of the records from the Constitutional Convention—the IP Clause should be interpreted as limiting Congress’ power.⁶⁹ Oliar found three specific showings of the drafters’ “collective intent” that the IP Clause limit Congress’ authority, such that Congress may only pass copyright laws to “promote the progress.”⁷⁰

Initially, Oliar noted that the framers discussed a plenary copyright power, but chose to amend the proposal into the form we now know.⁷¹ Had they intended to adopt an unlimited

⁶² Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982). Radin’s theories are similar to those of Hegel. See Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1324 n.46 (2004).

⁶³ Zachary Garsek, *Napster Through the Scope of Property and Personhood: Leaving Artists Incomplete People*, 19 CARDOZO ARTS & ENT. L.J. 205, 208–09 (2001).

⁶⁴ See, e.g., *U.S. Golf Ass’n v. St. Andrews Sys., Data-Max, Inc.*, 749 F.2d 1028, 1035 n.12 (3d Cir. 1984).

⁶⁵ *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (describing, in the patent context, that the IP Clause limits the scope of legislative power when exercising the IP Clause to passing statutes that “promote the progress”); see also *Lee v. Runge*, 404 U.S. 887, 888–89 (1971); *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003); *Figueroa v. United States*, 66 Fed. Cl. 139, 152 (2005), *aff’d*, 466 F.3d 1023 (Fed. Cir. 2006).

⁶⁶ See, e.g., Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 299 (2002).

⁶⁷ WALTERSCHEID, *supra* note 27, at 2.

⁶⁸ Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87, 91 (1999).

⁶⁹ Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1845 (2006).

⁷⁰ *Id.* at 1810; see also Sean M. O’Connor, *The Lost “Art” of the Patent System*, 2015 U. ILL. L. REV. 1397, 1466–67 (2015); Sean M. O’Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 768 (2015).

⁷¹ Oliar, *supra* note 69, at 1811.

IP Clause, they need not have amended the proposal.⁷² This supports the conclusion that Congress' copyright authority is indeed limited by the language of the Clause.

Second, the “promote the progress” clause is an amalgamation of goals identified in two un-adopted constitutional provisions.⁷³ Historical analysis shows that these statements of goals were intended to limit the exercise of Congress' power under the respective proposals.⁷⁴ It follows that if the language from which the “promote the progress” clause arose was intended to limit Congressional authority, the “progress” clause should similarly serve as a restraint on the power to pass federal law.⁷⁵

Lastly, Olliar noted that a plenary copyright power was proposed by a group favoring a strong national government, while the “promote the progress” limitation was proffered by those who were suspicious of concentrating such power.⁷⁶ This is relevant because the conflicting parties could only be expected to find common ground if each side made concessions.⁷⁷ On this point, the states-rights camp conceded a federal copyright power, but only if the strong national government contingent conceded a substantive limitation on the federal power, namely “promoting the progress.”⁷⁸

These pieces of history—while not individually conclusive—produce a coherent narrative, whereby the “promote the progress” limitation is binding.⁷⁹ Other commenters have, through historical analysis, come to similar conclusions.⁸⁰ The position that the “promote the progress” clause is a limitation on Congressional power is, as discussed below, likewise supported by application of basic tenets of constitutional interpretation.

2. Constitutional Interpretation

The Constitution uses “a spare and elegant style” that does not include superfluous language.⁸¹ With this in mind, it is improper to interpret the document to render a provision (*i.e.*, the “promote the progress” clause) devoid of meaning.⁸² The Supreme Court has held accordingly, stating that “every word must have its due force [because] no word was unnecessarily used, or needlessly added.”⁸³

It contravenes these tenets of interpretation to understand the IP Clause as not requiring that copyright law serve its utilitarian mandate. To do so renders the phrase “to promote the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Olliar, *supra* note **Error! Bookmark not defined.**69, at 1813.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1810–11.

⁸⁰ WALTERSCHEID, *supra* note 27, at 3; *see also* Fromer, *supra* note 32, at 1339.

⁸¹ L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 370 (2000).

⁸² Comments of President James Monroe (4th of May, 1822) (reprinted in JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 445 (Vol. II, 1833)).

⁸³ *Wright v. United States*, 302 U.S. 583, 588 (1938) (quoting *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840)).

progress of science and useful arts” meaningless, as Congress then has the capacity to legislate in the copyright area for *any* purpose. This cannot be correct.

Some commenters attempt to avoid these basic rules of constitutional interpretation by giving the “promote the progress” clause *some* meaning while simultaneously arguing that it does not limit Congress’ power.⁸⁴ For example, it has been asserted that the Clause is a nonbinding statement of “purpose,” which avoids rendering the language meaningless but stops short of giving it any power.⁸⁵ Re-characterizing the Clause in this way is an action without meaning; this interpretation again renders the language to have no effect. Congressional power is in no way hindered or amended by a non-limiting, purposive statement. This variation of the non-limiting theme again renders a portion of the Constitution meaningless, which is an unacceptable conclusion.

B. The IP Clause as a Limit on other Congressional Powers

While laws passed pursuant to the IP Clause must “promote the Progress of Science and the useful Arts,”⁸⁶ the Commerce Clause contains no such limitation and arguably encompasses the ability to pass copyright statutes.⁸⁷ Whether the IP Clause impliedly prohibits using the Commerce Clause to pass copyright laws is a question with no clear answer.⁸⁸ If the Commerce Clause could be used in this manner, all limitations placed on the IP Clause would be meaningless, as Congress could simply look to the Commerce Clause for any necessary legislative authority.⁸⁹ The Supreme Court has not ruled on this issue,⁹⁰ and lower courts are inconsistent on the topic.⁹¹ Non-judicial commenters are, however, almost unanimous in their belief that the IP Clause does serve as a substantive limit on the Commerce Clause’s grant of authority.

1. Unclear Case Law

In 2004, the Second Circuit addressed whether Congress could grant perpetual anti-bootlegging⁹² protections in contravention of the IP Clause’s requirement that copyrights exist for “Limited Times.”⁹³ Responding to arguments that the law was a valid use of the Commerce Clause,

⁸⁴ See, e.g., Melville B. Nimmer & David Nimmer, 1 NIMMER ON COPYRIGHT § 1.03[[A] (Matthew Bender, Rev. Ed.).

⁸⁵ See, e.g., Martin, *supra* note 56, at 299.

⁸⁶ See *supra* Section III(0).

⁸⁷ See Philip H. Miller, *Life After Feist: The First Amendment, and the Copyright Status of Automated Databases*, 60 FORDHAM L. REV. 507, 536 (1991).

⁸⁸ *KISS Catalog v. Passport Int’l Prods., Inc.*, 350 F. Supp. 2d 823, 833 (C.D. Cal. 2004) *order vacated in part on other grounds on reconsideration sub nom. Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

⁸⁹ Aaron K. Perzanowski, *The Penumbra Public Domain: Constitutional Limits on Quasi-Copyright Legislation*, 10 U. PA. J. CONST. L. 1081, 1082 (2008).

⁹⁰ See Walterscheid, *supra* note 68, 88 & n.5 (1999).

⁹¹ Compare, e.g., *United States v. Martignon*, 492 F.3d 140, 144 (2d Cir. 2007) with *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

⁹² Bootlegging “has been defined as the making of ‘an unauthorized copy of a commercially unreleased performance.’” *United States v. Moghadam*, 175 F.3d 1269, 1271 n.3 (11th Cir. 1999) (quoting *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985)).

⁹³ *United States v. Martignon*, 346 F. Supp. 2d 413, 424 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

the court stated “Congress may not . . . enact [a copyright] law under a separate grant of power [e.g., the Commerce Clause], even when that separate grant provides proper authority.”⁹⁴ Unfortunately, the court backed away from this clear statement when it vacated the opinion and replaced it with the more milquetoast holding that:

No Section 8 clause, including the [IP] Clause, states that Congress can make certain laws only pursuant to that particular clause or that any limitations on the power granted by that clause carry over to Congress’s power to act in a related area under a different Section 8 clause[, though,] in limited instances, the expressed limitations of one clause do apply externally to another clause.⁹⁵

The court further elucidated that the anti-bootlegging statute at bar was not actually a “copyright statute” because it does not “allocate property rights in expression.”⁹⁶ Since the law was not a “copyright statute,” the Court held that it was not subject to the constitutional limitations found in the IP Clause.⁹⁷

This less-than-clear standard is further muddied by conflicting court opinions. In 2005, the Central District of California held “that legislation that could not be permitted under the IP Clause could nevertheless pass muster under the Commerce Clause—if the independent requirements of that clause were met.”⁹⁸ The Eleventh Circuit also disagreed with the Second, holding that “each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them [e.g., the IP Clause] may very well be doable under another [e.g., the Commerce Clause].”⁹⁹ Of course, both of these cases dealt with the constitutionality of a law dealing with *live* performances of music,¹⁰⁰ which is outside the purview of copyright.¹⁰¹ It is therefore not surprising that laws that do not create a copyright were not held to the limitations of the IP Clause.

While this state of affairs leaves the question unanswered, one Supreme Court Justice has made statements relevant to the issue. In 1995, Justice Thomas stated in a dissent that “[a]n interpretation of [one clause in the Constitution] that makes [another clause] superfluous simply cannot be correct.”¹⁰² This is directly applicable to the current issue. If the Commerce Clause can be used to pass copyright laws (regardless of if they comply with the IP Clause), the entire IP Clause and any limitations therein are superfluous.¹⁰³ Congress’ power would be coterminous regardless of whether the IP Clause existed. According to Justice Thomas’ logic, this conclusion

⁹⁴ United States v. Martignon, 346 F. Supp. 2d 413, 424-25 (S.D.N.Y. 2004) *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007) (footnote omitted).

⁹⁵ United States v. Martignon, 492 F.3d 140, 144 (2d Cir. 2007).

⁹⁶ *Id.* at 149–52.

⁹⁷ *Id.* at 153.

⁹⁸ Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc., 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

⁹⁹ United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999).

¹⁰⁰ Kiss Catalog, 405 F. Supp. 2d at 1174; Moghadam, 175 F.3d at 1277.

¹⁰¹ Craig W. Mandell, *Balance of Powers: Recognizing the Uruguay Round Agreement Act’s Anti-Bootlegging Provisions As A Constitutional Exercise of Congress’s Commerce Clause Authority*, 54 J. COPYRIGHT SOC’Y U.S.A. 673, 695 (2007).

¹⁰² United States v. Lopez, 514 U.S. 549, 589 (1995) (Thomas, J., concurring).

¹⁰³ See I.J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 910, at 664 (5th ed., 1891).

cannot be correct, and the Commerce Clause powers must be curtailed, such that the IP Clause's limitations are respected. This is, of course, not binding precedent.

2. Nearly Uniform Academic Literature

While the courts disagree on whether one constitutional grant of legislative authority can limit the use of another enumerated power,¹⁰⁴ outside commentary is almost unanimous. The significant majority of commentators believe that the IP Clause imposes such a restriction, in that Congress cannot look to other grants of authority to avoid the Clause's limitations (*e.g.*, "to promote the progress of science and the useful arts").¹⁰⁵ Several such opinions are discussed below.

In their 2000 article, Heald & Sherry asked the question "[t]o what extent does the limiting language of the [IP] Clause constrain Congress's other Article I powers, such as those granted in the Commerce and Treaty Clauses?"¹⁰⁶ To address this query, they reviewed "historical evidence, structural provisions, and precedent relevant to identifying principles of intellectual property law that the ratifiers of the Constitution likely presumed would restrain Congress."¹⁰⁷ From their research, they found that the IP Clause placed several limitations on Congress' authority to legislate under other clauses.¹⁰⁸

Relevant to the current discussion, Heald and Sherry determined that "legislation that imposes monopoly-like costs on the public through the granting of exclusive rights" (including copyright laws) must "attempt to secure a countervailing benefit to the public."¹⁰⁹ Congress does not have constitutional mandate to utilize other grants of power (*e.g.*, the Commerce Clause) to pass copyright legislation that does not satisfy this standard.¹¹⁰

Likewise, Pollack argued that "Congress may not do an end run around a limitation in [the IP Clause] of the Constitution by invoking a more general clause" (*i.e.*, the Commerce Clause).¹¹¹ In coming to this conclusion, she apparently invoked a variant of the common rule of statutory interpretation that "when both a general statute and a specific statute govern the same topic, the specific statute controls."¹¹² A host of other parties reached a similar conclusion.¹¹³

¹⁰⁴ See *KISS Catalog v. Passport Int'l Prods., Inc.*, 350 F. Supp. 2d 823, 833 (C.D. Cal. 2004) *order vacated in part on other grounds on reconsideration sub nom.* *Kiss Catalog*, 405 F. Supp. 2d 1169.

¹⁰⁵ Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004)

¹⁰⁶ Heald & Sherry, *supra* note 27, at 1120.

¹⁰⁷ *Id.* at 1160.

¹⁰⁸ *Id.* at 1167.

¹⁰⁹ *Id.* at 1160–62 (citing *Brenner v. Manson*, 383 U.S. 519, 534 (1966); Robert A. Kriess, *Patent Protection for Computer Programs and Mathematical Algorithms: The Constitutional Limitation on Patentable Subject Matter*, 29 N.M. L. REV. 31, 60 (1999)).

¹¹⁰ *Id.* at 1167.

¹¹¹ Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 60 (1999); *see also* Fromer, *supra* note 32, at 1341.

¹¹² See *Merryfield v. Sullivan*, 301 Kan. 397, 398 (2015).

¹¹³ See, *e.g.*, Rochelle Cooper Dreyfuss, *A Wiseguy's Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 230; Robert Patrick Merces & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 63 (2000);

With this weight of commentary in mind and considering the ambiguous state of case law, this Article proceeds under the expectation that Congress cannot utilize the Commerce Clause to circumvent the limitations imposed by the IP Clause. As set forth above, to determine otherwise would render the Clause without purpose or effect. Literally, any copyright law could be passed under the Commerce Clause, and there would be zero need for the IP Clause to exist (and zero need to write on the topic).

The below subsections continue to discuss the constitutional bounds of copyright statutes by evaluating the congruence between the present state of the law and the Constitution's utilitarian goals for the intellectual property system. This Section concludes by arguing that the copyright system (as it currently exists) is unconstitutional but this issue is largely moot, as federal courts refuse to exercise any significant judicial review of these statutes.

C. Copyright Laws do not serve their Constitutional Goal

Incentives exist that may induce legislatures to pass laws representing bad policy or creating a net social loss at the hands of special interests.¹¹⁴ This is not a surprising proposition, and in the vast majority of instances, disproportionate influence from special interests leads to the passing of laws that are “just” bad policy. This is not the case for copyright legislation.

The following subsection details why—from a host of subject-matter viewpoints—the present state of copyright law represents an extra-constitutional use of legislative power. Due to the above-described limitations on the exercise of power under the IP Clause, Congress' expansion of copyright protection becomes unconstitutional when it does not “promote the progress of science and useful arts.” Over-representation of special interests in this field—a phenomenon predicted by public choice theory and shown through copyright's ever-expanding protections—has caused copyright laws to range into the area of unconstitutionality. This conclusion is described in the following subsections.

1. Failure to Create New Incentives

Congress has repeatedly expanded the scope of copyright's protections. Review of several of these acts establishes that the legislation falls short of the constitutional requirement of “promot[ing] the progress.” This conclusion can be reached through any of the several below-discussed fields of analysis.

The Copyright Act of 1909 is an early example of copyright's expansion, broadening the maximum length of a term from 42 years to 56 years.¹¹⁵ Despite this increase, the data does not

Perzanowski, *supra* note 89, at 1100-03; Joseph C. Merschman, Note, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress's Copyright Power*, 34 CONN. L. REV. 661, 664 (2002).

¹¹⁴ See, e.g., John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law Forbidden Grounds: The Case Against Employment Discrimination Laws*, by Richard A. Epstein, 44 STAN. L. REV. 1583, 1599 n.71 (1992).

¹¹⁵ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 643-44 (1943); *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 271 (2d Cir. 1965); MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY*, 98-99 (2008).

show a significant increase in literary output, as shown through copyright registrations. In their book, *Against Intellectual Monopoly*, Boldrin and Levine point out that in 1900 (9 years before the term-extension) .13% of the population registered a literary work with the U.S. Copyright Office.¹¹⁶ This rate of registration barely increased following the 1909 Act; .14% of the population registered works in 1925 and 1950.¹¹⁷ This minimal increase is particularly relevant in light of the ever-decreasing illiteracy rate in the United States: 10.7% in 1900, 6% in 1920, 4.3% in 1930, and 3.2% in 1950.¹¹⁸ These statistics show a growing portion of the citizenry that could create and consume works of literary authorship, but little growth in the relative output of these works.

It is notable that Boldrin and Levine's comparison of registration rates in 1900 and 1925/1950 is imperfect, as the incentives to register changed with the 1909 Act. Before 1909, registration was necessary for copyright protection,¹¹⁹ whereas the 1909 statute provided that registration was only required before an infringement action could be brought.¹²⁰ Recognition of this fact does not, however, defeat Boldrin and Levine's position. A review of the annual registration rates show that, after the 1909 statute, the relative rate of literary registration generally declined until the 1970s (with exceptions being peaks near 1930 and 1950).¹²¹ Of course, these statistics are subject to other extrinsic influences, but taken with the below-described information, they support the conclusion that the continued expansion of copyright has not succeeded in promoting the progress of science and the useful arts.

Approaching the issue from a different perspective, a group of economists—including no fewer than five Nobel laureates—similarly concluded that modern copyright law has come untethered from its constitutional mandate.¹²² In a 2002 amicus brief, the economists addressed to what extent the Copyright Term Extension Act of 1998 encouraged creation of new authorship by adding 20 years to the copyright term for then-existing *and* future works.¹²³ Their below-described analysis concluded that any incentive to create was outweighed by disincentives.

Initially, the brief addressed any new economic inducements created by extending copyright's term by 20 years.¹²⁴ Using the example of an author who lived for 30 years after

¹¹⁶ BOLDRIN & LEVINE, *supra* note 115, at 98–99.

¹¹⁷ *Id.* at 99.

¹¹⁸ *National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/naal/lit_history.asp.

¹¹⁹ Tyler T. Ochoa, *Protection for Works of Foreign Origin Under the 1909 Copyright Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 285, 295 (2010).

¹²⁰ *Peer Int'l Corp. v. Latin Am. Music Corp.*, 161 F. Supp. 2d 38, 46 (D.P.R. 2001).

¹²¹ BOLDRIN & LEVINE, *supra* note 115, at 99–100.

¹²² Brief of George A. Akerlof, et al., at 1, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 at *3 (“Taken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs.”). The economists were George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser. *Id.* at 1. This brief was described as such: “In this nearly unprecedented document, the economists jointly stated that the then-recent extension of copyright term in the United States could not appreciably increase incentives to authors.” Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 625 (2014).

¹²³ Brief of George A. Akerlof, et al., *supra* note 122, at 1.

¹²⁴ *Id.* at 5–6.

authorship, the additional term was calculated to increase the copyright's value by a nominal .33%.¹²⁵ Almost comically, this estimate likely overstates the additional value because it assumes that the copyrighted work will sell at a constant level for each year of protection, which is a dubious proposition.¹²⁶

The authors next addressed the statute's extension of the term for then-existing copyrights. They concluded that the extra "twenty years provides *essentially no* incentive to create new works."¹²⁷ Accepting, *arguendo*, the proffered explanation that extending current copyrights incentivizes future authors because they can expect to enjoy any future term-extensions, the economists found that the "maximum impact on incentives from this effect . . . is trivial."¹²⁸ To this point, they estimated that granting an infinite copyright would only nominally increase the copyright's present value, and therefore, the value of any finite extension was, by definition, even less.¹²⁹ In summation, the economists determined that the CTEA's copyright term extension created very little new incentive to create.

The brief then turned its eye to whether the statute actually hindered authorship of future works. On this point, the economists concluded that the 20-year extension *disincentivizes* creative activity by elevating the cost to build upon works that—but for the term extension—would be in the public domain.¹³⁰ In summation, the brief concluded that the newly created disincentives to create significantly outweighed any newfound incentives.

Approaching the issue from a legal perspective, Justice Breyer used similar logic to likewise criticize the current breadth of copyright protection.¹³¹ Writing in 2003, the Justice stated that no reasonable party believes that they have "more than a tiny chance of writing a classic that will survive commercially long enough for the [CTEA's 20-year] copyright extension to matter."¹³² Premised upon this, he found a "total implausibility of any incentive effect," and determined that the term extension fell outside of the Constitution's mandate for a utilitarian copyright system.¹³³ While the above is sufficient to show a failure on Congress' part to encourage the creation of new works, the analysis would not be complete without reviewing the laws' effect

¹²⁵ *Id.* at 8.

¹²⁶ *Id.* at 7 (citing Barbara A. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 616-20 (Arthur Fisher Memorial ed. 1963); Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, CONGRESSIONAL RESEARCH SERVICE REPORT 98-144E (1998)). The fact that sales do not continue at a constant level is shown through the fact that, when copyright renewal terms were available, most works were not renewed (presumptively as their sales had decreased). Landes and Posner have stated that "fewer than 11 percent of the copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term, even though the cost of renewal was small." William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003).

¹²⁷ Brief of George A. Akerlof, et al., *supra* note 122, at 8 (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 10–15.

¹³¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 254 (2003) (Breyer, J., dissenting).

¹³² *Id.* at 254 (Breyer, J., dissenting).

¹³³ *Id.* at 264–67 (Breyer, J., dissenting).

on another utilitarian goal of copyright policy: encouraging the public domain and dissemination of information.

2. The Public Domain, Dissemination, and Promoting the Progress

Apparently recognizing the constitutional issues presented above, some proponents of expansive-copyright protection have refocused their position from discussing incentives to create to asserting that works entering the public domain represents a social ill. These parties argue that allowing works to fall into the public domain disincentivizes their upkeep and dissemination, which in turn discourages the progress of science and the useful arts.¹³⁴ This point was emphatically made by the president and CEO of the Motion Picture Association of America, Jack Valenti, who stated to Congress:

Whatever work is not owned is a work that no one protects and preserve[s]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. How does the consumer benefit from the steady decline of a film's quality?¹³⁵

It has similarly been argued that, with regard to written works, publishers are wary of investing in publishing and disseminating public domain works because they do not have the protection of copyright's artificial monopoly.¹³⁶ This hypothesis (hereinafter, the "Underuse Hypothesis") has been addressed by several empirical studies, each of which concluded that the stated concerns are overblown. The evidence supports for the contention that a work's entry into the public domain does not discourage its future dissemination.

One project analyzed how often songs from 1913-1922 were used in modern movies before and after they fell into the public domain.¹³⁷ If the Underuse Hypothesis is correct, these songs should be used less after they fell into the public domain. This is not what was found. The data established that songs' usage did not diminish after entering the public domain, and in fact, it

¹³⁴ See, e.g., H.R. REP. NO. 105-452, 4 (arguing that "[e]xtending copyright protection will . . . provide copyright owners generally with the incentive to restore older works and further disseminate them to the public"); see also H.R. REP. NO. 105-452, at 4 (1998); Eldred, 537 U.S. at 207; *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 161, 171, 188 (1996) (statement of Marybeth Peters, Register of Copyrights).

¹³⁵ *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 41, 42 (1995) (statement of Jack Valenti).

¹³⁶ Jerome N. Epping, Jr., Comment, *Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?*, 65 U. CIN. L. REV. 183, 208 (1996) (citing *Copyright Term Extension: Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of John A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks)).

¹³⁷ Paul J. Heald, *Does the Song Remain the Same? An Empirical Study of Bestselling Musical Compositions (1913-1932) and Their Use in Cinema (1968-2007)*, 60 CASE W. RES. L. REV. 1, 11 (2009).

increased, though not to a statistically significant amount.¹³⁸ The study concluded that, contrary to the Underuse Hypothesis, “public-domain songs from this era [did] not become orphans that are unavailable for public consumption.”¹³⁹

A similar work compared the rate of publication for 334 bestselling books from 1913-1922 (which became public domain works from 1988-1997) and from 1923-1932 (which are under copyright until at least 2018).¹⁴⁰ The study found that, depending on the year of observation, the public domain bestsellers were either more likely, or just as likely, to be in print relative to the works still under copyright.¹⁴¹ Based on this data, the research concluded that, contrary to the Underuse Hypothesis, “the number of editions of public domain works available do not suggest that these works are underexploited” or not being disseminated.¹⁴²

A final piece of research compared the availability of audio-book versions of 171 public domain novels (from 1913-1922) and 174 copyrighted novels (from 1923-1932).¹⁴³ It is notable the creating an audiobook constitutes a derivative work, which is protected by copyright.¹⁴⁴ This study found that, far from being underutilized, the public domain works were converted to an audio format at approximately twice the rate of their copyright-protected counterparts.¹⁴⁵ It can thus be concluded that entry into the public domain does little to inhibit a work’s future usage and actually *encourages* dissemination.

Analysis from a host of above-described fields—empirical, economic, and legal—show that copyright expansion has failed to fulfill its obligation to “promote the progress,” and therefore represents an extra-constitutional use of legislative power. These laws, therefore, seem ripe for judicial review of their validity. This expectation has not become a reality.

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 11.

¹⁴⁰ Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1034 & 1037 (2008).

¹⁴¹ *Id.* at 1040.

¹⁴² *Id.* at 1043.

¹⁴³ Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 21 (2013).

¹⁴⁴ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014).

¹⁴⁵ Buccafusco & Heald, *supra* note 143, at 23.

D. Judicial Deference to Congressional Mandate

While the scope of the federal government has expanded significantly since the beginning of the nation,¹⁴⁶ Congress can still only legislate within a set of constitutionally enumerated grants of power.¹⁴⁷ With this in mind, it is the province of the judiciary to determine whether Congress has the power to pass a statute, including copyright laws.¹⁴⁸ A law that falls outside of Congress' enumerated powers must be invalidated.¹⁴⁹ Courts have, however, been reluctant to exercise judicial review regarding copyright,¹⁵⁰ leading some to allege dereliction of duty.¹⁵¹

The CTEA—the above-described addition of 20 years to copyright's term—is a primary example of the courts' unwillingness to review intellectual property legislation.¹⁵² Two different Supreme Courts (the Rehnquist and Roberts courts) have been tasked with analyzing the constitutionality of the law, and both courts have wholly deferred to the will of Congress.

In *Eldred v. Ashcroft*, a group of businesspeople who utilize works in the public domain challenged the CTEA for failure to abide by the requirement that copyrights must exist for a “limited tim[e],” as mandated by the IP Clause.¹⁵³ The challenge was not to the extension for new works, but rather the additional term for copyrights *already in existence*.¹⁵⁴ Their position was that a copyright's “limited” duration was set and unchangeable at the term's start.¹⁵⁵

In support of their argument, petitioners cited the truism that copyright is a *quid pro quo*, whereby the author gets a temporary limited monopoly and the public gets access to the work.¹⁵⁶ They argued that the “deal” was made at the time the copyright was granted, and adding to the term after that gave the author a benefit without a corresponding benefit being granted to the public, thus violating the idea of a *quid pro quo*.¹⁵⁷ The Court rebuffed, stating that the deal was not for the monopoly period then offered by Congress, but rather, for the current period *and any later added extensions*.¹⁵⁸ This hands-off position was explained as such: “it is generally for Congress, not the courts, to decide how best to pursue the [IP] Clause's objectives.”¹⁵⁹

¹⁴⁶ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

¹⁴⁷ *Id.* at 2577.

¹⁴⁸ Kiss Catalog, Ltd. v. Passport Int'l Prods., Inc., 405 F. Supp. 2d 1169, 1171 (C.D. Cal. 2005).

¹⁴⁹ United States v. Tom, 565 F.3d 497, 501 (8th Cir. 2009).

¹⁵⁰ See Luck's Music Library, Inc. v. Ashcroft, 321 F. Supp. 2d 107, 112 (D.D.C. 2004), *aff'd sub nom.* Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005); DeepSouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972).

¹⁵¹ Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1637 (2004); Lunney, *supra* note 44, at 901.

¹⁵² Golan v. Gonzales, 501 F.3d 1179, 1181 (10th Cir. 2007); UNITED STATES COPYRIGHT OFFICE, COMPENDIUM III: COPYRIGHT OFFICE PRACTICES, ch. 100, 2014 WL 7749576, at *16 (2014).

¹⁵³ 537 U.S. 186, 196 (2003).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Petition for a Writ of Certiorari at 9–10, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); see also *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539, 578 (E.D. Pa. 2005).

¹⁵⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003)

¹⁵⁸ *Id.* at 215.

¹⁵⁹ *Id.* at 212 (citations omitted).

A similar outcome was reached in the 2012 case of *Golan v. Holder*, which addressed the question of whether Congress could restore copyright protection to works that had previously fallen into the public domain.¹⁶⁰ A restoration of this nature had never before occurred.¹⁶¹ Petitioners argued that granting protection to works that are in the public domain could not promote the progress of science through the creation of new works.¹⁶²

The Court disagreed, asserting a newfound position that the constitutional mandate of progress could be satisfied by encouraging the dissemination of information (as opposed to creation of new works).¹⁶³ With this in mind, Justice Ginsburg opined “Congress rationally could have concluded that [the extension of copyright’s term] promotes the diffusion of knowledge.”¹⁶⁴ To reach this conclusion, the Court acceded not only to Congress’ policy choice, but also to its novel interpretation of the Constitution.

The proposition that a rational Congress concluded that *decreasing* the public’s access to work (via the expansion of copyright) could encourage dissemination thereof is the apex of deference. As pointed out by Justice Breyer, the Court was deferring to an illogical factual premise (*i.e.*, restricting access to increase dissemination).¹⁶⁵ The proposition likewise diverges from conclusions reached by academic commentators¹⁶⁶ and the above-discussed empirical studies showing that works in the public domain are just as likely (or more likely) to be disseminated relative to those under copyright.¹⁶⁷

Furthermore, dissemination of information is not a historically recognized constitutional goal of the U.S. copyright system.¹⁶⁸ At most, dissemination was an end brought about by incentivizing parties to create.¹⁶⁹ It was thus not surprising that promoting the progress via

¹⁶⁰ *Golan v. Holder*, 132 S.Ct. 873, 881–83 (2012).

¹⁶¹ Brief for the Petitioners, at 4, 15, & 19, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); *but see* *Golan*, 132 S.Ct. at 885–87.

¹⁶² Brief for the Petitioners, at 24, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

¹⁶³ *Golan v. Holder*, 132 S.Ct. 873, 888–89 (2012).

¹⁶⁴ *Id.* at 889.

¹⁶⁵ *Id.* at 900 (Breyer, J., dissenting) (“[C]opyright tends to restrict the dissemination (and use) of works once produced either because the absence of competition translates directly into higher consumer prices or because the need to secure copying permission sometimes imposes administrative costs.” (citing W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 68–70, 213–214 (2003))).

¹⁶⁶ Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 *REV. OF ECON. RES. ON COPYRIGHT ISSUES* 1, 5 (2013) (“Economic analysts sometimes describe copyright law as a compromise between its positive effect of inducing initial creativity, and its negative effect of reducing dissemination.”); Gordon, *supra* note 122, at 631 (“[I]t would jar our traditions (and my common sense) if legislation were to expand copyright for [the purpose of dissemination.]”); Jessica W. Rice, Case Note, “*The Devil Take the Hindmost*”: *Copyright’s Freedom from Constitutional Constraints After Golan v. Holder*, 161 *U. PA. L. REV. ONLINE* 283, 294 (2013).

¹⁶⁷ *See supra* Section III(C)(2) (“[E]ntry into the public domain does little to inhibit a work’s future usage and dissemination.”); *see also* Hannah Dubina, Note, *Decomposing the Precarious Future of American Orchestras in the Face of Golan v. Holder*, 60 *UCLA L. REV.* 950, 958 (2013).

¹⁶⁸ Stuart V. C. Duncan Smith, *Individualism and Republicanism in the Intellectual Property Clause*, 19 *B.U. J. SCI. & TECH. L.* 432, 449 (2013).

¹⁶⁹ *J.L. Mott Iron Works v. Clow*, 82 F. 316, 318–19 (7th Cir. 1897) (“The object of [the IP Clause] was to promote the dissemination of learning, by inducing intellectual labor in works which would promote the general knowledge in science and useful arts.”); *Ansehl v. Puritan Pharm. Co.*, 61 F.2d 131, 133 (8th Cir. 1932).

dissemination was an idea not universally adopted,¹⁷⁰ especially given the position's arguable inconsistency with precedent.¹⁷¹ This is a particularly egregious example of the extent to which the Court is willing to go in deference to Congress on matters of copyright policy.

As shown by the above examples, deference is the attitude of the Supreme Court with regard to copyright legislation. And as pointed out by Justice Stevens, opinions such as these render "Congress' actions under the [IP Clause], for all intents and purposes, judicially unreviewable," which is a result that "cannot be squared with the basic tenets of our constitutional structure."¹⁷²

It is notable that such hyper-deference cannot be explained as a simple feature of the relevant Courts: Rehnquist (*Eldred*) and Roberts (*Golan*). On the contrary, the Rehnquist Court was described as showing a "dramatic lack of deference to Congress."¹⁷³ It has been argued that the Court during Rehnquist's tenure as Chief Justice was less deferential to Congress than any before it.¹⁷⁴ While the Roberts Court has shown greater deference,¹⁷⁵ this does not explain the continued unwillingness to exercise judicial review of copyright legislation.

An alternate hypothesis might be that those in favor of broad copyright protection are likely to be repeat litigants, and therefore, are able to cultivate judicial rulings and norms that are to their benefit.¹⁷⁶ These parties have the ability to repeatedly choose which lawsuits to file, which to settle, and which to litigate, in order to achieve a preferred set of precedent.¹⁷⁷ While this topic is interesting, further exploration is not warranted to support the relevant issue: courts are presently

¹⁷⁰ *Golan v. Holder*, 132 S. Ct. 873, 900 (2012) (Breyer, J., dissenting) ("The possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection."); Deidre A. Keller, *Recognizing the Derivative Works Right As A Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 513 n.16 (2012); Robert E. Shepard, Note, *Copyright's Vicious Triangle: Returning Author Protections to Their Rational Roots*, 47 LOY. L.A. L. REV. 731, 746 (2014). Historical documents likewise provide support for the proposition that copyright is intended to encourage the creation of new works (as opposed to dissemination). See *DRONE*, *supra* note 52, AT 209 ("[Copyright's] true scope and spirit are to encourage the production of 'useful books.'"); *Boucicault v. Fox*, 3 F. Cas. 977, 982 (C.C.S.D.N.Y. 1862) ("[T]he policy of the law is to encourage literary labor."); *Yuengling v. Schile*, 12 F. 97, 103 (C.C.S.D.N.Y. 1882) ("It cannot be doubted that the purpose of the copyright laws from the foundation of the government has been to encourage native talent [to produce new works of authorship.]"); *Taylor v. Blanchard*, 95 Mass. 370, 372 (1866) ("[Copyrights] are indulged for the encouragement of ingenuity.").

¹⁷¹ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventors.").

¹⁷² *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (J. Stevens, dissenting).

¹⁷³ Rosemarie Unite, *The Perrymander, Polarization, and Peyote v. Section 2 of the Voting Rights Act*, 46 LOY. L.A. L. REV. 1075, 1122 (2013) (citation omitted).

¹⁷⁴ Honorable Lawrence L. Piersol, *The Role of the Judiciary in A Democratic Society*, 52 S.D. L. REV. 444, 452 (2007); Michael Keenan, *Is United States v. Morrison Antidemocratic?: Political Safeguards, Deference, and the Counter-majoritarian Difficulty*, 48 HOW. L.J. 267, 303 (2004).

¹⁷⁵ J. Michell Pickerill & Artemus Ward, *Measuring Judicial Minimalism on the Roberts Court*, 30–31, Paper Prepared for the Annual Meeting of the American Political Science Association (Sept. 1, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314135; Katherine H. Blankenship, *The Great Tactician: The Chief Justice, Obamacare, and Walking the Tightrope of Partisan Politics*, 2 BELMONT L. REV. 149, 163 (2015); Charlotte Schneider, *Supreme Court Year in Review*, FED. LAW., Aug. 2013, at 78.

¹⁷⁶ Lunney, *supra* note 44, at 902.

¹⁷⁷ Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 451 (2002); Lunney, *supra* note 44, at 902–04.

unwilling to review copyright legislation for congruity with the utilitarian mandate of the IP Clause. The policy implications of this conclusion are further explored in the next part of the Article.

IV. EMPIRICAL ASSESSMENT OF PUBLIC KNOWLEDGE ABOUT COPYRIGHT

This Section presents survey evidence establishing that the public does not understand basic tenets of copyright law, which is a prerequisite to advocacy towards returning copyright to its utilitarian goals. Absent sufficient knowledge about copyright law, citizens are unable to recognize that their interests are being ignored and thus, are unable to change the state of affairs. This issue is discussed below, and the survey results relating to knowledge of copyright are presented in the following subsections.

The founding fathers envisioned the U.S.'s copyright system as furthering the promotion of authorship and enriching the public domain.¹⁷⁸ Unfortunately, public choice theory predicts—and history has shown—that law makers will ignore this mandate by continually broadening copyright's protections unless a superseding incentive is placed before them.¹⁷⁹ This incentive exists: votes. If the electorate ties an issue (*e.g.*, copyright reform) to their support (*e.g.*, their vote),¹⁸⁰ public choice theory holds that self-interested Congressmen will take action on that topic.

This presents a solution to the problem of disproportionate influence by content owners in formulating copyright policy, but for one thing: the U.S. electorate does not know enough about the copyright system to realize their constitutionally entitled interests are being trampled upon. The following subsections describe survey-evidence establishing that U.S. citizens are insufficiently informed about copyright law to realize that their interests are not being protected by Congress. Policy implications of this conclusion are addressed at the end of this Section.

While this is the first academic work to investigate the public's understanding of basic copyright law, prior studies have evaluated perceptions about the intellectual property system and motivations that are important to creative individuals. Sprigman, Buccafusco, and Burns conducted a series of experiments confirming the value of attribution to individuals.¹⁸¹ Survey research conducted by Mingaleva and Mirskikh found—at least with regard to Russian creators—personal inquisitiveness and the potential for financial remuneration were paramount incentives.¹⁸² In a similar vein, Silbey conducted a variety of interviews with innovative parties, concluding

¹⁷⁸ L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 918 (2003).

¹⁷⁹ See *supra* Section II(B).

¹⁸⁰ "Tying" support or vote to an issue could mean that the voter is more likely to vote for a candidate that agrees with the voter on a particular issue. Such "tying" could be an absolute decision to vote for the relevant candidate or an increase in the likelihood to vote for that candidate by some significant amount.

¹⁸¹ Christopher Jon Sprigman et. al., *What's A Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. Rev. 1389, 1392-93 (2013).

¹⁸² Zhanna Mingaleva & Irina Mirskikh, *Psychological Aspects of Intellectual Property Protection*, 190 PROCEDIA SOCIAL AND BEHAVIORIAL SCIS. 220, 223 (2015).

that—while monetary gain was a relevant consideration—concerns such as personal challenge and professional autonomy were also important in their decision to create.¹⁸³

Building on this work, Mandel, Fast, and Olson conducted survey research into the public’s subjective beliefs about the justification for intellectual property laws.¹⁸⁴ Their study concluded that, above all, the respondents validated these laws as a means to avoid plagiarism.¹⁸⁵ While that article presented some conclusions about the public’s knowledge of specific intellectual property laws (e.g., patent’s term length),¹⁸⁶ they did not research the level of understanding of basic tenets of the copyright. This is a void in the literature addressed by the current survey.

A. Google Consumer Surveys

Prior research tells us that—with regard to substantive intellectual property issues (e.g., term of protection, protectable subject matter, and obtaining protection)—the scope of U.S. citizens’ knowledge is low.¹⁸⁷ The present study expands on this research by being the first to collect information on the public’s understanding of elementary tenets of copyright law. More specifically, data was collected pertaining to basic goals of the system and the interaction of copyright holders’ rights and the public domain.

This study collected survey data using Google Surveys (GS), a web-based platform launched in 2012.¹⁸⁸ The system asks web-users a series of short questions in order to access a premium website.¹⁸⁹ Owners of the pages are paid for these responses, such that GS may be used in lieu of selling website advertising.¹⁹⁰ Online tools of this type are increasingly popular due to their convenience.¹⁹¹

¹⁸³ JESSICA SILBEY, THE EUREKA MYTH: CREATORS INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 14–15 (2015).

¹⁸⁴ Gregory N. Mandel et. al., *Intellectual Property Law’s Plagiarism Fallacy*, 2015 B.Y.U. L. Rev. 915, 917 (2015).

¹⁸⁵ *Id.* at 917.

¹⁸⁶ *Id.* at 935-36.

¹⁸⁷ *Id.* at 919 & 960. The cited article paid particular attention to the scope of intellectual property rights and questions relating to obtaining rights. *Id.* at 980–82.

¹⁸⁸ Lauren Indvik, *Google Partners With Publishers on a New Kind of Paywall*, MASHABLE (March 30, 2012), <http://mashable.com/2012/03/30/google-survey-paywall/#M011C8gxukq4>.

¹⁸⁹ Letter To FTC (Docket No. 9358), 2015 WL 6396129, at *13 (2015); *A Comparison of Results from Surveys by the Pew Research Center and Google Consumer Surveys*, THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, at 3, (Nov. 7, 2012), <http://www.people-press.org/files/legacy-pdf/11-7-12%20Google%20Methodology%20paper.pdf>. The scope of GS queries and multiple choice responses on this platform are significantly restricted. Questions are limited to 175 characters and answers are limited to 44 characters. See Alex Burr, *Public Understanding of the Implications of Metadata Collection from Internet and Phone Usage*, at 25 (2014, article on file with author). Communication within these parameters must be particularly brief, causing some details to be eliminated in the name of brevity.

¹⁹⁰ Tony John, *Google Consumer Surveys: An additional way to monetize your site*, GOOGLE (Feb. 19, 2015), <https://adsense.googleblog.com/2015/02/sign-up-for-google-consumer-surveys.html>; J. Bonneau, et al, *Secrets, lies, and account recovery: Lessons from the use of personal knowledge questions at google*, in PROCEEDINGS OF THE 24TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB, WWW ‘15 148 (2015).

¹⁹¹ Sebastian Schnorf, et al., *A Comparison of Six Sample Providers Regarding Online Privacy Benchmarks*, 1 (2014), <https://static.googleusercontent.com/media/research.google.com/en//pubs/archive/42558.pdf>.

The GS platform is distinct from many other online survey tools in that it does not pay its survey participants¹⁹² and it does not collect their demographic information.¹⁹³ Survey takers are “paid” through access to the subject website, and relevant personal attributes are inferred from the user’s internet history.¹⁹⁴ Extrapolated information about age, gender, and location are employed to weight the value of collected data or target respondents to be representative of all internet users (or some subset thereof, per instructions from the party conducting the research).¹⁹⁵ This attribute of GS eliminated the need for preliminary questions inquiring into the demographic information of respondents in the instant study.

Several studies have been conducted on whether GS is a viable tool for survey research, and the results are positive.¹⁹⁶ Addressing if the platform successfully creates a representative sample population using inferred demographics, one article found no evidence that GS “is either more or less representative than other non-probability samples.”¹⁹⁷ Pew Research reached similar conclusions, finding that “Google [] Surveys achieved a representative sample of internet users on gender, age, race/ethnicity, marital status and home ownership when compared with internet users in Pew Research Center surveys.”¹⁹⁸

A Google-funded study found that GS outperformed both probability and non-probability internet surveys in several areas, including average absolute error from a benchmark obtained via a large telephone survey.¹⁹⁹ The same report concluded that the response rate for GS compared favorably to most internet-based intercept surveys,²⁰⁰ telephone surveys, and online panels.²⁰¹ Based on such positive results, on researcher stated: “we asked whether [GS] is likely to be a useful platform for survey experimenters doing rigorous social scientific work[, and overall], our answer is yes.”²⁰²

¹⁹² See e.g., Michael Buhrmester, et al., *Amazon’s Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPECTIVES ON PSYCHOLOGICAL SCI. 3 (2011).

¹⁹³ Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L.J. 1252, 1268 (2015).

¹⁹⁴ THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 189.

¹⁹⁵ Philip Santoso, et al., *Survey Experiments with Google Consumer Surveys: Promise and Pitfalls for Academic Research in Social Science*, 24 POLITICAL ANALYSIS 356, 371 (2016); THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 189.

¹⁹⁶ Benjamin Livshits and Todd Mytkowicz, *InterPoll: Crowd-Sourced Internet Polls (Done Right)*, at 9, <https://www.microsoft.com/en-us/research/wp-content/uploads/2016/02/paper-23.pdf>.

¹⁹⁷ Santoso, et al., *supra* note 195, at 370.

¹⁹⁸ THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 189.

¹⁹⁹ Paul McDonald et al., *Comparing Google Consumer Surveys to Existing Probability and Non-Probability Based Internet Surveys*, GOOGLE, at 5 & 10, http://www.google.com/insights/consumersurveys/static/consumer_surveys_whitepaper.pdf.

²⁰⁰ Intercept surveys on the web are popup surveys that frequently use systematic sampling for every kth visitor to a website or web page. R.D. Fricker, *Sampling methods for web and e-mail surveys*, in THE SAGE HANDBOOK OF ONLINE RESEARCH METHODS 203 (N. Fielding, et al. eds., 2008).

²⁰¹ Paul McDonald et al., *supra* note 199, at 3; *Readership Survey Results We Asked; You Answered*, BENCH & B. MINN., NOV. 2013, at 11; see also *Product Overview, Google Consumer Surveys*, GOOGLE, <http://services.google.com/fh/files/helpcenter/generalonesheet.pdf> (touting a response rate over 20%).

²⁰² Santoso, et al., *supra* note 195, at 371.

Use of internet-based platforms do not, however, come without drawbacks. Online systems such as GS are inherently limited to the 78% of U.S. adults who use the internet, which biases the population younger, better educated, and wealthier.²⁰³ It is therefore unlikely that any internet-based sample is perfectly representative.²⁰⁴ This worry is, however, mitigated by Google's ability to infer demographic information and weight responses accordingly.²⁰⁵

Concerns about using an online system are further marginalized by the results of the survey. Internet users (including internet-based survey participants) tend to be wealthier and better education—characteristics which positively correlate with legal knowledge.²⁰⁶ The present study found a lack of popular knowledge about copyright, and this finding is only *emphasized* by the fact that the survey's participants might have had a greater understanding of the law than the public at large. The online-nature of the survey therefore appears to do little to mitigate the findings.²⁰⁷

B. The Survey

The primary goal of this survey was to determine whether the voting public in the United States appreciates the constitutional goals of the copyright system. To this end, the questions were tailored to assess the understanding that a utilitarian copyright regime serves the public good by promoting the creation of new works of authorship²⁰⁸ while ensuring that that any incentive

²⁰³ Paul McDonald et al., *supra* note 199, at 2 (citing *Demographics of Internet Users*, PEW RESEARCH CENTER (2011), <http://pewInternet.org/Static-Pages/Trend-Data/Whos-Online.aspx>).

²⁰⁴ THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 189.

²⁰⁵ *Id.*

²⁰⁶ Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 476 (1999); Stan L. Albrecht & Miles Green, *Cognitive Barriers to Equal Justice Before the Law*, 14 J. RES. CRIME & DELINQ. 206, 216–17 (1977); Martha Williams & Jay Hall, *Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences*, 7 LAW & SOC'Y REV. 99, 113 (1972); Note, *Legal Knowledge of Michigan Citizens*, 71 MICH. L. REV. 1463, 1471–72 (1973); Paul McDonald et al., *supra* note 199, at.

²⁰⁷ In addition, GS does not exhibit some drawbacks present in other online platforms that have been accepted in academic fields. For instance, Amazon's MTurk is considered a reliable platform for research. David S. Cohen & Jeffrey B. Bingenheimer, *Abortion Rights and the Largeness of the Fraction 1/6*, 164 U. PA. L. REV. ONLINE 115, 134 (2016); Mandel et. al., *supra* note 184, at 921–22 & n.10. This acceptance is despite MTurk's policy to pay respondents by the survey, which introduces possible misrepresentation or self-selection issues. Clarke & Fox, *supra* note 193, at 1293; Ilyana Kuziemko et al., *How Elastic Are Preference for Redistribution? Evidence from Randomized Survey Experiments*, 105 AM. ECON. R. 1478, 1480–84 (2015). It is therefore not surprising that, despite its recent vintage, GS has been used in academic research in fields including political science, law, business, and psychology. Clarke & Fox, *supra* note 193, at 1267 (citing Jessica Lavariega Monforti et al., *¿Por Quién Votará? Experimental Evidence About Language, Ethnicity and Vote Choice (Among Republicans)*, 1 POL., GROUPS, & IDENTITIES 475, 481 (2013), Andrew K. Przybylski, *Who Believes Electronic Games Cause Real World Aggression?*, 17 CYBERPSYCHOLOGY, BEHAVIOR, AND SOC. NETWORKING 228, 229 (2014); *The Limits of Attraction*, 51 J. MKTG. RESEARCH 487, 491 (2014)).

²⁰⁸ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237 (11th Cir. 2014); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

structure not unduly encroach upon the public domain.²⁰⁹ The questions were drafted to be brief to ensure a maximum response rate and comply with word limits on the GS platform.²¹⁰

The survey was targeted to people in the U.S. of voting age²¹¹ and consisted of three substantive questions.²¹² The Author chose not to use introductory (non-substantive) questions about the respondents, though doing so might have made the data set more robust (*i.e.*, collecting information about what attributes correlate with copyright knowledge). Inclusion of additional questions would have negatively affected the study's completion rate. Additionally, the research targeted knowledge across the *entire* U.S. electorate, making attributes of any single respondent less important.

The first question spoke unequivocally to the purpose of copyright law. It tested whether respondents appreciated that these statutes were constitutionally meant for the public benefit of encouraging the creation of new works, as opposed to rewarding an author's work or to ensure the author held dominion over his intellectual creations. The question read:

1. The primary goal of copyright law is:
 - a. To encourage creation of new books, art, etc.
 - b. To reward authors for their hard work.
 - c. To make sure people own what they create.

The first answer (A) is correct,²¹³ as it mimics relevant constitutional interpretation of the IP Clause.²¹⁴ The second choice is incorrect; the idea that a party deserves a copyright as a *quid pro quo* for hard work (*i.e.*, the Sweat of the Brow Doctrine) has been rejected by the Supreme Court.²¹⁵ Answer C is incorrect as it recites a "Moral Rights" justification for copyright law, which while popular abroad, is not a primary goal of U.S. copyright legislation.²¹⁶

The second survey question addressed the respondent's appreciation that all copyrights end, as per the Constitution's "limited Times" mandate.²¹⁷ The question implicitly tested whether

²⁰⁹ Threshold Media Corp. v. Relativity Media, LLC, No. cv 10–09318, 2013 WL 11287701, at *6 (C.D. Cal. Mar. 15, 2013) (“[C]opyright law strikes a utilitarian balance between two competing yet complementary societal interests: providing sufficient economic incentives to stimulate the creation of new works while protecting a large and vibrant public domain in which new ideas can flourish.” (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1109 (1990)).

²¹⁰ See Burr, *supra* note 189, at 25; Richard S. McLachlan, *Medical Conditions & Driving: Legal Requirements & Approach of Neurologists*, 16 MED. & L. 269, 270 (1997).

²¹¹ The survey was targeted to the group Google describes as “General Population in the United States” Google’s age groups start at age 18. See *Google Surveys Help*, GOOGLE, https://support.google.com/360suite/surveys/answer/2753080?hl=en#demo_geo_segments.

²¹² The first question was prefaced by the language: “Answer this anonymous 2 minute academic survey if you consent to participate.”

²¹³ Note that, while the order of questions was not varied from respondent to respondent, the order of the multiple choice answers was randomized for each participant.

²¹⁴ *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981).

²¹⁵ *Matthew Bender & Co. v. W. Pub. Co.*, 158 F.3d 693, 699 (2d Cir. 1998).

²¹⁶ See Michael P. Goodman, *Congress Can’t Trade America’s “Air”: Copyright, the “Kindred Subject of Patent”*, 3 DUKE J. CONST. L. & PUB. POL’Y 191, 192 (2008).

²¹⁷ U.S. CONST. art. I, § 8, cl. 8.

the subject was aware that the public domain existed, as a work falls into the public domain when its copyright term expires.²¹⁸ The question read:

2. Bob owns the copyright for a book. What option does he have when the copyright's term expires?
 - a. Renew the copyright.
 - b. There is nothing he can do.
 - c. A copyright's term never ends.

The second answer (B) is correct. Copyrights must be for a limited time, and there is nothing the author can do to change this. Under the present regime, renewal is not an option, as all copyrights exist for a designated period.²¹⁹ Therefore, the first response is incorrect. It is notable that a “renewal term” was available under the Copyright Act of 1909, but no party has been required to renew a copyright since 1991.²²⁰ Thus, “renew the copyright” has not been a valid option for a copyright owner for 25 years. The final answer is incorrect, as it recites the untrue belief that copyright terms are perpetual.

The third question tested the basic tenet of copyright law that there comes a time for all works after which the public has unfettered access and use. This time is, of course, when the work enters the public domain. The question read:

3. Jessica owns the copyright for a book. At some point in the future, the public can sell the book without her permission. True or False?
 - a. True—Copyrights end. Then anyone can sell it
 - b. False—Owners always control this right
 - c. False—The public will never have this right

The first answer is correct, as it recognizes that after a copyright's term concludes, the public can make use of the work without permission from the author. The incorrect second answer posits that an owner's right to sell his copyrighted work is eternal, which is at odds with the constitutional limitation that copyrights exist for a finite time. Answer C expressly limits the rights that the public can *ever* enjoy, which is at odds with the public's completely free use of a work in the public domain.

C. Results

The survey addressed 1,000 U.S.-based respondents of voting age. This number of survey takers was chosen to minimize uncertainty associated with the results without making the respondent pool unduly large. That goal was largely realized, with the maximum margin of error for any answer being plus or minus 3.5%. Further, the sample size led to a 95% statistically

²¹⁸ See *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 790 (7th Cir. 2014).

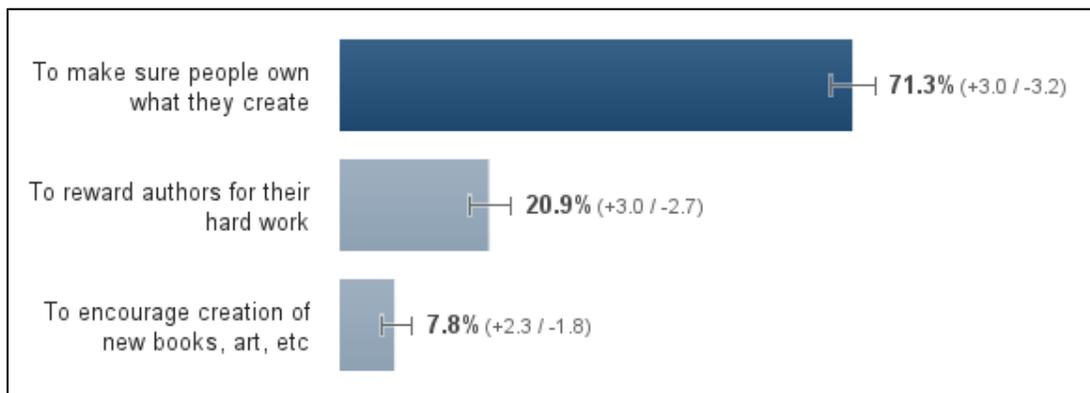
²¹⁹ See, e.g., U.S. Copyright Office, *Duration of Copyright*, at 1–2, <http://www.copyright.gov/circs/circ15a.pdf>.

²²⁰ See, e.g., *id.* at 2.

significant “winning (though incorrect) answer” for the first two questions. For the third query, respondents’ below-discussed inability to select the correct answer was likewise significant.²²¹

The study was conducted from July 21, 2016 to July 23, 2016 with results consistent with expectations based on earlier studies.²²² Respondents of voting age displayed little knowledge of the constitutional goals of the copyright system—namely incentivizing creation of new works and maintaining a robust public domain.²²³

Question 1 asked respondents to complete the sentence: “The primary goal of copyright law is ____.” The response was overwhelmingly that copyright’s primary goal is “To make sure people own what they create.”²²⁴ This answer is incorrect. Only 7.8% of those surveyed correctly recognized the utilitarian goal of copyright. The results are shown below:



Question 2 presented a miniature fact scenario for the respondent to evaluate. The query read: “Bob owns the copyright for a book. What option does he have when the copyright’s term expires?” A majority of respondents indicated that Bob could simply “renew” his copyright.²²⁵ This answer is incorrect. Only 9.2% correctly recognized that all copyrights end (and the work falls into the public domain). The results are shown below:

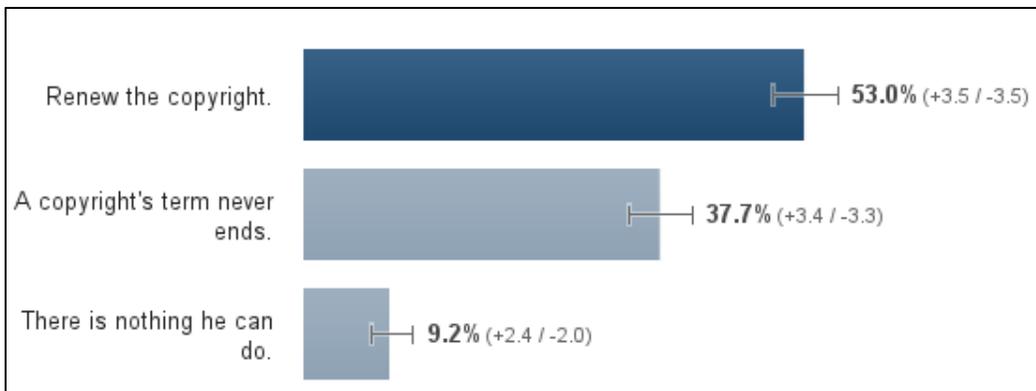
²²¹ Complete survey results on file with the Author. For question three, a comparison of the total responses to incorrect answers versus the correct answer was statistically significant.

²²² Mandel et. al., *supra* note 184, at 960.

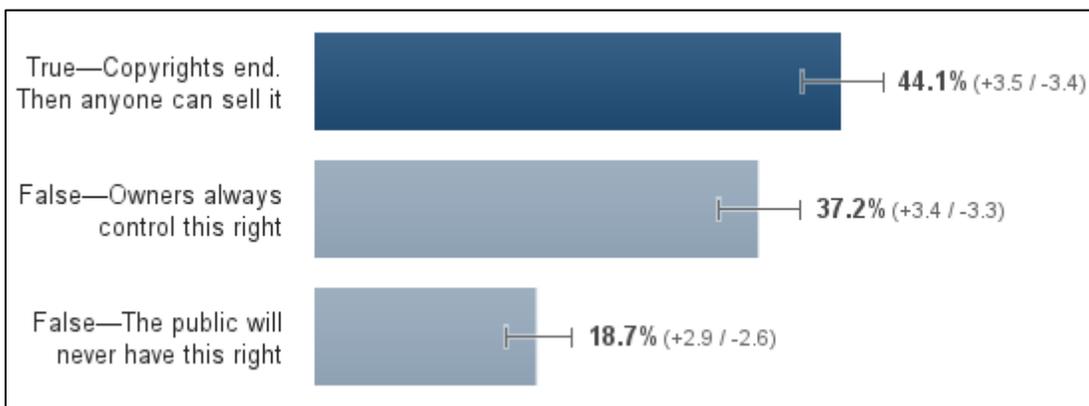
²²³ Threshold Media Corp. v. Relativity Media, LLC, No. cv 10–09318, 2013 WL 11287701, at *6 (C.D. Cal. Mar. 15, 2013).

²²⁴ The data is based on 845 responses.

²²⁵ The data is based on 825 responses.



Question 3 was unique within the survey, as it produced the only plurality winner. Survey takers were again presented with a short fact scenario, reading: “Jessica owns the copyright for a book. At some point in the future, the public can sell the book without her permission. True or False?” On this topic, 44.1% of the public correctly recognized that a public domain work could be sold by anyone, though this percentage likely over-estimates the portion of respondents that actually knew the correct answer (as opposed to guessing the correct choice).²²⁶ Regardless, a majority of respondents did not recognize this tenet of copyright law.²²⁷ The results are shown below:



D. Analysis

The results of the instant survey found significant misunderstandings about primary tenets of copyright law among U.S. residents of voting age. For each question, a majority of respondents’ answers indicated a failure to grasp the utilitarian nature of the copyright system. More specifically, the survey results found the audience to not understand that copyright laws must benefit the public by encouraging the creation of new works (Question 1) which will eventually fall into the public domain (Question 2) and be freely available for public use (Question 3). In contrast, the responses led one to believe the public thinks that copyright laws exist to reward

²²⁶ See Floyd J. Fowler, Jr., IMPROVING SURVEY QUESTIONS: DESIGN AND EVALUATION 69 (1995) (explaining that some portion of “correct” multiple choice answers were simply lucky guesses and don’t represent actual mastery of the subject). This effect is likely applicable in each of the instant survey questions.

²²⁷ The data was based on 814 responses.

authors and content owners. Respondents generally did not recognize the existence or nature of the public domain.

It is notable that the current results are consistent with earlier research which investigated survey-respondents' subjective justification for the existence of intellectual property. That study gave four possible reasons for the creation of intellectual property laws and asked respondents to "rank the statements based on how much you agree with them as a basis for intellectual property law."²²⁸ The subjective nature of the inquiry was shown in the introduction to each of the statements, namely "We *should* have intellectual property rights because"²²⁹ That survey found "preventing plagiarism" was the plurality winner (37.1%), with "incentive to create" and "moral rights" both coming in with 25.9%.²³⁰

The current survey investigated respondents' knowledge of the objective, constitutional goals of copyright law. The prior work looked asked questions about "intellectual property laws" (a superset of copyright law), but the findings are still fairly consistent. The instant study (Question 1) showed a very strong belief (71%) that copyright exists to "make sure people own what they create." This answer seems to envelop both the prior research's subjective justifications of "moral rights" (25.9%) and "avoiding plagiarism" (37.1%). The sum of those answers (63%) is similar to the percentage of respondent who (incorrectly) believed the objective purpose of copyright law is ensuring someone owns what they made (71%).

Aside from exhibiting similar findings, the prior study's investigation into the population's subjective beliefs about why intellectual property exists is also explanative of the current results. Specifically, a survey into the moral grounds for intellectual property is likely to indicate what the respondents believe is a "fair" state of affairs, and this perception commonly influences what a party believes the law actually is.

In the absence of knowledge about a particular subject, individuals are likely to employ a fairness heuristic, whereby they conflate laws and norms.²³¹ This heuristic is particularly prevalent where parties have to make quick decisions, such as those made in a survey.²³² Recognizing that the public lacks a knowledge about copyright law²³³ and that it subjectively believes copyright should exist to avoid plagiarism or support moral rights,²³⁴ it is unsurprising that the present survey found a belief that copyright law is intended to create very broad rights for the owner.²³⁵

²²⁸ Mandel et. al., *supra* note 184, at 929.

²²⁹ *Id.*

²³⁰ *Id.* at 973. A study investigating the objective reasons that the U.S.'s copyright/intellectual property system exists would omit the word "should."

²³¹ Kim, *supra* note 206, at 480; Daniel B. Klaff, *Debiasing and Bidirectional Bias: Cognitive Failure in Mandatory Employment Arbitration*, 15 HARV. NEGOT. L. REV. 1, 11–12 (2010).

Russell Cropanzano et al., *Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice*, 58 J. OF VOCATIONAL BEHAVIOR 164, 170 (2001).

²³² Larry A. Dimatteo et. al., *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 470 (2011).

²³³ *See supra* Section IV(D).

²³⁴ Mandel et. al., *supra* note 184, at 973.

²³⁵ This would include making sure that people own what they create (Question 1), granting long-term copyrights (Question 2), and allowing the author to continuously maintain some level of control over their work (Question 3).

This Section presented survey evidence establishing that the public lacks a basic understanding of copyright law, which is a prerequisite to public advocacy to return copyright laws to its utilitarian goals. The following discussion details how this issue may be remedied towards a successful realignment of the copyright system.

V. PROPOSALS TO RETURN TO A UTILITARIAN COPYRIGHT REGIME

Public Choice theory explains why Congress passes copyright laws that are untethered from their utilitarian goals.²³⁶ These overly expansive statutes fail to “promote the progress” and—beyond just being bad policy—are unconstitutional.²³⁷ The courts, however, have refused to judicially review these laws, which means that only the electorate can sufficiently influence Congress to pass utilitarian copyright statutes. Unfortunately, as the current study has shown, the electorate is not amply knowledgeable about the copyright system to recognize that it is being denied constitutionally mandated benefits (*e.g.*, the public domain and access to works of authorship).

This Section looks to several fields, including behavioral economics and the study of collective action, for methods to incentivize the public to educate themselves about the copyright system and successfully advocate for reform. The below proposals do not represent an exhaustive list of possible courses of action, but rather, are intended as a preliminary strategy to contend with, and possibly reverse, the rationally predicted expansion of copyright’s protections.

A. Avoiding Collective Action Problems: Lessons from PIPA and SOPA

While traditional economics and public choice theory expect that concentrated interests will successfully secure legislative actions in their favor, reality has occasionally deviated from these expectations. This subsection investigates the defeat of a recent proposal to expand copyright’s protections and attempts to glean lessons underlying the movement.

The Stop Online Piracy Act (“SOPA”) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“PIPA”) were contemporaneous proposals to enlarge the scope of remedies associated with copyright infringement.²³⁸ Both bills were aggressively lobbied for by the music and movie industries,²³⁹ which usually equates to

²³⁶ See *supra* Section II(B).

²³⁷ See *supra* Section III(0).

²³⁸ Tabrez Y. Ebrahim, *3d Printing: Digital Infringement & Digital Regulation*, 14 NW. J. TECH. & INTELL. PROP. 37, 71 (2016). These bills have been described as such:

The Stop Online Piracy Act (SOPA) was a bill directed toward expanding the ability of U.S. enforcement officials to combat Internet sites dedicated to the theft of U.S. property marketed as offering counterfeit goods in a way that enabled or facilitated copyright infringement. The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP Act or PIPA) enabled the Attorney General to sue an owner or operator of an Internet website dedicated to infringing activities that had a legitimate purpose other than to facilitate copyright infringement.

Id. (citations omitted); see also Beverly E. Hjorth, Lin J. Hymel, *What Does “Public Domain” Mean After the U.S. Supreme Court’s Decision in Golan v. Holder?*, MD. B.J., SEPTEMBER/OCTOBER 2012, AT 26.

²³⁹ Annemarie Bridy, *Internet Payment Blockades*, 67 FLA. L. REV. 1523, 1540 (2015).

passage. These proposals, however, were met with widespread resistance from individuals, interested companies, and academia.²⁴⁰

Social media was a significant tool for citizens looking to express their displeasure with the bills. Complaints were publicly aired through the blogosphere (*e.g.*, Reddit and Techdirt),²⁴¹ and protesters organized using anti-SOPA Facebook groups.²⁴² Individuals additionally censored parts of their public Facebook profiles to highlight their disapproval.²⁴³

Large corporate interests, including Google, Microsoft, and Facebook, also opposed the bills.²⁴⁴ These companies initially registered their displeasure through standard means, such as contacting Congress.²⁴⁵ This approach did not prove immediately successful,²⁴⁶ which led to a less conventional manner of protest. On January 18, 2012, a significant number of websites (approximately 75,000) altered or blacked out their content as a means to protest the bills.²⁴⁷

The anti-SOPA/PIPA cause found traction with individuals across a variety of professional and political boundaries,²⁴⁸ and the backlash eventually made its way to legislators in Washington.²⁴⁹ Support for the bills plummeted, and the proposals were ultimately defeated.²⁵⁰ The following subsection identify several aspects of the SOPA/PIPA story that may prove useful in returning copyright to its constitutional moorings.

1. Organizing Interested Companies

The actions of the various corporate interests that stood against SOPA/PIPA are notable for the tremendous breadth of the group, including Facebook, Google, PayPal, eBay, Mozilla, Yahoo, AOL, LinkedIn, Twitter, and Zynga.²⁵¹ The joint action by these parties was undoubtedly

²⁴⁰ Matthew Bernstein, *Searching for More Efficient Piracy Protection*, 43 AIPLA Q.J. 625, 638–39 (2015).

²⁴¹ See Melis Atalay, *Regulating the Unregulable: Finding the Proper Scope for Legislation to Combat Copyright Infringement on the Internet*, 36 HASTINGS COMM. & ENT L.J. 167, 183 (2014).

²⁴² Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 224 & n.168 (2013).

²⁴³ Catharine Smith & Ramona Emerson, *Mark Zuckerberg: 'Facebook Opposes SOPA and PIPA,'* THE HUFFINGTON POST (Jan. 18, 2012, 5:52 PM), http://www.huffingtonpost.com/2012/01/18/mark-zuckerberg-sopa_n_1214090.html; Mike Tuttle, *SOPA Blackout: Individual Protests on Facebook and Twitter*, WEBPRONEWS (Jan. 18, 2012), <http://www.webproneews.com/facebook-individual-blackouts-2012-01>.

²⁴⁴ Jack C. Schechter, *Online Piracy Legislation: Is the Cure Worse Than the Disease?*, FED. LAW., APRIL 2012, AT 20; Annemarie Bridy, *Copyright Policymaking As Procedural Democratic Process: A Discourse-Theoretic Perspective on Acta, Sopa, and Pipa*, 30 CARDOZO ARTS & ENT. L.J. 153 n.45 (2012); Lev-Aretz, *supra* note 242, at 240.

²⁴⁵ Mary Quinn O'Connor, *Censoring Clicks or Saving the Web? SOPA Hearing May Shape Net's Future*, FOX NEWS (Dec. 15, 2011), <http://www.foxnews.com/tech/2011/12/15/censoring-your-clicks-saving-web-sopa-hearing-may-shape-nets-future/#ixzz2LdeGaXpk>.

²⁴⁶ K.K. Duvivier, *E-Legislating*, 92 OR. L. REV. 9, 64 (2013).

²⁴⁷ Bernstein, *supra* note 240, at 638; Philip Chwee, *Bringing in A New Scale: Proposing a Global Metric of Internet Censorship*, 38 FORDHAM INT'L L.J. 825, 847 (2015).

²⁴⁸ Lev-Aretz, *supra* note 242, at 223.

²⁴⁹ Bernstein, *supra* note 240, at 639.

²⁵⁰ Lev-Aretz, *supra* note 242, at 225–26.

²⁵¹ Duvivier, *supra* note 246, at 64.

a significant part of the bills' defeat, and the impetus for these companies to work together is significant with regard to catalyzing future copyright reform.

The literature on collective action to attain a public good sheds insight on the successful group protest. In this instance, defeating SOPA/PIPA can be modeled as a public good, as it exhibits the two primary attributes of public goods: non-rivalrousness and non-excludability.²⁵² Precluding enactment of these bills was a benefit that can be held by all interested parties without diminishing another's enjoyment (non-rivalrous), and it would have been impossible to exclude a member of the public from enjoying this benefit (non-excludable).²⁵³

Where a single party maintains a sufficient interest in securing a public good, it will rationally choose to individually incur the cost of attempting to obtain that good.²⁵⁴ This was presumptively the case for one or more of the nine companies that chose to lobby Congress to reject SOPA/PIPA.²⁵⁵ At least one of the parties that paid to lobby against the bills determined that defeating the proposals was worth the cost of attempting to persuade Congress. For instance, Google might have concluded that SOPA's regulation of search engines would have been a sufficient detriment to warrant hiring lobbyists.²⁵⁶ Any (or all) of the parties that lobbied against SOPA/PIPA may have made this conclusion, and allowed the balance of the signatories to add their support post hoc.

This effort to dissuade Congress would, however, ultimately fail. Such a fate was not particularly surprising given the commercial strength of the bills' supporters, who included ABC, CBS, Comcast/NBC Universal, and Disney.²⁵⁷ This failure led these parties to engage in a collective protest by blacking out or altering their respective websites—an act which would prove successful.²⁵⁸ The causes of this collective action are notable, as they may have a significant role to play in future copyright reform.

The literature on collective action holds that—absent an extrinsic motivator—a group may not collectively act to obtain a public good where no member will undertake the entire cost to act.²⁵⁹ If the group is large enough that the members are essentially anonymous (a “large group”), parties will choose to freeride and allow others to take the necessary actions, because the public

²⁵² See [redacted], *supra* note 18, at [redacted].

²⁵³ See *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 763 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982), and *aff'd sub nom.* Appeal of Moor-Law, Inc., 691 F.2d 491 (3d Cir. 1982); H. Spencer Banzhaf, *The Market for Local Public Goods*, 64 CASE W. RES. L. REV. 1441, 1445 (2014).

²⁵⁴ Olson, *supra* note 17, at 22, 33–34.

²⁵⁵ Letter from AOL Inc., eBay Inc., Facebook Inc., Google Inc., LinkedIn Corporation, Mozilla Corp., Twitter, Inc., Yahoo! Inc., and Zynga Game Network, to Pat Leahy, Chairman of the Committee on the Judiciary (Nov. 15, 2011), <http://www.protectinnovation.com/downloads/letter.pdf>.

²⁵⁶ See Monica Yun, *Pinterest's Secondary Liability: The Dmca Implications of Holding Pinterest Responsible and What Pinterest Can Do to Avoid Liability*, 36 HASTINGS COMM. & ENT L.J. 489, 500 (2014). The Author does not assert to know what business choices or valuations any of the relevant parties made.

²⁵⁷ See David Harris-Gershon, *THE LIST-Every Corporation & Organization Supporting SOPA, Care of the House Judiciary Committee*, DAILY KOS (Dec. 21, 2011, 4:45 PM), <http://www.dailykos.com/story/2011/12/21/1047747/-THE-LIST-Every-Corporation-Organization-Supporting-SOPA-Care-of-the-House-Judiciary-Committee>.

²⁵⁸ Bernstein, *supra* note 240, at 638–39.

²⁵⁹ Olson, *supra* note 17, at 21.

good will be enjoyed by everyone (including free-riders). All parties will rationally make this conclusion, and no party will act. The public good will thus not be obtained unless there is an outside means to discipline (encourage to act) those who freeride.

Likewise, if the group is small enough that an entity failing to “pay its share” will be noticed by other members (a “small group”), it is indeterminate whether the collective good will be obtained.²⁶⁰ The other parties may recognize a free-rider’s lack of engagement and likewise choose to stop pursuit of the good.²⁶¹ However, the initial party may foresee this course of events, and—still wanting to obtain the public good—decide not to freeride.²⁶² As above, the only certain means to obtain the public good is to have some enforcement mechanism to discipline free-riders.

Looking to the SOPA website blackout, the collective action problem is relevant. It is unlikely that a blackout of any single website would exert the public pressure necessary to defeat the bills, and therefore, collective action (*e.g.*, a collective internet protest) was required. As discussed above, regardless of whether the group is defined as “small” or “large”,²⁶³ there is no guarantee of collective action *absent some extrinsic motivator to force parties to do their part towards the greater good* (*e.g.*, blacking out their website towards defeating SOPA).²⁶⁴ One such extrinsic motivator is identifiable: the cultural cachet of participating in the blackout.

In the time surrounding the blackout, the anti-SOPA/PIPA undertaking had become a cause celebre.²⁶⁵ Vast numbers of citizens were influenced by the movement,²⁶⁶ and each of these individuals represented a potential customer for firms participating in the blackout. Websites engaging in the protest were commercially rewarded via positive perceptions of their firm among those with anti-SOPA leanings.²⁶⁷ Conversely, parties that failed to participate would not obtain this benefit and, potentially, would be viewed negatively for failure to join the cause.

Value generation of this type externally incentivizes firms to join a collective action (*e.g.*, the movement to defeat SOPA/PIPA), such that they may be rewarded with positive public

²⁶⁰ *Id.* at 43–44.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ One could define the parties that engaged in the blackout as small, if one were to only include the primary members, including Wikipedia, Google, etc. Likewise, one would define the group as large, if one were to include all 75,000–115,000 participating website. As discussed in the body text, this characterization is not relevant to the current conclusion.

²⁶⁴ Olson, *supra* note 17, at 44.

²⁶⁵ See, *e.g.*, Matthew Belloni, *Fox’s Jim Gianopulos Talks SOPA Debacle, Steve Jobs, 3D at USC Law Institute*, THE HOLLYWOOD REPORTER (Oct. 27, 2012, 4:55pm), <http://www.hollywoodreporter.com/thr-esq/foxs-jim-gianopulos-talks-sopa-383679>.

²⁶⁶ Sascha Meinrath & Marvin Ammori, *Internet Freedom and the Role of an Informed Citizenry at the Dawn of the Information Age*, 26 EMORY INT’L L. REV. 921, 933 (2012).

²⁶⁷ See Deborah J. Webb and Lois A. Mohr, *A Typology of Consumer Responses to Cause-Related Marketing: From Skeptics to Socially Concerned*, 17 J. OF PUBLIC POLICY & MKTG. 226, 226 (1998) ([C]onsumers’ perceptions of corporate social responsibility can influence their beliefs about and attitudes toward new products manufactured by a company.); Michael J. Barone, et al., *The Influence of Cause-Related Marketing on Consumer Choice: Does One Good Turn Deserve Another?*, 28 J. OF THE ACAD. OF MKTG. SCI. 248, 248 (2000); Shuili Du, et al., *Maximizing Business Returns to Corporate Social Responsibility (CSR): The Role of CSR Communication*, 12 INT’L J. OF MGMT. REVIEWS 8, 8–9 (2010).

perception. Likewise, parties that do not participate (*e.g.*, firms that did not participate in the anti-SOPA blackout) are disciplined to the extent that they do not receive the same public benefit (or potentially, may be viewed negatively for not participating). These conclusions are relevant to future attempts to encourage collective action to obtain a public good—namely copyright reform.

As discussed above, collective corporate action towards a policy goal can have significant effects. It is therefore advantageous for proponents of copyright reform to secure such backing. When seeking corporate support for this cause, reformers would do well to emphasize the reputational value available to firms that participate in the collective action and the lack thereof for those who do not. This is true regardless of the nature of the requested corporate action (*e.g.*, lobbying, public display of support, etc.). Of course, the reputational value available to corporations is proportional to the number of individuals that are, or may become, supportive of the cause. Similarly, the number of interested individuals increases with corporate support. It is therefore important to simultaneously secure individual and corporate backing for copyright reform.

2. Incentivizing Individual Action

A second lesson from the anti-SOPA/PIPA movement is worth noting: an individual's choice to educate themselves on an issue and advocate for a policy can significantly influence government action when conducted on a large scale.²⁶⁸ Similar to the above analysis, collective action theories are useful to explain if, and when, individuals will work together to secure public goods such as copyright reform and public education about copyright policy. This subsection discusses means to incentivize this type of collective action, including obtaining celebrity endorsements and using social media for education and advocacy.

The use of social media as a tool of learning about political issues, individual social protest, and expression of policy preferences is significant in that it reduces costs associated with collective action (*e.g.*, expenditures on communication and organization).²⁶⁹ It does not, however, eliminate all problems related to achieving a public good such as copyright education and reform. As discussed above, when organizing a large group of parties to act towards a good that will be shared by all, the free-rider problem will prevent achievement of the goal absent some outside motivation to participate in the collective action.²⁷⁰ It is thus imperative that—in order to secure a critical mass of education about, and subsequent support for, copyright reform—some incentive must be identified to encourage individual action and avoid free-riding. The literature provides several possible methods.

²⁶⁸ Meinrath & Ammori, *supra* note 266, at 933; Victoria Smith Ekstrand et. al., *Panel II: Critical Legal Activism and Netroots Movements*, 31 CARDOZO ARTS & ENT. L.J. 624, 635 (2013).

²⁶⁹ Sebastián Valenzuela, *Unpacking the Use of Social Media for Protest Behavior: The Roles of Information, Opinion Expression, and Activism*, 57 AM. BEHAVIORAL SCIENTIST 920, 921 (2013); Nizan Geslevich Packin & Yafit Lev-Aretz, *Big Data and Social Netbanks: Are You Ready to Replace Your Bank?*, 53 HOUS. L. REV. 1211, 1215 (2016); *see also* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 7 n.24 (2010).

²⁷⁰ Olson, *supra* note 17, at 21.

There is a significant body of research on the capacity for celebrities to influence public opinion.²⁷¹ Within the boundaries of politics, these endorsements directly influence politicians²⁷² and persuade the public to adopt a proffered policy stance.²⁷³ Beyond immediately effecting policy change, endorsements are important because they may motivate members of the electorate to advocate for reform. As discussed above, absent sufficient outside motivation, members of a large group will rationally choose to free-ride, and therefore, any means to encourage collective political activity is significant.²⁷⁴ There is reason to believe that obtaining celebrity support for copyright reform is feasible.

In the modern era, celebrities are encouraged to develop a public “brand” that can be commercially exploited in the future.²⁷⁵ To this end, they have reason to actively secure public goodwill, and as discussed above, supporting a cause is a means by which a brand may do so.²⁷⁶ Celebrity endorsement of copyright reform is thus a symbiotic relationship, whereby the public figure enhances their “brand” and the reform movement obtains public awareness and support of problems and proposals associated with copyright.

Individuals can similarly be encouraged to act collectively by wisely choosing the means to express dissatisfaction with the copyright regime. The use of social media as an educational and protest platform has innate characteristics that incentivize users to express policy preferences. This incentive comes in the form of personal gratification that inherently arises from using social media to express beliefs and share news.²⁷⁷ Individual incentives include status seeking (*e.g.*, getting attention or gaining in reputation), boosting one’s self-confidence, and socialization.²⁷⁸ The existence of these motivations encourage individuals to participate in a collective protest (and the prerequisite self-education) towards a utilitarian copyright system, as opposed to free-riding on the actions of others with the expectation of still securing the public good.

²⁷¹ See generally David Jackson & Thomas Darrow, *The Influence of Celebrity Endorsements on Young Adults’ Political Opinions*, 10 HARV. INT’L J. OF PRESS/POLITICS 80, 81–82 (2005); David Jackson, *Selling politics: The impact of celebrities’ political beliefs on young Americans*, 6 J. OF POLITICAL MKTG. 67, 69 (2007).

²⁷² Amy Becker, *Star power? Advocacy, receptivity, and viewpoints on celebrity involvement in issue politics*, 21 ATLANTIC J. OF COMM’N 1, 2 (2013).

²⁷³ Jackson, *supra* note 271, at 77; but see David Morin, et al., *Celebrity and politics: effects of endorser credibility and sex on voter attitudes, perceptions, and behaviors*. 49 SOCIAL SCI. J. 413, 418 (2012).

²⁷⁴ In this vein, celebrity advocacy has been described as a means to “reach out to and mobilise otherwise apathetic publics.” David Marsh, et al., *Celebrity politics: the politics of the late modernity?*, 8 POLITICAL STUDIES R. 322, 333 (2010).

²⁷⁵ Naeha Prakash, *Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection Through Fan Goodwill*, 35 HASTINGS COMM. & ENT L.J. 247, 248–49 (2013).

²⁷⁶ See Webb & Mohr, *supra* note 267, at 226; Barone, et al., *supra* note 267.

²⁷⁷ Pradeep Krishnatray, et al., *Gratifications from new media*, 4 J. OF CREATIVE COMM’NS 19, 24–27 (2009); Chei Sian Lee, et al., *Why Do People Share News in Social Media?* 129, 130 in ACTIVE MEDIA TECHNOLOGY, 7TH INTERNATIONAL CONFERENCE, AMT PROCEEDINGS (2011); Valenzuela, *supra* note 269, at 921; Anne Marie Warren, et al., *Understanding civic engagement behaviour on Facebook from a social capital theory perspective*, 34 BEHAVIOR & INFO. TECH. 163, 163 (2015).

²⁷⁸ Chei Sian Lee & Long Ma, *News sharing in social media: The effect of gratifications and prior experience*, 28 COMPUTERS IN HUMAN BEHAVIOR 331, 337 (2012); Birnbaum, M. G., *The fronts students use: Facebook and the standardization of self-presentations*, 54 J. OF COLL. STUDENT DEV. 155, 155–57.

The use of social media as a means of expressing policy preferences has a second benefit, namely widespread education about the need for copyright reform. While individuals share political information for personal gratification, this activity creates a beneficial externality, namely the dissemination of relevant information.²⁷⁹ Through this means, the public receives information about copyright policy and reform that might not otherwise be available.²⁸⁰ Education of this sort may remedy the public's lack of understanding about copyright policy²⁸¹ and enables larger-scale collective action by an informed populous.

The above subsections addressed why traditional economic theory predicts difficulties in producing collective action by individuals and corporations towards a public good (*e.g.*, copyright education and reform). Means to overcome the predicted free-riding problems were proposed in the form of feasible extrinsic incentives to encourage participation in collective action. The next subsection discusses how issue presentation may likewise influence willingness to be part of a group endeavor.

3. Effective Issue Presentation

A final lesson on collective action can be learned from the successful SOPA/PIPA protests: the value of issue presentation. The literature postulates that a movement's success relies, at least in part, on the issue's capacity to resonate with a large group of parties. Such arguments are premised on framing theory. This idea holds that "an issue can be viewed from a variety of perspectives," and the manner in which an issue is presented (framed) influences how "people develop a particular conceptualization of an issue."²⁸² The terms in which an issue is couched determine whether parties believe the issue is relevant to them.

In the intellectual property realm, Kapczynski analyzed the use of framing in the access-to-knowledge (A2K) movement²⁸³ to create a sense of common cause among disparate interests.²⁸⁴ The A2K movement could be framed as relating to purely legal issues or it can be presented as championing a public good—the public domain. More parties are likely to believe the issue is relevant to them when presented in the latter manner, showing how issue framing influences people's willingness to support an issue or collective action. Likewise, OseiTutu evaluated the

²⁷⁹ Homero Gil de Zúñiga, Nakwon Jung, Sebastián Valenzuela, *Social Media Use for News and Individuals' Social Capital, Civic Engagement and Political Participation*, 17 J. OF COMPUTER-MEDIATED COMMUN, 219, 322 (2012); see also Valenzuela, *supra* note 269, at 923.

²⁸⁰ Valenzuela, *supra* note 269, at 921.

²⁸¹ See *supra* Section IV.

²⁸² Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANNU. REV. POLIT. SCI. 103, 104 (2007).

²⁸³ The A2K movement is a loose collective that seeks to "enhanced balance and flexibility in IP law." Sean Williams, Note, *Closing in on the Light at Wipo: Movement Towards A Copyright Treaty for Visually Impaired Persons and Intellectual Property MOVEMENTS*, 33 U. PA. J. INT'L L. 1035, 1046 (2012).

²⁸⁴ Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 857 (2008).

framing of intellectual property as a human right²⁸⁵ and Cantrell discussed the issue as an anti-poverty measure.²⁸⁶

The SOPA/PIPA protests exemplified the successful use of framing in several ways. Early organizers of the movement smartly presented the issue broadly enough to appeal to a significant array of parties—arguing SOPA would hinder websites important to many parties (including social media and news sites) and destabilize the functioning of the internet.²⁸⁷ This framing was particularly successful, as it spoke to the interests of the citizenry and many large corporate interests that normally might not care about copyright legislation (e.g., Google, Twitter, and eBay). The ability to secure support from companies that would normally be disinterested in copyright issues was key to this protest.

Further, framing of the issue by corporate protesters is informative about its appeal across a large swath of the citizenry. For instance, Google presented the protest as acting against censorship by modifying its home page to have a black box over the Google logo and including the phrase “[t]ell Congress: Please don’t censor the web!”²⁸⁸ As censorship is widely viewed in a negative light,²⁸⁹ this position was likely to find broad support. Similarly, Craigslist employed an equally accessible theme of patriotism, using a red, white, and blue motif on its protest page.²⁹⁰ Again, framing protests against SOPA as a patriotic act presents the issue in a manner that many will support.

Building on the research by Kapczynski, et al. and the successes of the SOPA/PIPA protests, it is prudent to inclusively frame future calls for collective action in the copyright field. The relevant issue should be presented to pique the interest of potential corporate allies that would usually remain uncommitted. This secures significant backing from unexpected supporters—such as the large corporate interests (e.g., Google and Facebook) that surprisingly stood against SOPA/PIPA.

Further, the public is unlikely to respond to a call for legal reform, as many don’t understand or care about the law. However, were expanded copyright protections framed as interfering with education or destroying a common good—the public domain—broad support and collective action against expansionist copyright policies is more likely. Building from this subsection’s suggestions relating to incentive structure, traditional economic theory, and issue

²⁸⁵ J. Janewa OseiTutu, *Corporate “Human Rights” to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 6 (2015).

²⁸⁶ Deborah J. Cantrell, *Common Ground: The Case for Collaboration Between Anti-Poverty Advocates and Public Interest Intellectual Property Advocates*, 15 VA. J. SOC. POL’Y & L. 415, 417–18 (2008)

²⁸⁷ Boonsri Dickinson, *The Largest Online Protest in History Started Here*, BUSINESS INSIDER (Jan. 19, 2012), <http://www.businessinsider.com/largest-protest-in-history-started-here-more-than-a-billion-people-will-see-anti-sopa-messages-2012-1>; Fight for the Future, *PROTECT IP/SOPA Breaks the Internet* (Oct. 25, 2011), <https://vimeo.com/31100268> (see video at 1:40-2:30); see also Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987-2012*, 14 YALE J. L. & TECH. 162, 216–218 (2012).

²⁸⁸ Catherine L. Langford, *Free Speech in Cyberspace: A Rhetorical Analysis of SOPA and PIPA Cyberprotests*, 47 FIRST AMENDMENT STUDIES 85, 97 (2013).

²⁸⁹ Jeffrey (Chien-Fei) Li, *Internet Control or Internet Censorship? Comparing the Control Models of China, Singapore, and the United States to Guide Taiwan’s Choice*, 14 U. PITT. J. TECH. L. POL’Y 1, 16–18 (2013).

²⁹⁰ Langford, *supra* note 288, at 97–98.

presentation, the following discussions set forth proposals arising from a different realm: behavioral economics.

B. Status Quo Bias

The field of behavioral economics unites the study of economics and psychology to describe how individual behaviors may predictably deviate from the rational actions expected by neoclassical economics.²⁹¹ These repeated irrationalities are described as a set of cognitive biases; this subsection describes how these biases serve as an impediment to, and catalyst for, change in the copyright system.

People exhibit an irrational preference for maintaining the current state of affairs,²⁹² referred to as the status quo bias.²⁹³ Humans are innately averse to loss, and this aversion causes decision makers to overvalue that which they currently have, but might lose if they deviate from the status quo.²⁹⁴ This irrational overvaluation of what one presently has is why parties commonly refuse to trade the present state of affairs for an objectively better situation.²⁹⁵

Content owners have used this bias to their benefit by presenting copyright as a personal property interest, as opposed to a monopoly granted for the benefit of society.²⁹⁶ Lemley argues this viewpoint invokes ideas of strong property rights and an entitlement to reap *all* profits arising from one's intellectual property.²⁹⁷ Once such a sense of entitlement is created, the citizenry perceives all possible benefits from a copyright—owned now or in the future—to be theirs as a matter of property right (as opposed to a deviation from the government's usual abhorrence of monopolies).²⁹⁸

When viewed through such a lens, copyrights (and the “right” to obtain one) become the subject of humanity's inherent overvaluing of current property interests and irrational unwillingness to deviate from the status quo.²⁹⁹ In the face of this bias, the electorate may choose

²⁹¹ Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1033 (2012).

²⁹² Dan Weijers, *Intuitive Biases in Judgments About Thought Experiments: The Experience Machine Revisited*, 41 PHILOSOPHICAL WRITINGS 17, 27 (2013); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

²⁹³ Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 148–50 (1995).

²⁹⁴ Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 THE QUARTERLY J. OF ECON. 1039, 1044 (1991); Kahneman, *supra* note 20, at 302.

²⁹⁵ Tversky & Kahneman, *supra* note 294, at 1044; Kahneman, *supra* note 20, at 302.

²⁹⁶ Keith Porcaro, Note, *Private Ordering and Orphan Works: Our Least Worst Hope?*, 2010 DUKE L. & TECH. REV. 15, 15, 33 (2010).

²⁹⁷ Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032–33 (2005); *see also* Desai, *supra* note 61, at 221; Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1801 (2007); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 715–16 (2007).

²⁹⁸ *See Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 313 (1963) (Brennan, J., dissenting); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 5, 51 (2003); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., WINTER/SPRING 2003, at 33.

²⁹⁹ Tversky & Kahneman, *supra* note 294, at 1042.

to disfavor copyright reform, *even where it is in their best interest to do so*.³⁰⁰ This is an obvious impediment to retargeting copyright towards its constitutional goals, but it may not be insurmountable.

Research indicates that when actors view their choices relative to a state of affairs other than the present, the status quo bias is marginalized and existing conditions may be destabilized.³⁰¹ Should the electorate recognize that copyrights have been historically characterized as an aberration from the free-to-use public domain³⁰²—as opposed to a positive property right—preference for the current state of affairs may be diminished.³⁰³ Educating the public on this issue minimizes the power of the status quo bias and furthers the goal of copyright reform.

As an alternative, it might be possible to coopt the use of property rhetoric in copyright to diminish the status quo bias. Researchers such as Carrier believe the “proPERTIZATION” of copyright is irreversible, and thus, there is no return to the traditional view of that area of law.³⁰⁴ Recognizing this, he suggests importing limitations from real property doctrine into intellectual property.³⁰⁵ For instance, Carrier cites to easements, adverse possession, and zoning as examples of generalized property doctrines to incorporate.³⁰⁶ His approach concedes the use of property rhetoric, but inherently decreases the property interest that citizens believe they “own.” This diminishes the impact of the status quo bias because the public no longer perceives itself to own the entire scope of all uses of a copyright (and it will not fight to protect its ability to exploit those interests).

C. Strategic Framing of the Issue

Preference weighting associated with loss aversion is relevant to the present discussion in a second manner. Faced with a choice to deviate from the status quo, decision makers are disproportionately more likely to select a choice presented as a means of avoiding a loss (as opposed to securing a gain).³⁰⁷ This type of choice framing can be used to influence an electorate

³⁰⁰ Davis & Barua, *supra* note 293, at 148. This does not imply that the decision maker will never change their position, just that they are less likely to do so than traditional economic theory would predict. Kahneman, *supra* note 20, at 292.

³⁰¹ Jack S. Levy & Daniel Kahneman, *Judgment, Decision, and Rationality*, 35 POLITICAL SCI. & POLITICS 271, 272 (2002); *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 456 (1981); Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 837 (2012).

³⁰² Mark A. Lemley, *Private Property*, Comment, 52 STAN. L. REV. 1545, 1548–49 (2000). Similarly, the public’s eye could be refocused on the fact that intellectual property has “historically served as a means to accomplish national welfare objectives,” as opposed to a means to enrich content owners. Ruth L. Gana, *Prospects for Developing Countries Under the Trips Agreement*, 29 VAND. J. TRANSNAT’L L. 735, 747 (1996); *Kendall v. Winsor*, 62 U.S. 322, 329 (1858).

³⁰³ If an enterprising strategist were able to frame deviations from the status quo as a “routine commercial exchange[,]” it is likewise possible that they might diminish the status quo bias. Kahneman, *supra* note 20, at 293. Use of this bias is, unfortunately, unlikely to be available in this situation, as rights given under law are not commonly viewed as fungible.

³⁰⁴ Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 5 (2004).

³⁰⁵ *Id.* at 82; *see also* Emily Hudson & Robert Burrell, *Abandonment, Copyright and Orphaned Works: What Does It Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?*, 35 MELB. U. L. REV. 97, 973–74 (2011).

³⁰⁶ Carrier, *supra* note 304, at 54–65.

³⁰⁷ Richard H. Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 36–37 (2008).

that is deciding to what extent it will support a legislative proposal.³⁰⁸ Research relevant to this bias is below-described, and strategic application of this phenomenon in behavioral economics is discussed with regard to framing copyright reform.

A 1995 study addressed the rate of success in encouraging someone to act by alternatively emphasizing losses arising from not acting or gains associated with acting.³⁰⁹ To this point, the authors looked at inducements employed by credit card companies to encourage inactive cardholders to use their line of credit.³¹⁰ The companies sent inactive customers information emphasizing either “gains they can obtain from using the [card] or . . . losses they would suffer from not using it.”³¹¹

The study found a significant increase in use among customers receiving information about losses associated with non-use, relative to those sent information about the benefits of using their charge account.³¹² These increases included greater card usage among non-active customers and a larger number of charges.³¹³ The disproportionately high rate of influence associated with emphasizing the negative has likewise been found in other studies.³¹⁴ This relative over-valuing of avoiding losses is germane to successfully presenting questions associated with copyright policy.

Emphasizing losses to the public domain associated with expansive copyright laws is likely to be a disproportionately successful strategy when attempting to reduce, or avoid enlarging, copyright protections. For example, a slogan such as “avoid losing parts of the public domain” is more likely to succeed than “secure a broader public domain for future generations.” These statements are essentially equal (and both are applicable to calls to reduce copyright protection or to not expand protection), but pursuant to the research above, the former is likely to prove more successful.

This approach may be particularly beneficial if tied to the extant property-like perception of copyright discussed in the last subsection. As recognized by Fagundes, property should not be viewed as “coterminous with private property, but instead includes common and public forms of property.”³¹⁵ Likening the public domain to communal land creates a perception of “property ownership” for all citizens. Consequently, presenting an issue as a potential loss to the public

³⁰⁸ See Tversky & Kahneman, *supra* note 301, at 453.

³⁰⁹ Yoav Ganzach & Nili Karsahi, *Message Framing and Buying Behavior: A Field Experiment*, 32 J. OF BUS. RESEARCH 11, 11 (1995).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 14–15.

³¹³ *Id.*

³¹⁴ See Beth Meyerowitz & Shelly Chaiken, *The Effect of Message Framing on Breast Self-Examination Attitude, Intentions, and Behavior*, 52 J. OF PERSONALITY AND SOC. PSYCHOLOGY 500, 501–502 (1987); Durairaj Maheswarn & Joan Meyers-Levy, *The Influence of Message Framing and Issue Involvement*, 27 J. MKTG. RESEARCH 361, 366–367 (1990).

³¹⁵ David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 677 (2010); see also Haochen Sun, *Fair Use As A Collective User Right*, 90 N.C. L. REV. 125, 164–165 (2011).

domain may both invoke the status quo bias and the irrational fear of loss. Framing the issue in this way thus increases the public's willingness to stand against copyright expansion.³¹⁶

This strategy assumes that the earlier discussions about educating the population regarding the basic tenets of copyright law (including about the public domain) are successful. With this assumption in hand, framing policy choices in terms of "losses to the public domain" should prove successful (relative to other options). Strategic choices of this nature are of value when faced with significant rational incentives for others to push copyright-expanding legislation.³¹⁷

VI. CONCLUSION

This Article is not the final work on the ever-expanding scope of copyright and its interplay with the IP Clause's utilitarian mandate. Rather, it sets the stage for reform by using several doctrinal means of analysis to investigate why protections afforded by copyright have historically broadened. Novel survey evidence established that the electorate lacks the understanding necessary to realize that its interests in a utilitarian copyright system are not being protected. In conjunction with a judiciary that is unwilling to limit Congress' actions under the IP Clause, this creates a state of affairs whereby the utilitarian goals of copyright will not be fulfilled absent collective activity to educate the populous and advocate for reform. Suggested avenues to achieve these goals were presented in conclusion.

³¹⁶ Presenting the public domain as real property-like, of course, should only be used if attempts to defeat the "propertization" of intellectual property are unsuccessful. This approach should thus, only be used in conjunction with attempts to import real property limitations (e.g., zoning) are also used (*see* Carrier, *supra* note 304, at 54-65, as discussed at the end of Section V(B)).

³¹⁷ *See supra* Section II(B).