FORMALITIES

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The history of copyright law in the United States is a history of steady reduction in the number and type of formal actions that an author must take in order to acquire a valid copyright.

Under the Copyright Act of 1790, copyright was available only if the author recorded the title of the work with the clerk of the district court where the author resided, prior to publication of the work, to be followed by newspaper publication of the fact of the clerk's action and delivery of a copy of the work to the Secretary of State within six months of publication of the work.

The Copyright Act of 1909 confirmed a change in practice that had evolved over the intervening century, particularly with the establishment of the United States Copyright Office (which took over the recording function of local court clerks) in 1870. As Congress confirmed in 1909, copyright was obtained by publishing the work, so long as the publication was accompanied by an appropriate notice of copyright. The 1909 statute also provided that certain works that were not reproduced for publication, such as lectures or motion picture screenplays, could obtain federal copyright protection via registration with the Copyright Office. In all cases, federal copyright protection required deposit of copies of the work with the Copyright Office, which during the nineteenth century became the leading source of new material for the collections of the Library of Congress. If a creative work was published but lacked the requisite notice of copyright, the penalty was strict: The author forfeited any possible copyright, and the work passed immediately into the public domain.

An international copyright regime took shape with the formation of the Berne Convention in 1886, by which member countries (not including the United States) agreed to conform their national laws to a uniform set of minimum standards of copyright protection. Under Berne, a different model emerged. Article 5, §5 of the Convention stipulates that "The enjoyment and the exercise of these rights shall not

be subject to any formality." This provision was intended to distinguish the approach taken by countries that subscribed to the convention, in which copyright would arise automatically upon creation of a qualifying creative work, from the notice-and-publication approach of the United States.

Though the United States did not join the Berne Convention until 1989, its membership was widely anticipated during the negotiations that preceded enactment of the 1976 Act. Accordingly, the notice-and-publication regime for obtaining copyright protection was dropped as part of the 1976 revision, in favor of a regime that granted copyright protection in the United States to an author automatically upon creation of a work of creative authorship, as determined under section 102 of the Copyright Act. That regime is still in effect today.

Among other important effects, this change dramatically increased the number of works created in the United States that are subject to the federal copyright system. Before the 1976 Act, only published works and certain registered unpublished works were subject to that system. Authors of unpublished works retained rights established under state law, including state common law copyright.

Under the 1976 Act, and continuing today, both unpublished and published works are subject to federal statutory copyright, so long as they are fixed in a tangible medium of expression. No "common law copyright" exists under current law. Section 301 of the Act confirms the unification of copyright protection under the federal scheme and the abolition of state protection for copyrighted works, including state common law copyright. Section 301 preempts enforcement of rights "equivalent" to federal statutory copyright rights:

> *On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.*

Attaching a notice of copyright to the work, publication of the work, and deposit of copies of copyrighted works retain some important effects, however, even under the current statute.

First, whether a given work is protected by copyright is determined in the first place by the legal standards in place at the time that the work was created (if the work was created after January 1, 1978) or published (if the work was created before January 1, 1978). Since there are thousands of works published before 1978 that are still protected by copyright, notice-and-publication standards are still relevant as to those works.

Second, though the validity of a copyright under the current statute does not depend on including a copyright notice or on publication of the work, notice of copyright *was* required, subject to certain exceptions, for works published between 1978 (when the new statute came into effect) and March 1, 1989 (when the United States joined the Berne Convention).

Third, even today, authors and publishers who include notice of copyright on their published works earn certain benefits under the statute, including access to enhanced remedies for infringement. Registration of copyrighted works with the Copyright Office is a prerequisite to filing most lawsuits for copyright infringement.

1. The Development of International Copyright Law

The Berne Convention grew out of the maturing of international trade in copyrighted works during the 1800s, as developing countries (such as the United States) imported books and other materials from countries with more mature economies (such as England). In the absence of a workable international regime of copyright protection, there was no way for authors of these works to prevent piracy by publishers in the importing countries. During most of the 1800s, the United States was a net importer, consumer, and re-printer of copyrighted works rather than a producer. It was regarded, particularly in Europe and the United Kingdom, as a nation of pirate publishers. American interests in copyrighted materials focused largely on having cheap and free access to works produced elsewhere.

In 1886, at a meeting in Berne, Switzerland, promoted by the French novelist Victor Hugo, a small group of countries adopted the Berne Convention for the Protection of Literary and Artistic Works, known as the Berne Convention, which established a framework for international copyright law. Though it is a treaty, the Berne Convention is not itself a source of law. Rather, it provides that signatory countries must provide certain minimum standards of protection within their domestic copyright law, and, importantly, that each Berne member nation must offer domestic copyright protection to authors of other Berne member nations on the same basis that it offers copyright protection to its own nationals. These are

known as principles of "minimum standards," and "national treatment," respectively. In this respect, international law standardizes the core propositions of copyright law across Berne member countries, notwithstanding the general assumption that copyright law is a matter of the domestic law of each country and has no "extraterritorial" effect beyond that country's borders. The Berne Convention has been amended from time to time, and more and more countries have joined it. Along with other international intellectual property treaties, today the Berne Convention is administered by the World Intellectual Property Organization, or WIPO, headquartered in Geneva.

The United States was an observer at the original Berne negotiations but did not join the Convention itself until 1989. By that time, the United States had gone from being an importer of copyrighted materials from other countries to a major producer and exporter, and the interests of American authors and publishers in copyright protection abroad had grown dramatically. Because American adherence to Berne had been anticipated for some time, the Copyright Revision Act of 1976 embodied most of the changes to American copyright law that were needed to bring the United States into compliance with Berne. That statute is the foundation for contemporary copyright in the United States.

Though the Berne Convention was significant as a matter of international diplomacy, it still lacked (and lacks) an effective enforcement mechanism. The enforceability of national copyright obligations changed in 1994, as part of the Uruguay Round of negotiations on the General Agreement on Tariffs and Trade, or GATT, the major treaty governing trade relations around the world. That round established the World Trade Organization (WTO), which has the authority, among other things, to adjudicate disputes between nations arising under WTO rules. The Uruguay Round also saw adoption of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPs, which specifically incorporated international intellectual property rules into the WTO framework and made member non-compliance with TRIPs standards a basis for WTO sanctions. For copyright law, the TRIPs agreement borrowed Berne Convention standards nearly wholesale, at last creating a meaningful enforcement mechanism for international copyright norms.

2. Notice of Copyright

The importance of notice of copyright – meaning the presence of some relevant © or other "copyright" legend on each copy of a copyright-protected work of authorship – varies depending on when the work was produced.

For works produced after the implementation of the Copyright Revision Act of 1976, but before the effective date of the Berne Convention Implementation Act in 1989 (March 1, 1989), the work of authorship is automatically eligible for copyright protection, but *published* works must be accompanied by proper notice. Failure as to notice renders the copyright invalid and leaves the copyright plaintiff without a remedy.

For works produced after March 1, 1989, the omission of notice is not fatal to copyright protection. Instead, the absence of notice may limit the remedies available to a plaintiff successful against an infringer who lacked notice, *see* 17 U.S.C. §405(b) (actual or statutory damages not available). In addition to serving as a deterrent to some infringers, therefore, a copyright notice attached to the work preserves the maximum range of remedies available to the copyright owner.

The continuing importance of copyright notice in the remedial context serves as a reminder of the underlying public policies involved. One policy concerns the interests of the public. Enforcing copyright, or (under current law) preserving the maximum remedies for copyright, only for works accompanied by public notice is fair to defendants accused of infringement and especially to individuals and firms that want to exercise reasonable caution to avoid being accused. A counterpart policy concerns copyright owners themselves. It is reasonable to believe that an author or publisher who expects to exploit a copyrighted work for profit signals that expectation to society by investing at least a modest effort in protecting the copyright in the first place, by including a copyright notice. This serves to reinforce a distinction between valuable and less valuable works and to encourage copyright owners to invest in works that they believe are worth more.

The Copyright Act of 1909 included elaborate provisions regarding both the form of a proper copyright notice and its placement within a given copyrighted work, meaning that copyright protection could be defeated not only by omission of notice entirely but also by inclusion of a notice that was defective in form or in placement on the work. The 1976 Act relaxed those requirements. *See* 17 U.S.C. §401(b) (describing elements of form of copyright notice). To create an effective notice, the current statute requires only that the notice be placed in a location that gives "reasonable notice" of the claim of copyright. *See* 17 U.S.C. §401(c). In case of omission, however, section 405(a) allows a generous five-year period for curing errors regarding notice. The Copyright Act of 1909 provided that accidental omission of a proper copyright notice would not invalidate the copyright, but it included no provision for curing the omission.

The consequences of improper notice may be substantial. In *Charles Garnier, Paris v. Andin Int'l, Inc.*, 36 F.3d 1214 (1st Cir. 1994), a jewelry designer sold copyrighted earrings for the first time in 1988 but failed to include notice of copyright on the earrings themselves. Upon discovery of infringement by the defendant, Garnier revised its manufacturing process to include notice and tried to cure the omission as to earrings in retailers' inventories by sending letters to its 50 largest customers, reminding them of Garnier's copyright interest. Also, for two years prior to that time, Garnier distributed "story cards" to its customers — for distribution with the earrings — that referred to Garnier's copyrighted design. The court held that these efforts to cure the omission of copyright notice were insufficient, and it affirmed a judgment for the accused infringer.

In *Charles Garnier, Paris*, which interpreted section 405, the questions were twofold. First, when does that five-year period begin to run, and second, what constitute satisfactory efforts to cure? If the cure is both timely and satisfactory, it operates retrospectively, restoring proper notice as of the date the work was initially published. As to the running of the five-year period, there is the concern that a copyright owner might deliberately omit a copyright notice in order to lull potential competitors into infringing activities. In the case of deliberate omission, then, the five-year period begins to run immediately upon publication of the work. As to the adequacy of the cure itself, the copyright owner's effort to provide notice must be merely "reasonable," not perfect, but that effort both must follow discovery of the inadequate notice and also must be directed to affixing notice to copies of the work themselves. Publicly disseminating notice of the copyright interest, as Garnier tried to do, was insufficient both under the language of the statute and as a matter of public policy. Garnier's "story cards" might have provided adequate notice to its retail customers and to individuals who bought Garnier designs through those customers. But if the Garnier earrings were resold later, subsequent purchasers would have no way to be aware of Garnier's copyright claim absent notice affixed to the jewelry itself.

Determining whether a copyright owner has complied with the relevant notice requirements of the copyright statute is particularly complex when a work embodies previously published material. A modern computer program or videogame, for example, may incorporate copyrighted material that was published as part of an earlier version of that same work. A modern program or game may incorporate material from a succession of earlier versions. Determining the copyright status of the most recent version of that program or game may require independently examining compliance with notice rules with respect to each earlier version of the work. *See, e.g.*, *Montgomery v. Noga*, 168 F.3d 1282 (11th Cir. 1999) (concluding that later-released version of computer program constituted a

copyrightable derivative work even though prior versions fell into the public domain following publication without notice).

3. Registration and Deposit

Though both registration and deposit involve submitting copies of the work to appropriate federal offices, they are distinct requirements of the statute. Registration of copyright with the United States Copyright Office (over which the "Register of Copyrights" presides) is permissive, not mandatory. Since the United States joined the Berne Convention in 1989, copyright registration is not required to secure a valid copyright.

However, registration has its benefits, and under some circumstances it is required.

First, issuance of a certificate of registration within five years of publication of the work provides prima facie evidence of the validity of the copyright and of the facts stated in the certificate. *See* 17 U.S.C. §410(c). The validity of the copyright may still be challenged, but the defendant in a copyright infringement lawsuit ordinarily will bear the burden of proof on this point. Attorneys' fees and statutory damages (as an alternative to actual damages and lost profits) may be recoverable in copyright infringement lawsuits, but these remedies are barred with respect to infringement that occurred before registration of the copyright. *See* 17 U.S.C. §412.

Second, for works created in the United States or by American authors, issuance of a certificate of registration for the work is a statutory prerequisite to filing a lawsuit for copyright infringement. *See* 17 U.S.C. §411(a).

In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), a case involving judicial approval of a class action brought on behalf of owners of both unregistered and registered works, the Supreme Court held that section 411(a) is not jurisdictional and that a federal court has subject matter jurisdiction to hear such a dispute.

The mechanics of copyright registration are simple. Registration requires completion of a simple form, payment of a small fee, and submission of one or more copies of the work being registered (the number and form of the copies will vary somewhat depending on the character of the work). Registration forms are available for download via the Copyright Office Web site, at http://www.copyright.gov/. The Copyright Office does examine applications for registration, but its review is not as searching as the examination process for patents is designed to be, and there is no mechanism for opposing another party's application for registration. The Copyright

Office offers procedures for batch registration of large numbers of works and for collective works. As a general matter, registration of a collective work does not produce a valid registration for the individual works included in the collection, unless the author of the individual work is also the author of the collective work. *See Muench v. Houghton Mifflin Harcourt Publ'g Co. & R.R. Donnelley & Sons Co.*, 712 F. Supp. 2d 84 (S.D.N.Y. 2010).

Section 407 requires that copies of works published in the United States be deposited with the Copyright Office, "for the use or disposition of the Library of Congress," of which the Copyright Office is a part. The express purpose of this requirement and its predecessors is to enhance the collection of the Library of Congress, thereby making copyrighted works available to the public. In this respect American copyright law has been a spectacular success. The deposit requirement has no function related to copyright validity or infringement actions. Partly for that reason, the deposit requirement has been challenged as an unconstitutional "taking" of private property. So far, the statute and the deposit requirement have been upheld. *See Valancourt Books, LLC v. Perlmutter*, 554 F. Supp. 3d 26 (D.D.C. 2021). That decision is now before the DC Circuit, on appeal.

Failure to comply with the deposit requirement does not affect the validity of the copyright. Instead, the Librarian of Congress may demand that two copies of published works be deposited, and the Copyright Office has the authority to levy a small fine for noncompliance.

4. Duration, Renewal, Transfers, and Termination

Duration, including renewal: The Copyright Clause of the Constitution authorizes Congress to enact copyright protection that will last "for limited Times." Copyright is thus limited not only in scope but in duration. Unlike trademark protection, which can last indefinitely so long as the mark is used by the trademark owner, copyright protection expires. At that point, the work passes into the public domain, where anyone is free to use the work, for any purpose, without seeking the author's permission or crediting the author (or any authors) as the source of the work. The term of copyright therefore plays a potentially vital role in ensuring that a steady supply of new works passes ultimately into the hands of the public.

The history of American copyright is a history of the steady expansion of the copyright term and deferral of the public interest. The first Copyright Act, in 1790, offered protection for a term of 14 years from publication, plus the prospect of an additional 14 years if the author survived to renew the copyright. In 1831, Congress extended the term of copyright to an initial term of 28 years from

publication, plus a possible renewal term of 14 years. The 1909 Act extended copyright still further, granting copyright owners a 28-year baseline and a renewal term of an additional 28 years.

The 1976 Act replaced this dual system of initial terms plus renewals with a single, unitary term for new works, using an initial term of life of the author, plus 50 years, the minimum standard adopted in the Berne Convention (Article 7). Moreover, to bring copyright term under the old dual system approximately into line with copyright term under the new unitary system, in 1976 Congress added 19 years to unexpired renewal terms of existing copyrights. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act, which added 20 years to the term of all copyrights then in existence (including 20 years added to renewal terms), and also extended the baseline for new works to life of the author, plus 70 years.

Renewals, risks, and rewards: Under the Copyright Act of 1909, the renewal system was understood as economic protection for the author. The renewal term created a new estate, free of any licenses or transfers of copyright interests that the author had granted during the initial term. If an author made a bad deal during the initial term, selling or licensing the copyright on terms that later turned out to be unfavorable given the unexpected popularity of the work, the renewal term gave the author a second bite at the apple, in the form of the power to negotiate a higher fee. In *Stewart v. Abend*, 495 U.S. 207 (1990), for example, the Supreme Court held that the owner of the renewal copyright in the short story "It Had to Be Murder" could sue Alfred Hitchcock and Jimmy Stewart, the producers of the derivative work *Rear Window* (among the most celebrated Hollywood films of the 20th century), for copyright infringement, based on re-release of this classic film beginning in 1984. The plaintiffs prevailed even though *Rear Window* was produced in 1954 in reliance on permission granted during the initial copyright term. *Stewart* illustrates how the renewal system generated some risks, and some unfairness, for producers (and consumers) of works based on permission granted in the initial term. Authors had the power to sell (and publishers would typically acquire) both initial and renewal terms simultaneously, but a renewal interest acquired during the initial term was contingent and only vested if the author survived to register the renewal at the appropriate time – as the initial term was ending – with the Copyright Office.

The unitary system created by the 1976 Act for new works eliminated those hazards, though it created a new one, by eliminating the ability to determine in advance when a copyright would expire. Congress also wanted to be sensitive to the "second bite at the apple" opportunity that the renewal system had offered authors. It there-fore created a "termination right," allowing copyright owners the

statutory right at a point in the distant future to terminate transfers of copyright interests, and to recover those interests for themselves. Today, therefore, the unitary-term-plus-termination-right roughly approximates the previous dual system, both in purpose, and (in theory) in duration.

Calculating: Determining how long a copyright lasts is a matter of applying the detailed provisions of three sections of the Copyright Act: sections 302, 303, and 304. To figure out which section applies and the term of copyright that results, you need to know three pieces of information: First, when the work was created; second, whether and when the work was published; and third, if the copyright was renewed following its initial term.

For works created on or after January 1, 1978, apply section 302 to determine the term of copyright:

- A copyright in a work created by a single author lasts for the life of the author plus 70 years.
- A copyright in a joint work (other than works made for hire) lasts for the life of the last surviving author plus 70 years.
- A copyright in a work made for hire, anonymous work, or pseudonymous work lasts for 120 years from the year of creation or 95 years from the year of publication, whichever expires first.

For works created before January 1, 1978, apply sections 303 and 304 to determine the term of copyright. For works published or copyrighted before January 1, 1978, apply section 304; for works created but not published or copyrighted before January 1, 1978, apply section 303.

For works published or copyrighted before January 1, 1978:

- The initial term of copyright is 28 years.
- The renewal term of copyright is 67 years, for a total potential copyright term of 95 years.
- However: Filing a renewal certificate to qualify for the renewal term was made optional in 1992, meaning that renewal of the copyright term was made automatic. Automatic renewal, however, could apply only to copyrights still in their initial term (i.e., works published not more than 28 years before 1992).

Therefore, for works published or copyrighted before January 1, 1978, but after 1964, the total copyright term is 95 years.

For works published or copyrighted before January 1, 1978, and before 1964, the total copyright term is 28 years, plus an additional 67 years if a renewal certificate was timely filed.

For works created but not published or copyrighted before January 1, 1978:

- The term of copyright is the term provided by section 302, i.e., life of the author plus 70 years, or (for works made for hire, anonymous, and pseudonymous works), 120 years from creation or 95 years from publication, whichever expires first).
- However, in no case does a copyright for a work in this category expire before December 31, 2002, and if the work is published (by or with the authority of the copyright owner) before that date, then in no case does a copyright for a work in this category expire before December 31, 2047.

The paradoxical effect of these provisions is clearest when considering older works. By virtue of the dual system of copyrights, 1923 becomes a salient date. Any work published before 1923 is now in the public domain, because its maximum 56-year term expired before the 1976 Act took effect in 1978. Likewise, the 95-year term for published works that exists by virtue of section 304 means that the "public domain" date exists, in practice, as a rolling phenomenon. On January 1, 2022, copyrighted works from 1926 entered the public domain. On January 1, 2023, copyrighted works from 1927 entered the public domain. And so on, looking ahead. Some public interest organizations celebrate January 1 as "Public Domain Day" and publish lists of well-known works that are now in the public domain.

Any work created after 1927 (the most recent "Public Domain Day") may still be copyrighted today, if the appropriate renewal certificate was filed. Any work created but not published before 1927, including diaries and letters from centuries ago, may still be protected by copyright law today, if they were published in the United States before December 31, 2002. As "works of authorship fixed in a tangible medium of expression," legal protection for these works is governed by federal statutory copyright, and not by older common law copyright or other state law.

Termination, including termination of transfers: Termination rights are governed by two sections of the Copyright Act, sections 203 and 304. These sections apply to transfers or grants of copyright interests. Assignment or sale of copyrights, and licensing copyright interests, are the two most common forms of transfers. Copyright interests can pass by will and via bankruptcy proceedings, but

the termination rules do not apply to wills or bankruptcy plans. In addition, as you read in connection with works made for hire, the termination of transfer rules do not apply to works made for hire.

Termination rights can be exercised only by the author (which may not be the copyright owner) or by the author's successors as defined by copyright law. Analyzing a possible termination claim under section 203 or section 304 requires knowing, first, when the original transfer occurred.

For transfers made on or after January 1, 1978, apply section 203:

- Termination can be effected at any time during a five-year window that begins at the end of 35 years from the date of the grant, or transfer. Appropriate prior notice of the intent to terminate must be given to the grantee and recorded in the Copyright Office.
- To protect the legitimate interests of the grantee, derivative works prepared under the authority of the original grant can continue to be used, subject to any conditions (such as payment of royalties) included in that grant.

For transfers made prior to January 1, 1978, apply section 304(c) and (d):

- Only transfers conveying an interest in the renewal term can be terminated. Subsection (c) applies to transfers of interests in the 19 years added to the renewal term by the 1976 Act. Subsection (d) applies to transfers to interests in the 20 years added to the renewal term in 1998, by the Sonny Bono Copyright Term Extension Act.
- Notice requirements and protection for existing derivative uses are similar to those under section 203. The termination window, however, is different. Under section 304(c), the five-year termination window opens 56 years from the date when copyright was first secured. Under section 304(d), a second five-year window opens 75 years from the date copyright was first secured. Section 304(d) is available only if the rights granted by section 304(c) expired before the Sonny Bono statute took effect in 1998, and if section 304(c) rights were not exercised.

The complexities of the termination statutes are legion, and they are coming into clearer focus as more and more transfers of copyright interests become subject to termination, and many are challenged in litigation. Among the most important and difficult problems is the fact that identifying the work subject to termination can be extremely problematic, given the fact that the precise "work" that is

copyrighted need not be identified by its author in the first place. *See, e.g., Siegel v. Warner Bros. Entertainment Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008) (considering which of the various expressions of the Superman cartoon character were subject to termination rules).

5. More on the Duration of Copyright

The Sonny Bono Copyright Term Extension Act of 1998 was challenged on constitutional grounds. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the plaintiff, Eric Eldred, a publisher of public domain works, argued that Congress had exceeded its authority to enact copyright legislation. He made two arguments. First, he argued that Congress exceeded its authority to enact copyright legislation under the Copyright Clause, on the ground that the extension of the copyright term for previously produced works violated the "limited Times" provision of that clause. Second, he argued that the extension violated the First Amendment, since it interfered with the plaintiff's ability to publish works that he anticipated would fall into the public domain. The Supreme Court, in a 7-to-2 decision, rejected both arguments, on the ground that the statute was a permissible exercise of Congress's authority.

Eldred's challenge to the extension of the term of copyright was the culmination of a long, international battle over the "right" policy for the length of copyright. In 1993, the European Union adopted a Directive mandating that EU member countries extend the term of copyright in their respective national laws, from the life-of-the-author-plus-50-years baseline required under the Berne Convention, to the life-plus-70 term that later appeared in American legislation. In passing the Sonny Bono statute, Congress noted that it was responding to the desire of American authors and publishers to "keep up with" their European competitors.

The Court majority in *Eldred* took note of this development in concluding that Congress had a rational basis for enacting the statute. On the other hand, the Court majority seemed to make it clear it was skeptical of the merits of Congress's choice, a position that may reflect the well-known fact that term extension in Congress was partly the product of heavy lobbying by copyright-owning industries, and particularly by the motion picture industry. Each of the two dissenters, Justices Stevens and Breyer, would have been less deferential to Congress on the premise that the benefits conferred by the statute are sizable, and private (particularly concerning their retrospective character), and the costs conferred, in terms of added licensing and permission fees for older works not in the public domain, are sizable, yet public. Notably, before Justice Breyer became a federal appellate judge, he served on the faculty of Harvard Law School and published an early law review

article that used economic reasoning to express skepticism about overly strong copyright protection. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).