

WHAT DIDN'T HAPPEN: AN ESSAY IN SPECULATION

PETER JASZI

Most of us held off celebrating the beginning of a renewed slow trickle of works into copyright's public domain until the first seconds of New Year's Day, 2019, but (if it hadn't been so early in the day), we would have been entitled to raise a glass at 4:04 PM on the preceding December 27th, when the last substantive business undertaken in 2018 by either house of Congress was concluded in the Senate. (Like the House, which wrapped up its business at 4:02, the World's Greatest Deliberative Body had convened that day at 4:00.) At that moment, a last-minute push to extend copyrights beyond the 20-year bonus terms awarded in the 1998 Sonny Bono Copyright Term Extension became a practical and mathematical impossibility. This was all the more true since no legislation to achieve that result had been introduced in either house during the 115th Congress.

Obviously, non-events matter, not only in the Holmesian heuristic sense (per the "curious incident" recited in *The Adventure of Silver Blaze*), but substantively as well. Some of the last 25 years' most important positive developments in copyright policy have—in fact—been negatives: the collapse of the SOPA/PIPA bills in 2012, the congressional failure to enact categorical and comprehensive paracopyright legislation in 1998,¹ and the long and ultimately successful effort (throughout the mid-and late-90's) to block enactment of *sui generis* database protection in U.S. law.² The congress's failure to enact term extension legislation (despite having been greenlighted by the Supreme Court in *Eldred v. Reno*) is another example.

So one minor goal of this essay is to celebrate the power of inaction. Another is to acknowledge the pleasure of having your

¹ As originally called for by a Clinton administration Commerce Department Task Force on Information Infrastructure. BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter WHITE PAPER]. In the event, the final version of the new Chapter 12 of U.S. Code Title 17, introduced in the Digital Millennium Copyright Act of 1998, constrained as it was by a workable mechanism for defining exceptions to the prohibitions against "circumvention," has proven inconvenient, expensive, and downright frustrating but not a measurable drag on innovation.

² For references to this still largely untold story, see INDRANATH GUPTA, FOOTPRINTS OF *FEIST* IN EUROPEAN DATABASE DIRECTIVE: A LEGAL ANALYSIS OF IP LAW-MAKING IN EUROPE (2017).

predictions proven wrong. I'm happy to say that in 1995 I told a Senate panel that a 20-year term extension would "represent[] a down payment on perpetual copyright on the installment plan."³ Obviously, and happily, it didn't work out that way. My main objective in what follows is to suggest what accounts for that particular negative result. In other words, how did the time-honored notion of periodic add-ons to copyright duration, so recently viewed as non-controversial, become politically toxic over less than two decades?⁴

In search of an explanation, you are invited to return with us now to those thrilling days of yesteryear to witness what is arguably the primal scene in which influence and ideology conceived the contemporary term extension movement. In May 1962, the stage was set in a House of Representatives Judiciary Committee hearing room. Congress recently had begun the process of devising comprehensive copyright reform legislation, and it was already clear that (among other things) it eventually would change the law in various ways. The most foreseeable and (then) least controversial of these would be to introduce a modest prospective extension of copyright term. It was just as easy to predict that any change in the formula would put the next generation of copyright owners at a durational advantage vis-à-vis the current one—so that transitional provisions to harmonize existing and new copyright terms would be politically necessary in the final legislative package. But because all of this was going to take some time (14 years, as it turned out!) there was a more immediate problem: If copyright terms calculated the old-fashioned way continued to run their course, some rightsholders would lose their existing protection before the new dispensation kicked in. A rough and ready solution would be to extend existing renewal terms while the new legislation was being considered, and this bill before the House was the first such "interim extension" to be proposed.⁵ The

³ *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Judiciary Comm.*, 104th Cong., 72 (1995) (statement of Peter Jaszi, Professor of Law, American University). My near contemporary reflections on this richly demoralizing experience can be found in Peter Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright*, 29 VAND. J. TRANSNAT'L L. 595 (1996).

⁴ See Timothy B. Lee, *Why Mickey Mouse's Copyright Term Extension Probably Won't Happen Again*, ARS TECHNICA (Jan. 8, 2018, 8:00 AM), <https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push>.

⁵ See *Extending the Duration of Copyright Protection in Certain Cases: Hearing on H.J. Res. 627 Before Subcomm. No. 3 of the Committee on the Judiciary, House of Representatives*, 87th Cong. (1962) [hereinafter *Hearing on Extending the Duration of Copyright Protection*]. The 1961 Report of the Register of

Judiciary Committee had consulted with the Justice Department, which had expressed strong reservations, writing that it would be “unwise” to extend the term of copyright from the viewpoint of the public “which is interested in the early passing of copyrighted material into the public domain.”⁶

Then as now, it was unusual but not unheard of for a member of Congress to appear as a witness before a committee other than their own; it was even more unusual when that member was one of the most powerful members of the body. Nevertheless, the next voice you hear is that of Majority Whip Hale Boggs (D-LA) countering the administration’s stated position with remarks leading up to this old-fashioned stemwinder of a conclusion:

This startling statement is wholly inconsistent with reality. The public does not gain from the “early passing of copyrighted material into the public domain.” When a copyright passes into the public domain, the public is not the beneficiary. The right to make the profit passes from the creator or the original publisher to a person who has contributed nothing to the work. The cost of a ticket to a Bach, Beethoven, or Brahms concert is no less than to one which provides the music of contemporary composers. Listening to radio or watching television programs which use public domain material costs no less than programs utilizing copyrighted works. Copyrighted and public domain works are sold in books in same price ranges.

The public cannot have any real interest in depriving authors, composers, or artists of their incomes from the books or songs or plays which they have written, or from the picture which they create. What benefit can result to a society dedicated to free enterprise from depriving some of its citizens of the earnings of their productions during their lifetime. Are we to say to our young authors, playwrights, composers, and others that they may live by their talents provided they do not live too long? Are we to say to

Copyrights that kicked off the reform process made a relatively modest suggestion: retain the long-prevailing general approach based on a relatively short initial term of 28 years commencing at publication, but extend the additional “renewal” term potentially upon application from 28 to 48 years. *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 50–51 (Comm. Print 1961), https://www.copyright.gov/history/1961_registers_report.pdf (proposing a maximum general term of “76 years from first dissemination” [20 years longer than the law then provided]).

⁶ Hearing on Extending the Duration of Copyright Protection, *supra* note 5, at 30 (statement of Rep. Cramer, referring to a letter from the Attorney General).

them that no matter how great their skills, despite their talents, and irrespective of the dedication to their work, if they commence writing too young and live too long, there is no place for them in our free enterprise society? Are we to tell them that the only property of value which can be transmitted to their dependents must be in the form of stocks, bonds, cash, or real property and that intellectual property must be valueless to them?

There is no benefit to the public from the “early passage of works into the public domain.” That is a foreign philosophy—on which is the very anthesis of the standards by which we live. In our society the creator of intellectual property cannot be the forgotten man, or we shall become a forgotten society.⁷

Why Rep. Boggs chose to insert himself into this debate on the side of interim copyright extension remains (at least to me) unclear. But for present purposes the politics of his intervention is less interesting than its rhetoric. Most notably (in addition to summoning the spirit of capitalism and darkly denouncing foreign influence), he models an approach to assessing (and denigrating) the value of the public domain which would dominate discussion for decades to come. In effect, Boggs suggests, allowing works to exit copyright would confer a public benefit only if it had a measurable effect on conventional measures of consumer welfare such as the unit price of a book or a concert ticket—and advocates of the term limitation have failed to meet their burden on that point. In the absence of such a showing—Boggs asserts—there is no reason to resist creators’ “natural” property claims.⁸

⁷ Hearing on Extending the Duration of Copyright Protection, *supra* note 5, at 6 (statement of Rep. Hale Boggs).

⁸ The proposed interim extension was enacted, and was the first of nine similar bills passed over years to preserve copyrights already in their renewal terms, ultimately qualifying them for the 20-year extension provided in the Copyright Act of 1976. Where prospective protection was concerned, however, the 1976 Act departed dramatically from the approach proposed back in 1961; following general international practice, it abolished the two-term scheme in favor of a basic unitary term consisting of the life of the author plus fifty years. In retrospect, we can see that the elimination of the renewal formality represented the single most dramatic extension of copyright term in U.S. history, since under the old dispensation the vast majority of copyrights wound up at the end of the initial term. See generally Jamie Carlstone et al., *Copyright Renewal of U.S. Books Published in 1932: Re-analyzing Ringer's Study to Determine a More Accurate Renewal Rate for Books*, 79 COLLEGE & RES. LIBRARIES 697 (2018), available at <https://doi.org/10.5860/crl.79.5.697>. But that’s another story.

So is the one that follows, but I can’t resist. The specific claim that Boggs understands as deriving from the frictionless operation of authors’ rights is, at least, relatively modest in scope, i.e., “creators should be able to live by their

talents,” as well as to pass along something (unspecified in extent) to their “descendants.” More than a half century earlier, that hot-and-cold champion of creative entitlement, Samuel Langhorne Clemens, had been more explicit in his testimony on what would become the Copyright Act of 1909: “I like that extension of copyright life to the author’s life and fifty years afterward. I think that would satisfy any reasonable author, because it would take care of his children. Let the grand-children take care of themselves. That would take care of my daughters, and after that I am not particular. I shall then have long been out of this struggle, independent of it, indifferent to it.” *To Amend and Consolidate the Acts Respecting Copyright: Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853*, 59th Cong. 196–201 (1906) (statement of Mr. Samuel L. Clemens); *Mark Twain in White Amuses Congressmen*, N.Y. TIMES, Dec. 8, 1906, at 5, <https://timesmachine.nytimes.com/timesmachine/1906/12/08/101852379.pdf>. Did he mean the last, or was the joke just too good to let pass? Either way, we can recognize in Twain’s main discourse a version of the argument from generational succession that would gain traction in years to follow. Consider, for example, the actuarially dubious congressional rationale for the CTEA memorialized by Justice Ginsberg in *Eldred v. Ashcroft*:

Members of Congress expressed the view that, as a result of increases in human longevity and in parents’ average age when their children are born, the pre-CTEA term did not adequately secure the right to profit from licensing one’s work during one’s lifetime and to take pride and comfort in knowing that one’s children—and perhaps their children—might also benefit from one’s posthumous popularity. 141 Cong. Rec. 6553 (1995) (statement of Sen. Feinstein); *see* 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch) (“Among the main developments [compelling reconsideration of the 1976 Act’s term] is the effect of demographic trends . . . on the effectiveness of the life-plus-50 term to provide adequate protection for American creators and their heirs.”).

537 U.S. 186, 207, n.14 (2003).

Indeed, in her 1995 congressional testimony, Register of Copyrights Mary Beth Peters had recited that “[p]rotection of two succeeding generations is the standard goal recognized in [the] Berne [Convention]” citing various authorities including recitals of the 1994 EU Directive on Copyright Term. *Copyright Term, Film Labeling, And Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary of the House of Representatives*, 104th Cong. 175 n.39 (1995). Subsequently, defending the constitutionality of the CTEA before the Supreme Court, the U.S. government asserted that in 1908, the revision of the Berne Convention to provide for a basic term of “life-plus-50” years was designed “to provide compensation during authors’ lives and during the lives of any children or grandchildren”—and that, as a result, changes in life expectancy justified the 20-year add-on. Brief for Respondent at 25, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

Viewed from an author-centric perspective, all this makes perfect sense. A copyright system that is author-directed, root and branch, could be expected to elevate considerations relating to the welfare of creators' survivors over, say, public access. Certainly, this explanation of the rationale for term extension provides relatively little room for weighing the consequences on pro and con. But there is a problem with this plausible-sounding explanation, which no one stopped to consider at the time: It is demonstrably untrue!

In fact, the records of the 1908 Diplomatic Conference (and that of 1967, where term was discussed again for good measure) are innocent of any mention of this author-centric rationale for term expansion. Sam Ricketson, the foremost historian of Berne, has stated that "in the debates that took place at various Berne revision conferences on the question of duration, one is hard pressed to find reasoned justifications for the move for longer terms of protection." Sam Ricketson, *The Copyright Term*, 23 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 753, 778 (1992). Indeed, a 1991 Memo on the project for what was then called the "Berne Protocol" (later rechristened the WIPO Treaty on Copyright) states (shades of Mark Twain) that the original intent had been to "make reasonably certain that at least the first generation of [heirs]" would benefit. Committee of Experts on a Possible Protocol to the Berne Convention, 1st Sess., Nov. 4–8, 1991, WIPO Doc. BCP/CE/1/3, ¶ 159, (Oct. 8, 1991). So where does this line of reasoning find its source? The answer may be found in Claude Masouyé's widely-read but authoritatively non-authoritative 1978 "Guide to the Berne Convention," a WIPO publication which recites that "It is not merely by chance that fifty years was chosen. Most countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e. three generations." CLAUDE MASOUYÉ, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 46 (1978). Of course, as then-WIPO Secretary General Árpád Bogsch made clear in his introduction, the Guide is not, in itself, "an authoritative interpretation." What was Masouyé's authority? None is cited, but the closest I can come is his own 1959 article, advocating for (without any identified source or precedent) the position later enshrined in the official-seeming volume. Claude Masouyé, *Vers une prolongation de la durée de la protection*, 24 REVUE INTERNATIONALE DU DROIT D'AUTEUR 93 (July 1959) (Fr.), <https://www.la-rida.com/fr/article-rida/3406>. There, the evidentiary trail ends, as does this digression. Or almost. I would be remiss to omit noting that Silke Von Lewinski's *Term of Protection in Copyright* repeats the rationale, although it adds no evidence for it. See Silke von Lewinski, *EC Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 23 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 753, 785 (1992).

So what, exactly, is demonstrated by this story of an all-too-plausible explanation that has—in fact—no visible means of support? On the one hand, perhaps, only that even the most distinguished scholars can, from time to time, get carried away with themselves. On the other, I'd suggest, is a different cautionary proposition: That the author-construct apparently enjoys, like the Shadow, the power to cloud human minds. It is not for nothing that at p. 3 of his statement, Rep. Boggs cites the century-old (and distinctly foreign) observation that "equally with the builder or the planter, the author's ownership of his work

There's nothing particularly remarkable in Boggs' framing. For decades, arguments on both sides of the issue were primarily made in what might be called a "consumerist" frame, with crisscrossing claims about whether a more robust public domain would (or wouldn't) offer more conventional information goods at lower prices. For many (or most) of that era's public domain advocates, myself included,⁹ engaged with the issue primarily, if not exclusively, in similar terms. Even the heroes of the early resistance to term extension, such as the late Professor Dennis Karjala, cast their arguments about the costs of a longer protection period primarily in terms of the loss to the public of specific finished derivative works (such as motion pictures based on public domain originals) that it might bring about—an expanded argument, to be sure, but one with roots in the dominant consumerist rhetoric nonetheless.¹⁰ It's not a coincidence, therefore, that the "business model" of the exemplary named plaintiff in the ultimate court challenge to the constitutionality of the 1998 Sonny Bono Copyright Term

is, in (literary raconteur and presumably proud parent) Disraeli's famous words, "the most natural of all titles, because it is the most simple and least artificial. It is paramount and sovereign, because it is a tenure by creation." I ISAAC DISRAELI, *THE CALAMITIES AND QUARRELS OF AUTHORS: WITH SOME INQUIRIES RELATING TO THEIR MORAL AND LITERARY CHARACTER, AND SOME MEMOIRS FOR OUR LITERARY HISTORY* 30 (New York, W.J. Widdleton 1868), which the publisher describes as "edited by his son, the Hon. Benjamin Disraeli" ("silver-fork" novelist turned politician). Isaac Disraeli (b.1766) had died more than a decade before the first British printing of this posthumous collection, which is undated but may be as early as 1859.

⁹ In retrospect, my own 1995 comment that "discussions of the public domain which center on whether high quality reprints of classics cost more or less than cheaply produced mass market paperbacks trivialize the concept of the public domain by overlooking its more central function as the source to which the creative men and women of each generation turn for the materials they refashion into new and newly valuable works of imagination" may have been on the track, but read now it seems infuriatingly non-specific. Likewise, it is sobering to reread David Lange's beautiful 1981 article, *Recognizing the Public Domain*, 44 *LAW & CONTEMP. PROBS.* 147 (1981), which launched a thousand inquiries, and realize that it says almost nothing about the virtues of limited copyright as such (rather than the vices of supplementary pseudo-copyright in state law). *But see id.* at 150 n.16–19.

¹⁰ See Statement Of Copyright And Intellectual Property Law Professors In Opposition To H.R. 604, H.R. 2589, & S. 505, "The Copyright Term Extension Act," from Dennis S. Karjala, Professor of Law, Arizona State University, to Comms. on the Judiciary of S. & H.R. 12–13 (Jan. 28, 1998), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/legmats/1998Statement.html>.

Extension Act was giving away physical exemplars of downloaded books (while encouraging others to follow suit).¹¹

This narrow, market-oriented understanding of the value of the public domain enabled, in turn, another set of tropes, in which the public domain was figured as a kind of information limbo in which neglected works linger precisely because nobody owns them. Here's Bruce Lehman, the Clinton administration's "IP Czar," in comfortable colloquy with Senator Mike DeWine (R-Ohio) in the run up to the CTEA, comprehensively missing the point about Shakespeare and the public domain:

SEN. DEWINE: . . . Your contention . . . was that going into public domain is really not necessarily to the benefit of the consumer . . . How far do you take that? . . .

MR. LEHMAN: . . . I can give you probably an example. I think that sometimes you go to book stores, and you will see very old films that have fallen into the public domain . . . [S]ome of those films you will see in a book store have been reissued and sold very cheaply as, you know, video cassettes maybe for \$6 or \$7 or something like that. That would be an advantage. But you have to balance that off by the fact that there are probably a lot more films that have been lost to the public forever and never reissued at all [nor] made available because nobody had the economic incentive to do so.

SEN. DEWINE: To preserve them.

MR. LEHMAN: That is right, to preserve them and to put them out. And I would also just say, if you think of your own behavior, if you go into a book store, there are lots of books—you know, Shakespeare is not under copyright anymore. Do you really see a big difference in price between the public domain stuff and the nonpublic domain stuff? Does that even enter into your consciousness as a consumer?¹²

Representations of the public domain as a limbo of the unowned still pop up from time to time, but—as the political collapse of copyright

¹¹ For more on programmer/provocateur Eric Eldred and his Eldritch Press, see generally *Eric Eldred*, WIKIPEDIA, https://en.wikipedia.org/wiki/Eric_Eldred (last visited on May 19, 2019).

¹² *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Judiciary Comm.*, 104th Cong., 38 (1995) (testimony of Hon. Bruce Lehman, Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office); but see MARIE HALL ETS, JUST ME 12 (1965) (“‘Rabbit,’ I said. [He didn’t have any name because nobody owned him.]”).

term extension demonstrates, they no longer dominate. So what changed? My speculative sketch of a tentative answer follows.

Material objectification characterized not only millennial discussions of the public domain; it also marked emerging discourse about what came to be known as Internet policy—although we hadn't yet even settled on a name for the thing itself. It was “cyberspace” to those like John Perry Barlow, who were committed to its disembodied potentialities, and “the information superhighway” or (worse) the “National Information Infrastructure” to its would-be regulators. Although Barlow insisted in 1996 that “increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world . . . [that] would declare ideas to be another industrial product, no more noble than pig iron.”¹³ (Or—he might have added—printed books.) Nevertheless, in the political debates of 1994–98, toward which he gestures here, the Internet was figured primarily as a complicated near-frictionless system of virtual conduits for the distribution (or misappropriation) of finished content.¹⁴ Indeed, this portrayal continued to hold rhetorical sway when the Internet found itself under close judicial scrutiny for the first time in connection with the file-sharing wars of the

¹³ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, 18 DUKE L. & TECH. REV. 5, 6 (2019).

¹⁴ Consider this, from the opening pages of the government report that started the trouble:

The NII of tomorrow . . . will be much more than these separate communications networks; it will integrate them into an advanced high-speed, interactive, broadband, digital communications system. Computers, telephones, televisions, radios, fax machines and more will be linked by the NII, and users will be able to communicate and interact with other computers, telephones, televisions, radios, fax machines and more—all in digital form. The NII has tremendous potential to improve and enhance our lives. It can increase access to a greater amount and variety of information and entertainment resources that can be delivered quickly and economically from and to virtually anywhere in the world in the blink of an eye. For instance, hundreds of channels of “television” programming, thousands of musical recordings, and literally millions of “magazines” and “books” can be made available to homes and businesses across the United States and around the world.

White Paper, *supra* note 1, at 8 (citations omitted). There are valuable near-contemporary discussions of such figures of speech. See RAYMOND GOZZI JR., *THE POWER OF METAPHOR IN THE AGE OF ELECTRONIC MEDIA* (1999); see also Annette N. Markham, *Metaphors Reflecting and Shaping the Reality of the Internet: Tool, Place, Way of Being* (2003) (unpublished paper) (<https://annetmarkham.com/writing/MarkhamTPW.pdf>).

early 2000's. Both foes and friends of Napster and its sequelae celebrated in, effect, the technology's potency as a mode of distribution, rather than confronting its potential to build disembodied communities of interest(s).¹⁵

Soon thereafter, the grip of this rhetoric on the public imagination began to loosen. Thanks to sweeping changes in the way we think and talk about networked digital technology, no one ever again can refer to the Internet as a "series of tubes" without major risk of embarrassment.¹⁶ What once was viewed as a delivery system is now commonly figured as a space for virtual interaction and collaboration—in accord with Barlow's foundational vision.¹⁷ And it is this shift that (in turn) has enabled the emergence of what was for many a whole new way to think about the public domain: less as a repository for disregarded cultural cast-offs and more as a rich mine of source material.¹⁸ To those of us with an early inchoate sense of the potential value inherent in the unowned, it provided a new wealth of practical and appealing examples of why the public domain really mattered. For others, direct experience online was a powerful teacher in its own right. Either way, the trends

¹⁵ Copyright scholars did this discussion no favors by generally conceding the issue of end-user infringement and focusing instead on the metes and bounds of secondary liability. In retrospect, there was more space than we were then aware to discuss the application of fair use to at least some peer-to-peer sharing practices.

¹⁶ Not an "Internet of Things" but the Internet as Thing. See Cory Doctorow, *Sen. Stevens' Hilariously Awful Explanation of the Internet*, BOING BOING (July 2, 2006, 11:45 PM), <https://boingboing.net/2006/07/02/sen-stevens-hilariou.html>.

¹⁷ And, giving credit where credit is due, that of Howard Rheingold. Ozymoronically clashing title and sub-title notwithstanding, his book gave many of us a first glimpse of the future. See generally HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (1993).

¹⁸ Not that the old rhetoric ever vanished entirely from the scene. In 2014, a New York Times article carried the following lead:

They show up in discount DVD bins, or more often today online, sometimes looking a little worse for the wear. A general pall of darkness might cloud the image; the dialogue might be a bit tinnier than you remembered. Often the quality is not too shabby, though in the case of the web, it can be a surprise that they're online at all. They're films that have fallen out of copyright for one reason or another and must weather the wilds of the public domain.

Nicolas Rapold, *Even Good Films May Go to Purgatory*, N.Y. TIMES (Feb. 14, 2014), <https://www.nytimes.com/2014/02/16/movies/old-films-fall-into-public-domain-under-copyright-law.html>.

thus set in motion led directly to the Great Legislative Nonevent of 2018.¹⁹

This broad and consequential shift began, I would suggest, with the availability of Web browsers and search engines, along with increased opportunities to cut, paste, and modify digital files using a growing host of applications and programs. Before the early 1990s, taking creative advantage of the public domain entailed scouring physical collections in search of old information objects, investing time and money in transcribing them, and recasting them using skilled techniques that hadn't changed dramatically in decades (if not centuries). But 1993 alone saw AOL offering access to the whole Internet to its users for the first time, the introduction of both the Mosaic browser and Photoshop 2.5; although flatbed scanner and OCR technology had been around since 1978, they became practically available to individual users only in the early 90s. In addition to a proliferation of tools that enabled increasingly convenient exchange of digital files, the following decade would see accelerated progress in public access to information online. The Internet Archive, with its ever-expanding storehouse of material (including rich collections of public domain works) became searchable by the public in 2001, and catalogues of other digitized records followed; in 2003, both "Open WorldCat" and an online index of public domain titles digitized by Project Gutenberg were launched. Within a few years of the CTEA's enactment, the world in which this provision (and the rest of copyright law) had altered materially and irreversibly—just as Barlow had called it.

The opening of the Internet did not, in itself, create or even first release the impulse to tinker with and recast found material for new purposes. Elite writers and artists had been at it since Classical times,²⁰ and in the late twentieth century Vidders²¹ and Ziners²² making creative

¹⁹ We might have known, had we been paying closer attention. In 2001, the Digital Future Coalition, of which I had been an organizer, secured a small grant from the MacArthur Foundation to study "messaging" strategies for public interest campaigns around copyright policy. The goal was to identify key words and concepts that might be deployed to counter the copyright industry's very effective communications campaign. We commissioned the Belden & Russonello strategic consulting firm to conduct a series of structured focus groups at sites across the U.S., and the results (never published nor, more's the pity, systematically implemented) were clear: the tropes of "freedom" and "choice" had the potential to trump "piracy" and "property."

²⁰ See, e.g., *Centos: Poetic Form*, POETS.ORG (Feb. 20, 2014), <https://poets.org/text/cento-poetic-form>.

²¹ See Morgan Dawn, *A History of Vidding*, VIDELICET, <https://vidders.github.io/articles/vidding/history.html> (last visited May 18, 2019) ("Vidding is communal poetry . . .").

(and painstaking) use of analog technology showed the way. Internet access did radically enlarge the population of people with the tools to express that impulse. In so doing, it also expanded practical appreciation for what could be done with diverse source material, including the rich trove that is the public domain.²³

Of course, there is more to the story. All honor goes to those who, in the dark years after the CTEA's enactment, kept the flame of the public domain alive. The *Eldred* litigation itself, however unlikely of conventional success, clearly raised levels of public awareness about the issue, particularly among Internet users. The attention, in turn, energized a powerful and persistent trope in which responsibility for term extension was laid squarely at the feet of the Mouse-You-Love-to-Hate; despite its tendency to obfuscate the real stakes and the forces actually at work,²⁴ the meme had enormous power as an organizing tool. Essential books like Laurence Lessig's *Free Culture* (2004) and *Remix* (2008), or James Boyle's *The Public Domain: Enclosing the Commons of the Mind* (2008), made indelible contributions, as has Duke University Law School's Center for the Study of the Public Domain (directed by Jennifer Jenkins). Beginning in 2005, campaigns to raise awareness of the "orphan works" problem that term extension did so much to exacerbate, although they ultimately brought no legislative relief, had the secondary effect of helping to refigure the public domain as a rich granary rather than a run-down Roach Motel.

In an environment marked by ubiquitous high-speed Internet connectivity, 200 million active websites, and a vast array of information tools, the Web hasn't brought us everything we hoped—and has brought much we might never have wished to see. Ultimately, though, it was the Internet itself that came to the rescue of copyright's open spaces. In this at least, John Perry Barlow's organic vision of cyberspace has been realized.

²² See *A Brief History of Zines*, DUKE UNIV. LIBRARIES, <https://library.duke.edu/rubenstein/findingdb/zines/timeline/> (last visited May 18, 2019).

²³ The ease with which information can be retrieved and repurposed online is not restricted to material that is out of copyright. In fact, the forces at work behind the markup in the cultural value of copyright-free material also helped to drive the transformation of the fair use doctrine from 1994 onwards. See generally, PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* (2d. ed. 2018).

²⁴ In fact, the music industry was more vocal and effective in pushing for the CTEA.