

TULANE JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY

VOLUME 9

SPRING 2007

Securitizing Copyrights: An Answer to the Sonny Bono Copyright Term Extension Act

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I. INTRODUCTION

This Article makes a specific proposal: instead of lobbying Congress for copyright term extensions, the owners of valuable copyrights should maximize the potential of their copyright privileges by pursuing the option of asset-backed securitization. The concept of substituting securitization for copyright term extensions is a novel idea. This Article illustrates that securitization offers artists the ability to raise money without selling the rights to their work, and to reap financial rewards on royalties earlier than otherwise would be possible. As a result, asset-backed securitization virtually eliminates the need for long-lasting copyrights.

Congress's most recent extension of the term of copyrights, in 1998, generated a great deal of controversy. While the owners of valuable copyrights have urged Congress to extend the life of their assets, others believe that the duration of today's copyright terms is excessive, unconstitutional, and directly linked to detrimental social consequences. By discussing securitization in the context of the recent copyright debate, this Article proffers a private law solution that addresses the economic concerns surrounding current copyright law. In resorting to extensions as the only solution to the copyright dilemma, Congress and the courts have exacerbated the problem. Alternatively, asset-backed securitization introduces an economic incentive to organize a new way in which to deal with this issue. Moreover, with the infrastructure of securitization already in place, asset-backed securitization is not only a smart, but also a practical solution.

As a means of facilitating full understanding of using asset-backed securitization as an alternative to future copyright term extensions, this

Article begins with an introduction of the history and theory behind U.S. copyright law. It then analyzes how Congress's 1998 extension fits within that landscape, and why copyright term extensions have become controversial. This involves a look at technology's impact on the law, as well as the cases leading up to the current debate. Because the debate legally culminates in the United States Supreme Court's decision in *Eldred v. Ashcroft*, Part IV of this Article examines the Court's majority and dissenting opinions in that case.¹ This includes a detailed look at the 1998 extension, the legality of its application to both existing and future copyrights, and whether the extension can be defended as synchronizing the United States with international norms. Because the legislation in question was enacted by Congress, this Article also considers the influence that the separation of powers doctrine had on the Supreme Court's decision.

Part V discusses what others have written on the debate surrounding copyright term extensions, including their suggested solutions. Part VI explores the idea of asset-backed securitization as a way to satisfy both the economic and proprietary needs of copyright owners, and thereby eliminate the need for copyright term extensions. This is done by discussing the history and economics of asset-backed securities (ABS), as well as their limitations. A detailed look at the structure of ABS, and a subset of securities referred to as celebrity asset-backed securities (CABS), leads to the conclusion that securitization is an intelligent option for the holders of today's valuable copyrights.

The conclusion reviews the issues surrounding the 1998 extension and how Congress and the courts have not been able to rectify the problems flowing from that legislation. Also reiterated are the examples of the harm caused by extensions and the need for an alternative method to deal with the objectives of copyright owners. Part VII returns to the proposal and how it applies to the issues and examples discussed in this Article. By alleviating the dominant concerns surrounding copyright term extensions, the pieces of the copyright puzzle fit well against the innovative idea of securitizing copyrights.

II. COPYRIGHT LAW

In early 2003, in the case of *Eldred v. Ashcroft*, the Supreme Court ruled on the constitutionality of the Sonny Bono Copyright Term

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

Extension Act (CTEA) of 1998.² Despite the Supreme Court's decision to uphold as constitutional the most recent, and most expansive, U.S. copyright term extension in congressional history, the CTEA remains controversial. For all intents and purposes, the dispute has not been settled; a flame still flickers in the heated debate over whether, in granting an additional 20-year extension of copyright term protection, Congress has gone too far.

Does the CTEA violate the constitutional requirement that copyrights endure only for "limited Times?" Does the CTEA violate First Amendment rights? By extending the copyright term for existing copyrighted works by the same 20-year period that it extends the term for future works, does the CTEA create a perpetual copyright? The Supreme Court has answered "no" to all three questions.³ As a result, copyright protection has the potential to last for 150 years from the date of a work's creation.⁴ The concern is that an excessive period of protection will lead to monopolistic control over much of this nation's cultural resources.⁵ Such control would, it is feared, stifle and inhibit social, artistic, and intellectual development. Since the Supreme Court has decided that the enactment of the CTEA was a valid exercise of the law, the issue now becomes one of developing ways in which to mitigate the Act's impact. The copyright law of the United States, enacted under Congress's Copyright Clause power, forms the basis of the lifetime and worldwide earnings of creative works.⁶ The concept that a creative work is a property right was first recognized in the United States in 1787 when Congress was given the power under the Constitution to enact statutes that "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."⁷

The basic ownership rights for intellectual property, as well as the remedies for the infringement of those rights, are set forth in the Copyright Act of 1790, the 1909 U.S. Copyright Law, the 1976 Copyright Revision Act, and the 1998 CTEA. American copyright law is based on

2. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 303).

3. *Eldred*, 537 U.S. at 186-88.

4. Under today's law, if a copyright owner lives to be at least 80 years old, his or her work will receive at least 150 years of copyright protection.

5. See Brief for Am. Ass'n of Law Libraries et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2001 WL 34092059 [hereinafter Brief for Am. Ass'n of Law Libraries et al.].

6. U.S. CONST. art. I, § 8.

7. *Id.*

the theory that society has an interest in encouraging the intangible products of the mind.⁸ As an incentive to produce, and as a way to eliminate the undesirable social consequences of unimpeded copying, authors are granted control over their work.⁹ Yet, the Constitution also provides that control should be for a limited duration of time so that others can build upon the previously copyrighted material to produce new work.¹⁰ Accordingly, copyright law has two goals. The primary focus of copyright law is on the benefit derived by the public from the labors of authors.¹¹ The secondary focus is on providing authors with an incentive to produce by rewarding them for their creative accomplishments.¹² Therefore, copyright law rests on a delicate balance of public and private interests. In order to achieve this balance, at some point, private control of copyrights must come to an end to allow for the uninhibited public use of creative works.

Furthermore, copyright is considered to be a “bundle of rights” that entails six exclusive rights of the copyright owner.¹³ These rights include control over reproduction, preparation of derivative works, public distribution, public performance, public display, and public digital performance of a sound recording.¹⁴ The exclusive rights of a copyright owner are limited by “fair use” of the work. A fair use is when a work is used for the purpose of criticism, comment, news reporting, education, scholarship, or research.¹⁵ These uses are noninfringing uses and do not require the authorization of the copyright owner.¹⁶

In the Copyright Act of 1790, the first Congress established a copyright protection term of 14 years, with the ability to renew the copyright for another 14 years.¹⁷ After the additional 14 years, the copyrighted work would fall into the public domain where anyone could freely use the work. Congress has extended copyright terms 11 times

8. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[The U.S. copyright laws are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

9. U.S. CONST. art. I, § 8.

10. *Id.*

11. *Sony*, 464 U.S. at 429 (“[T]he limited grant is a means by which an important public purpose may be achieved.”).

12. *Id.* (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.”).

13. 17 U.S.C. § 106 (2000).

14. *Id.*

15. *Id.* § 107.

16. *Id.*

17. Act of May 31, 1790, 1 Stat. 124.

since 1962, compared to only twice from 1790 to 1962.¹⁸ Each of the recent extensions have been designed to keep copyrighted works from falling into the public domain. The CTEA of 1998 has expanded the copyright duration of works to the author's life, plus 70 years after the author's death.¹⁹ The expansion adds an additional 20 years of protection to both existing and future works. For works made-for-hire by a corporation, and anonymous and pseudonymous works, their copyright term now lasts for 120 years from creation or 95 years from publication.²⁰ As a result, it is possible for works to remain copyrighted for 150 years.²¹ The CTEA's gross departure from the original 28 years, as specified in the Copyright Act of 1790, has caused its constitutional validity to be questioned.

III. THE CONTROVERSY: WHY NOT AN ISSUE UNTIL NOW?

Like other areas of the law, copyright rests on a delicate balance of interests. Creators of original works are entitled to a limited exclusive right to copy or otherwise benefit from their creations. The goal of this exclusive right is to give people a financial incentive to produce art, further science, and expand the boundaries of human knowledge. On the other hand, the United States legal system also recognizes the importance of making creative works available for the general benefit of society. Copyrights therefore last for a fixed period of time, after which works fall into the public domain where they can be freely used by anyone. Additionally, the public domain is expanded by the principle of fair use which allows copyrighted material to be used for certain purposes. For example, fair use allows a journalist to quote a few sentences from a copyrighted book in order to critique it, lets an English teacher pass out photocopies of a poem to a class, or allows a subscriber of *The New Yorker* to copy a cartoon and hang it on her refrigerator. These uses of

18. After the initial 1790 Act, Congress extended the duration of copyright terms in 1831 and again in 1909. See Act of February 3, 1831, 4 Stat. 436; Act of March 4, 1909, 35 Stat. 1075. Congress did not enact another extension until 1962. Pub. L. No. 87-668, 76 Stat. 555 (1962). From that point, copyright term durations were extended in 1965, 1967, 1968, 1969, 1970, 1971, 1972, 1974, 1976, 1992, and again in 1998. Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968), Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972), Pub. L. No. 93-573, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 102-307, 106 Stat. 264 (1992), and Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998).

19. 17 U.S.C. § 302(a).

20. *Id.* § 302(c).

21. See *supra* note 4 and accompanying text.

copyrighted material have generally been a minimal threat to publishers and therefore are rarely considered to be copyright infringements.²²

However, digital storage of information has changed things, making it easier for anyone to reproduce and instantly distribute protected material. The Internet, in particular, has drastically changed the dynamics and economics of copying someone else's material. In the past, the cost associated with the mass copying and distribution of a pirated work was relatively high. Due to the Internet, this is no longer the case. Today, many of the owners of registered works, especially major media companies such as literary publishers, face the new threat of an anonymous mass of casual Internet users who have few qualms about the unauthorized reproduction of copyrighted material. To counter this threat, major copyright owners, such as large media corporations, have lobbied the government to strengthen copyright protection.²³ The U.S. government has compiled and strengthened copyright protection by penalizing Internet copying and by lengthening the standard term of copyright protection.²⁴ The debate concerning digital publishing and

22. *But see* Basic Books Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991). Plaintiffs (publishing houses) sued defendant (copy business), alleging copyright infringement under the Copyright Act of 1976. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (2000)). Defendant admitted that it copied excerpts of copyrighted material without permission, compiled them in course packets, and sold them to college students. *Basic Books*, 758 F. Supp. at 1527-29. Plaintiffs sought damages, an injunction, a declaratory judgment, and attorney's fees and costs. *Id.* at 1522. The court found that copying the excerpts was not fair use under 17 U.S.C. § 107, as defendant argued, and that it constituted infringement. *Basic Books*, 758 F. Supp. at 1529-37. The court granted statutory damages, attorney's fees and costs, and injunctive relief. *Id.* at 1547.

23. *See* Brief for Songwriters Guild of America as Amicus Curiae Supporting Respondent, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1822130; Brief for AOL Time Warner Inc. as Amicus Curiae Supporting Respondent, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1836617; Brief for Ass'n of American Publishers et al. as Amici Curiae Supporting Respondent, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1836626.

24. *See, e.g.*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). The Digital Millennium Copyright Act (DMCA) was signed into law by President Clinton on October 28, 1998, and subsequently became part of U.S. copyright law. *Id.* In addition to implementing two 1996 World Intellectual Property Organization treaties, the legislation imposes civil and criminal sanctions on those who circumvent copyright protection by gaining unauthorized access to technologically protected work. 17 U.S.C. § 1201(a) (2000). To "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner. *Id.* § 1201(a)(3)(A). A technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. *Id.* § 1201(a)(3)(B).

copyright infringement was addressed by the Supreme Court in *Eldred*.²⁵ Central to the debate is the Internet—the most significant advancement in human communication in the last 550 years—and its content: intellectual property.

A. *Technology*

Whether it is the pictorial sketches of cave men or the hieroglyphics of the early Egyptians, from the beginning, human civilization has understood the importance of tangible communication. Johannes Gutenberg's fifteenth-century invention of the printing press, along with mass-produced written word, transformed civilization.²⁶ The introduction of mass-produced books marked a turning point in human history. Today, books are a staple in every society. They are an extremely durable source of information that preserve relatively well, and will continue to be a central part of culture for the next several centuries.²⁷ Yet, there are constraints on paper books that limit how far the knowledge they contain can be carried. These limitations suggest the need for a different type of book, the "HTML book"—or a book produced for the World Wide Web.²⁸

Publishing HTML books is an interest held by Eric Eldred. Eldred was a computer programmer in the United States Navy who was fascinated by how the Internet is able to facilitate the exchange of information.²⁹ When his daughter was assigned to read Hawthorne's *The Scarlet Letter*, Eldred tried to locate the text online, but was disappointed with the lack of available information.³⁰ He decided to make an Internet version of the book and enhanced it by adding Internet hyperlinks to the text.³¹ The result was his first HTML book.

The benefit of an HTML book is that it can do things that a paper book cannot.³² For instance, the author of an HTML book can add links to aid in the reader's understanding of the book or to guide the reader to other related texts.³³ These books can also be searched and copied into other texts more easily than can paper books.³⁴ Since HTML books

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

26. JOHN VIVIAN, *THE MEDIA OF MASS COMMUNICATION* 29 (2001).

27. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 122 (2001).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 123.

33. *Id.* at 122.

34. *Id.*

“live” on the Internet, they are available to anyone anywhere—including people who may need to reference a book but cannot afford to purchase it.³⁵ These features of HTML books have contributed to the efficiency of modern research and information gathering by making information increasingly accessible.³⁶

An HTML book is known as a derivative work under copyright law. In other words, if the original work is protected by a copyright, then to publish a derivative work, one would need the permission of the copyright holder.³⁷ *The Scarlet Letter* is a work in the public domain and is free for anyone, including Eldred, to use.³⁸ With the digital publication of Hawthorne’s book, Eldred began *Eldritch Press*—a free online book repository devoted to publishing HTML versions of public domain works.³⁹ With relatively cheap equipment, Eldred took books that had fallen into the public domain (and in some cases fallen out of print) and made them available, free of charge, to others on the Internet.⁴⁰

B. Reactions to the CTEA

Eldred is neither the first nor the last online publisher of public domain works.⁴¹ The physical and code layers of the Internet enable anyone to make use of this innovative technology. The only constraint is met at the content layer.⁴² This is not a slight constraint. Due to the fact that Eldred’s site was not for profit, Eldred could only include literature that had fallen into the public domain.⁴³ When Eldred began his Web site in the mid-1990s, under copyright law as it then existed, this content constraint meant that works published before 1923 were guaranteed to be

35. *Id.*

36. *Id.*

37. 17 U.S.C. § 103 (2000).

38. LESSIG, *supra* note 27, at 123.

39. Eldritch Press, <http://www.eldritchpress.org> (last visited Jan. 12, 2007).

40. LESSIG, *supra* note 27, at 123.

41. *See, e.g.*, Project Gutenberg, <http://www.gutenberg.net> (last visited Jan. 12, 2007).

42. LESSIG, *supra* note 27, at 123.

43. Displaying protected works on a noncommercial Web site violates the copyright owner’s exclusive rights under 17 U.S.C. § 106 (2000). The fair use doctrine, under 17 U.S.C. § 107, limits the exclusive rights provided to an author by § 106. Under § 107, teaching and noncommercial research are purposes for which limited copying is permitted under the fair use doctrine. *Id.* The guidelines under § 107 allow a teacher or researcher to make a single copy of a chapter in a book or to copy a single article from a periodical or newspaper. *Id.* The guidelines also permit a teacher to make multiple copies for a class, provided that the copies are short and maximum teaching effectiveness does not allow time to obtain permission from the copyright owner. *Id.*

free, and works published after 1923 were possibly free.⁴⁴ That changed in 1998 when Congress passed the CTEA.⁴⁵ The CTEA extended the term of existing copyrights by 20 years, meaning that works that were to fall into the public domain in 1999 would remain copyrighted until 2019.⁴⁶ The extension's impact on Eldritch Press turned Eldred into an activist who took his cause to the Supreme Court.⁴⁷ Backed by other activists and scholars, Eldred asserted that the CTEA was unconstitutional.⁴⁸ He claimed the Act is illegal because it conflicts with the original intent of the Framers of the Constitution, and in doing so violates the First Amendment by inhibiting the freedom of expression.⁴⁹

In fact, the CTEA is sometimes, sarcastically, referred to as the "Mickey Mouse Extension Act."⁵⁰ The fact is that Disney holds the copyright to Mickey Mouse, who first debuted in 1928.⁵¹ If no changes were made to the copyright laws, Disney's copyright in Mickey Mouse would have expired in 2003.⁵² The rights to other popular Disney characters, such as Donald Duck, Goofy, and Pluto, were also slotted to expire in the coming years.⁵³ If these copyrights were allowed to fall into the public domain, Disney would be financially devastated. It is no small coincidence that after aggressive and substantial lobbying, as well as precisely targeted campaign contributions from Disney, Hollywood, the publishing industry, and the music industry, Congress quietly passed the CTEA.⁵⁴ In effect, the CTEA not only kept Disney's Mickey and Goofy from passing into the public domain for at least the next 20 years, it afforded the same protections to the owners of other cultural assets. The same protections were extended to literature such as *The Great Gatsby* by F. Scott Fitzgerald and Ernest Hemingway's *The Sun Also Rises*, the music of the 1920s and 1930s, such as blues, jazz, swing, big band, and

44. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810).

45. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 303).

46. *Id.*

47. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003).

48. *Id.* at 193-94.

49. *Id.*

50. *See* David Savage, *Limitless Copyright Case Faces High Court Review*, L.A. TIMES, Feb. 20, 2002, at A12.

51. James Surowiecki, *Righting Copywrongs*, THE NEW YORKER, Jan. 21, 2001, at 22.

52. *Id.*

53. *Id.*

54. *Id.*

the collective works of George Gershwin; and films like *The Wizard of Oz* and *Gone with the Wind*.⁵⁵

1. *Eldred v. Reno*⁵⁶

Many, including Eldred, argue that this trend towards a “limitless copyright” negates the Framers’ original intention that copyright protection be limited.⁵⁷ As a result, he chose to challenge the 1998 amendment to the current copyright statute. In January of 1999, Eldred filed a complaint in federal court.⁵⁸ Eldred was joined in his suit by another Internet publisher, a company that reprints rare and out-of-print books that have entered into the public domain, a vendor of sheet music and a choir director, and a company that preserves and restores old films—all of whom rely on works found in the public domain.⁵⁹ Their claim was simple: if the Constitution permits Congress to grant authors an exclusive right “for limited Times,” then the Framers of that power clearly intended that the exclusive right must come to an end.⁶⁰ Giving Congress the power to perpetually extend copyrights would defeat the purpose of the expressed limitation. The plaintiffs also argued that the First Amendment says that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁶¹ Yet, the CTEA is a law that excessively limits Eldred’s HTML press. Eldred thus asked, how are these two provisions of the Constitution—one granting Congress the power to issue copyrights, and the other limiting Congress’s power to “abridge” the freedom of the speech—to be reconciled?⁶²

The Supreme Court explained how the two provisions coexist in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁶³ Copyright, the Court said, is an “engine of free expression.”⁶⁴ Due to the control incentive that copyright law provides, work gets created that otherwise would not have been produced. This means that copyright law both increases and restricts speech. The Court also pointed out that a fairly balanced copyright law can, in principle, increase more speech than it

55. David Savage, *Limitless Copyright Case Faces High Court Review*, L.A. TIMES, Feb. 20, 2002, at A12.

56. 239 F.3d 372 (D.C. Cir. 2001).

57. LESSIG, *supra* note 27, at 197.

58. *Id.*

59. *Reno*, 239 F.3d at 374.

60. *Id.* at 378.

61. U.S. CONST. amend. I.

62. *See Reno*, 239 F.3d at 374.

63. 471 U.S. 539 (1985).

64. *Id.* at 558.

restricts.⁶⁵ Therefore, in the Court's interpretation, copyright law does not necessarily conflict with the guarantees of the First Amendment.⁶⁶

Despite the Court's ruling in *Harper & Row*, Eldred argued that the Court's rationale cannot justify extending the terms of existing copyrights.⁶⁷ Existing copyrights protect works that are already created; extending the term of exclusive control over such works restricts speech without any promise of future creativity.⁶⁸ One thing that is known about incentives is that they are prospective.⁶⁹ No retrospective incentive exists for a work that has already been produced.⁷⁰ Furthermore, regardless of what anyone offers deceased artists, they are not going to produce any further works.⁷¹ To the plaintiffs, the assertion that increasing the duration of copyright terms for existing work adds an incentive to produce made no sense.

Eldred believed that his claims appeal to the Framers' sense of balance in establishing the original copyright power.⁷² It seems that the early Supreme Court would have agreed. In 1833, Supreme Court Justice Joseph Story explained that the original copyright power gave authors exclusive control for a "short interval"; after that interval, the work was to fall into the public domain "without restraint."⁷³ At the time Justice Story wrote about copyright, a "short interval" was an initial term of 14 years.⁷⁴ Today, that "short interval" can easily reach ten times that term.⁷⁵

Today's courts have little patience for the Framers', or Justice Story's, sense of balance. In Eldred's attempt to pursue the issue in a court of law, both the United States District Court for the District of Columbia⁷⁶ and the United States Court of Appeals for the District of Columbia⁷⁷ held that the Copyright Clause did not constrain Congress to a single "limited Time[.]" These courts held that Congress was free to grant extensions, as long as the extensions themselves were limited.⁷⁸ In

65. *Id.* at 551-57, 580.

66. *Id.* at 580.

67. LESSIG, *supra* note 27, at 197.

68. *Id.*

69. *Id.* at 198.

70. *Id.*

71. *Id.*

72. *Id.*

73. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, at 402-03 (R. Rotunda & J. Nowak eds., Carolina Academic Press 1987) (1833).

74. LESSIG, *supra* note 27, at 197.

75. *Id.*

76. *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999).

77. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

78. LESSIG, *supra* note 27, at 197.

rejecting Eldred's First Amendment claim, the court of appeals summarily held that "copyrights are categorically immune from First Amendment scrutiny."⁷⁹

2. *SunTrust Bank v. Houghton Mifflin Co.*⁸⁰

The ability to privatize culture is essentially unlimited by the United States Constitution—despite the fact that the plain text of the Constitution speaks volumes against such expansive control. The problem with allowing culture to become a proprietary interest can be seen in the lawsuit to enjoin the publication of a sequel to Margaret Mitchell's *Gone with the Wind*. Mitchell's book was published in 1936 and, under the law as it then existed, its copyright would have expired at the end of 1992.⁸¹ Yet, because of the CTEA's extensions, the copyright on Mitchell's work now extends until 2031.⁸²

The Mitchell estate's extended, exclusive rights over the story have raised issues concerning parody and derivative works. In 2001, author Alice Randall tried to publish a work called *The Wind Done Gone*.⁸³ To fall under fair use, she called her work a parody of Mitchell's book.⁸⁴ In telling the story of *Gone with the Wind* from the perspective of an African slave, Randall's book clearly relies upon Mitchell's work in an extensive manner. The Mitchell estate called Randall's work a sequel and brought a federal lawsuit to enjoin its publication.⁸⁵ They argued that the publication and sale of Randall's book would infringe their copyright interests in the story.⁸⁶ They claimed that the copyright interest in the original book was theirs to control well into the twenty-first century.⁸⁷ The United States District Court for the Northern District of Georgia

79. *Reno*, 239 F.3d at 376. The court here relies on its previous decision in *United Video, Inc. v. F.C.C.*, where petitioners desired to make commercial use of the copyrighted works of others. *Id.* (citing *United Video, Inc. v. F.C.C.*, 890 F.2d 1173 (D.C. Cir. 1989)). The court held that there is no First Amendment right to do so. Although there is some tension between the Constitution's Copyright Clause and the First Amendment, the familiar idea/expression dichotomy of copyright law under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression. *Id.* (citing *United Video*, 890 F.2d at 1191).

80. 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

81. LESSIG, *supra* note 27, at 198.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

agreed, and in April of 2001, issued an injunction stopping Randall from publishing her book.⁸⁸

On appeal, the United States Court of Appeals for the Eleventh Circuit found that the trial court abused its discretion by issuing a preliminary injunction.⁸⁹ In fact, the court said that the prerequisites for such an injunction were not satisfied, and the injunction represented an unlawful prior restraint of speech in violation of the First Amendment.⁹⁰ Lawrence Lessig, a law professor at Stanford University who has earned a reputation as one of the most important scholars of intellectual property in the Internet era, agrees with the reasoning behind the Eleventh Circuit's decisions. In Lessig's opinion:

Gone with the Wind is an extraordinarily important part of American culture; at some point, the story should be free for others to take and criticize in whatever way they want. It should be free, that is, not only for the academic, who would certainly be allowed to quote the book in a critical essay; it should be free as well for authors like Alice Randall as well as film directors or playwrights to adapt or attack as they wish. That's the meaning of a free society, and whatever compromise on that freedom copyright law creates, at some point that compromise should end.⁹¹

The *Gone with the Wind* and *Eldred* cases raised a similar issue: The freedom to build upon old work to create new work can "increasingly, and almost perpetually, be restricted under existing law."⁹² The consensus amongst those who support *Eldred* is that, to an extent that could not have been intended by the Framers of the Constitution, creative control has been concentrated in the hands of copyright holders—increasingly, large media corporations.⁹³ Represented by Lessig, *Eldred* appealed his lower court losses to the Supreme Court.⁹⁴ In support of *Eldred* and Lessig, the Society of American Archivists, the American Library Association, the Internet Archive, and dozens of legal experts filed briefs in the case urging the Court to rethink its stance on the connection between copyright and the First Amendment.⁹⁵ In their appeal, the group asked the Court to realize that Congress has

88. SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1358 (N.D. Ga. 2001).

89. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1257 (11th Cir. 2001).

90. *Id.* at 1277.

91. LESSIG, *supra* note 27, at 199.

92. *Id.*

93. *Id.*

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

95. See Brief for Am. Ass'n of Law Libraries et al., *supra* note 5; Brief for the Internet Archive et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1059714 [hereinafter Brief for the Internet Archive et al.].

transformed a limited monopoly into a virtually limitless one.⁹⁶ As a result, without some check on congressional power, they fear it is unlikely that any of the cultural and historical works of the first half of the twentieth century will ever enter into the public domain.⁹⁷ Even if works will be allowed into the public domain after the 150 years that copyright can now extend, no one from the author's lifetime would be allowed to freely use the work. By that time, many works may be dated and untimely.

Lessig and his colleagues claimed that the only real beneficiaries of copyright term extensions are the big media companies, the same companies that have been lobbying Congress for such extensions since 1962.⁹⁸ Lessig also resorted to Eldred's old claim that the extended copyright monopolies violate the First Amendment's guarantee of freedom of speech.⁹⁹ Lessig pointed out that the government should not limit speech more than is necessary; a possible 150-year restriction on some speech serves no vital purpose.¹⁰⁰

IV. DISSECTING THE HOLDING: *ELDRED V. ASHCROFT*

By a vote of 7-2, the Supreme Court held (1) that the CTEA does not violate the constitutional requirement that copyrights endure only for "limited Times," (2) that the CTEA does not violate the plaintiff's First Amendment rights, and (3) that by extending the copyright term for existing copyrighted works by the same 20-year period as it extends the term for future works, the CTEA does not create a perpetual copyright.¹⁰¹ Justice Ginsburg delivered the opinion of the Court, and was joined by the late Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas.¹⁰² Justices Stevens and Breyer filed dissenting opinions.¹⁰³

The majority of the Court went on to state that the CTEA provisions extending copyright terms for both existing and future copyrighted works, by 20 years, were rational exercises of legislative authority conferred by the Copyright Clause.¹⁰⁴ The Court also found that the

96. Brief for Am. Ass'n of Law Libraries et al., *supra* note 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

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

102. *Id.* at 191.

103. *Id.*

104. *Id.* at 187.

change brought United States law in line with international norms,¹⁰⁵ and the majority agreed that there was evidence that the extension would encourage copyright holders to invest in restoration and public distribution of their works.¹⁰⁶

A. *Life-Plus-70-Years*

Despite the assertion that yet another extension would promote the maintenance and preservation of copyrighted works, the Court did not cite any evidence to support its claim. Furthermore, there exists an abundance of proof to the contrary. In their brief, the Society of American Archivists stated that copyright extensions have the unfortunate and unintended effect of burying works that could otherwise be resuscitated.¹⁰⁷ Although popular works such as Gershwin's tunes will live on, the same is not true for many original creations. The Society of American Archivists says that "millions of copyrighted works are created every year, yet after 95 years, few remain in circulation. . . . In the year 1930 [, for example], 10,027 books were published in the United States. In 2001, all but 174 of these titles are out of print."¹⁰⁸

They further state that "[t]housands of old movies sit on shelves deteriorating because the companies that hold the copyrights make no efforts to restore them or make them available, while their copyright status prevents others from preserving such works."¹⁰⁹ To illustrate their point, they cite to Frank Capra's 1946 film *It's a Wonderful Life*, which had a second life when its copyright was allowed to lapse because of an oversight.¹¹⁰ This forgotten movie "lay gathering dust in a movie studio until the early 1970s," when its copyright expired.¹¹¹ Once it passed into the public domain, several public broadcasting stations aired the film during the Christmas season.¹¹² It was not until this point that the forgotten film became a classic and a Christmas tradition. Thanks to

105. *Id.*; see also Council Directive 93/98/EEC, arts. 1-3, 1993 O.J. (L 290) 9-13, available at http://www.ebu.ch.CMSimages/en/6g_ref_ec_directive_copyright_duree_protection_291093_tem6-4276.pdf. The European Union (EU) Directive harmonized the copyright terms of EU member states by requiring states to extend their copyright terms to match those of the longest terms granted by any member. Council Directive 93/98/EEC, *supra*, art. 11. U.S. copyright owners used the Directive to urge Congress to follow suit with the EU.

106. *Eldred*, 537 U.S. at 188.

107. See Brief for Am. Ass'n of Law Libraries et al., *supra* note 5.

108. Brief for the Internet Archive et al., *supra* note 95, at 20.

109. Brief for Am. Ass'n of Law Libraries et al., *supra* note 5.

110. Brief for the Internet Archive et al., *supra* note 95.

111. *Id.*

112. *Id.*

digital technology and the Internet, millions of such works could be restored and made available to the public, if only they were accessible.

An even greater injury than films going unnoticed and gathering dust is that, if they are not restored immediately, many will deteriorate. Although the emergence of cable television and video cassette/DVD markets has motivated studios to restore contemporary films for reissue, the fact is, most copyright holders do not invest the time and money needed to restore their assets.¹¹³ Usually, it is not until the work falls into the public domain that someone takes the initiative to restore these treasures. For example, movies from the 1920s through the 1960s were printed on celluloid.¹¹⁴ Due to the nitrate in celluloid, many of these films have crumbled to dust in their storage cans.¹¹⁵ This silent chemical disintegration of films, videos, and sounds recorded on magnetic tape has attracted the efforts of some of Hollywood's finest.¹¹⁶

The race to rescue these endangered materials began in the 1980s when directors Martin Scorsese, Steven Spielberg, and Francis Ford Coppola, amongst others, announced publicly that the early color films on which many of their works were printed were fading.¹¹⁷ Their campaign led to the creation of The Film Foundation, Inc., an organization committed to saving motion picture heritage.¹¹⁸ According to the Foundation, as an art form, "film is highly unstable and the most vulnerable to deterioration and alteration."¹¹⁹ They see film preservation as a race against time:

50% of all of the motion pictures produced in the United States prior to 1950 have disintegrated and are lost, while only 10% of the movies produced before 1929 exist in any form. For shorts, documentaries,

113. Mark Roosa, Dir. for Preservation, Library of Congress, Address at the 68th IFLA Council and General Conference: Some Thoughts on the Race Against Time and Inherent Vice: Preservation Program Development in Law 20th Century America (Aug. 18-24, 2002), *available at* <http://www.ifla.org/IV/ifla68/papers/134-109e.pdf>. His speech traces the roots of the current library preservation movement and its evolution during the second half of the twentieth century. *See id.* In doing so, it examines some of the contemporary shifts in thinking about preservation and changes in practice that are being explored by libraries. *See id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. Incorporated in New York City in 1990, the Film Foundation, Inc. is headed by Martin Scorsese and nine other eminent directors including Woody Allen, Francis Ford Coppola, Stanley Kubrick, George Lucas, Sydney Pollack, Robert Redford, Steven Spielberg, Robert Altman, and Clint Eastwood. The Film Foundation and Artists Rights Foundation Consolidate Under the Film Foundation, Inc. (2002), <http://www.film-foundation.org/news/detail.cfm?QID=1493> (last visited Jan. 12, 2007).

119. Film Found., Film Preservation, <http://www.film-foundation.org/preservation/content.cfm?TopicID=42&contentID=249> (last visited Jan. 12, 2007).

newsreels and other independently produced and “orphan” films, the fate is much worse and there is no real way of knowing how much is missing from our motion picture history. . . . Even contemporary films, made on acetate safety stock may begin to fade and deteriorate in less than ten years if improperly stored.¹²⁰

Through annual contributions, the foundation has been able to preserve and restore over 200 films, as well as many historical newsreels and documentaries.¹²¹ Unfortunately, more than time and money stands in the way of restoration. It is relatively simple to save a movie that has fallen into the public domain. Once the original film can be located, the necessary equipment and recourses are in place to transfer the old film into a digital format. The main obstacle that the Foundation faces is rescuing films that are still copyrighted. Today, locating copyright owners is oftentimes very difficult. When a work is copyrighted, permission is needed from the copyright holder in order to utilize the work. With increasingly large copyright terms, copyright owners are difficult to find because more and more often, the present owner is not the same person who filed for copyright protection. Often, it can be a distant relative who inherited the copyright, or a corporation who bought the rights to the product. Locating these copyright holders can be very expensive, if not impossible. Therefore, the cost of seeking permission can itself be prohibitive. Another problem is that, if found, the copyright holder may deny permission to use the work. In the case of old movies, it seems that longer copyright terms have not created a rush to save these works but, instead, have retarded the movement towards restoration and public distribution.

In fact, the Library of Congress (LOC) states that amongst the impediments to the current library preservation movement, and its evolution, are rights management and copyright.¹²² According to the LOC, it is not just film that is chemically disintegrating. Preservation librarians also have a race against time on their hands.¹²³ Not only are original documents susceptible to the risk of being lost, or destroyed by

120. *Id.*

121. Film Found., *supra* note 119. These films include such legendary works as *All About Eve* (20th Century Fox 1950), *How Green Was My Valley* (20th Century Fox 1941), *It Happened One Night* (Sony Pictures 1932), *The Last of the Mohicans* (Maurice Tourneur Productions 1920), *The Night of the Hunter* (MGM 1955), *On the Waterfront* (Sony Pictures 1954), *Seven Men from Now* (Batjac Productions 1956), *Shadow of a Doubt* (Universal Pictures 1943), *Shadows* (Lion International 1960), *The Story of G.I. Joe* (Lester Cowan Productions 1945), and many others. Film Found., *supra* note 119.

122. Roosa, *supra* note 113, at 5.

123. *Id.* at 3.

fire or flood, they run the risk of smoldering in their own acids.¹²⁴ Paper products manufactured since the nineteenth century have “contained the seeds of their own destruction in the form of acid added at the time of manufacture.”¹²⁵ The agents added to paper, mainly alum rosin and bleach, are a recipe for disaster.¹²⁶ As is the case with film, the race to rescue the tangible and intangible aspects of written, printed, and recorded culture is further frustrated by today’s copyright protection. Unless the effort is made by the copyright owner, the only works that are eligible for preservation are those that can be found in the public domain. With fewer and fewer books in circulation, preservation is crucial to the future of scholarship. Just as with film, the technology exists today to ensure that these documents, books, and newspapers can live on in a digital format, yet if not utilized, it may soon be too late.

The film industry is plagued by yet another negative consequence of long-lasting copyrights. One of the more serious effects associated with copyright term extensions is that, in some cases, copyrights can prohibit the production of new work. For instance, there are several examples of copyright owners who, in exercising control over the products they own, have restricted the production and screening of documentaries featuring their assets. Especially in the case of documentaries based on artists or musicians, it can be difficult to obtain the necessary permission to include an artist’s work. This restrictive control of copyrights can affect a film in several ways.

The inconclusive documentary film *Kurt and Courtney*, about the life and death of rock star Kurt Cobain, created a great deal of controversy when it was removed from the 1998 Sundance Film Festival in response to legal threats regarding permission to use music in the film.¹²⁷ Upon Cobain’s death, his wife, Courtney Love, inherited control of the publishing rights to his band, Nirvana’s, entire catalog of music.¹²⁸ With this control, Love was able to enjoin the film’s director, Nick Broomfield, from using any of Nirvana’s music in his documentary.¹²⁹ Before the film was completed, Love’s legal team placed heavy constraints on Broomfield’s work and threatened his producers into

124. *Id.*

125. *Id.*

126. *Id.*

127. Dennis Michael, “*Kurt and Courtney*” Now Showing Despite Love’s Efforts, CNN.COM, Apr. 13, 1998, <http://edition.cnn.com/SHOWBIZ/9804/13/kurt.courtney/>.

128. Foreclosure Threat on House Owned by Courtney Love, CBC.CA, Dec. 23, 2005, <http://www.cbc.ca/arts/story/2005/12/23/courtney-love.html>.

129. See Michael, *supra* note 127.

revoking all financial backing in the project.¹³⁰ Subsequently, Broomfield was forced to abruptly complete the film and substitute versions of Cobain's music.¹³¹

As these examples illustrate, despite the Supreme Court's belief that one of the goals and justifications of the CTEA was to preserve and restore cultural assets, as well as encourage their production, it seems that the CTEA has failed. In passing the CTEA, 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."¹³² However, this way of thinking breeds little more than laziness. Copyright owners should make the most of their rights while they have them. Simply stated, there is no excuse for not taking available opportunities to make the most of one's work, especially when one has their entire life to do so. As such, despite the fact that today, people live longer and have children at a later age, Justice Breyer's dissenting opinion states that these "issues" were already corrected by the 1976 Act's life-plus-50-years term, which automatically grew with changing life spans.¹³³ The fact that people are having children later in life provides no explanation as to why the 1976 Act's term of life plus 50 years, a longer term than was available to authors themselves for most of the nation's history, is an insufficient potential bequest.¹³⁴ The weaknesses in these rationales decrease the legitimate or serious copyright-related justifications for the CTEA.

130. *Id.*

131. *Id.*

132. 141 CONG. REC. 53393 (daily ed. Mar. 2, 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, such as increasing longevity and the trend toward rearing children later in life, on the effectiveness of the life-plus-50 term to provide adequate protection for American creators and their heirs."). Also cited was "the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media." 144 CONG. REC. S12377.

133. *Eldred v. Ashcroft*, 537 U.S. 186, 263 (2003); Ctr. for Disease Control, Life Expectancy at Birth, 65 and 85 Years of Age, by Sex and Race: United States, Selected Years 1900-2003, <http://209.217.72.34/aging/TableViewer/tableView.aspx?ReportId=357> (last visited Jan. 14, 2007) (reporting a four-year increase in expected lifespan between 1976 and 1998).

134. *Eldred*, 537 U.S. at 263 (Breyer, J., dissenting).

B. Existing and Future Copyrights

Despite the harm that can be caused by a long-lasting copyright term, petitioners in the *Eldred* case did not challenge the CTEA's life-plus-70-years time span itself.¹³⁵ Instead, they maintained that "Congress went awry not with respect to newly created works, but in enlarging the term for published works" that are already copyrighted.¹³⁶ Their argument was that "[t]he 'limited Time[]' in effect when a copyright is secured . . . becomes the constitutional boundary, a clear line beyond the power of Congress to extend."¹³⁷ With regard to the First Amendment, it was their contention that "the CTEA is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations."¹³⁸

In upholding the CTEA's validity, the Court was not troubled by the fact that the extended copyright term would apply to current as well as future copyrights.¹³⁹ According to the Court, this retrospective extension was acceptable because it did not veer from past congressional procedure; in prior copyright extensions, primarily in 1831, 1909, and 1976, Congress provided for application of the enlarged terms to existing as well as future copyrights.¹⁴⁰ The Court also upheld the district court's determination that "the CTEA does not violate the Copyright Clause's 'limited Times' restriction because . . . [its] terms, though longer than the 1976 Act's terms, are still limited, not perpetual, and therefore fit within Congress's discretion."¹⁴¹

In regard to the First Amendment argument, the Court also agreed with the district court's and the circuit court's decisions that "there [is] no First Amendment [right] to use the copyrighted works of others."¹⁴² In the circuit court's view, *Harper & Row*¹⁴³ "foreclosed the petitioner's First Amendment challenge to the CTEA."¹⁴⁴ According to the court, copyright does not impermissibly restrict free speech because it grants the author an exclusive right only to the author's specific form of expression; it does not shield any idea or fact contained in the

135. *Id.* at 186 (majority opinion).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 187.

140. *Id.* at 188.

141. *Id.* at 186.

142. *Id.*

143. 471 U.S. 539 (1985).

144. *Eldred*, 537 U.S. at 186.

copyrighted work, and it allows for “fair use” even of the expression itself.¹⁴⁵

Justice Breyer disagreed with both the circuit court’s and the Supreme Court’s interpretations of the CTEA’s impact on First Amendment rights. In his dissent, Breyer recognized that the CTEA involves not only economic regulation, but also the regulation of expression.¹⁴⁶ He pointed out that what may count as rational where economic regulation is concerned is not necessarily rational where the focus is on expression.¹⁴⁷ In light of the First Amendment, this is especially true for a country constitutionally dedicated to the free dissemination of speech, information, learning, and culture.¹⁴⁸ Because the significant benefits that the CTEA bestows are private and not public, because it threatens seriously to undermine the expressive values that the Copyright Clause embodies, and because it cannot find justification in any significant Clause-related objective, Breyer found that it lacks constitutionally necessary rational support.¹⁴⁹

Breyer could not find a constitutionally legitimate, or copyright-related, way in which the CTEA would benefit the public.¹⁵⁰ Instead, with respect to existing works, he found that the “serious public harm and the virtually nonexistent public benefit could not be more [obvious].”¹⁵¹ His analysis leads to the conclusion that the statute cannot be understood, rationally, to advance a constitutionally legitimate interest.¹⁵² As such, the statute falls outside the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress.¹⁵³

In regard to the Copyright Clause claim, the Supreme Court upheld the circuit court’s decision that there is “nothing in the constitutional text or history to suggest that a term of years for a copyright is not a ‘limited Time[]’ if it may later be extended for another ‘limited Time[].’”¹⁵⁴ Much deference was given to the fact that the First Congress made the 1790 Copyright Act applicable to existing copyrights that had arisen under state copyright laws.¹⁵⁵ To the circuit court, the construction and interpretation by contemporaries of the Constitution merited almost

145. *Eldred v. Reno*, 239 F.3d 372, 375-76 (D.C. Cir. 2001).

146. *Eldred*, 537 U.S. at 244 (Breyer, J., dissenting).

147. *Id.*

148. *Id.*

149. *Id.* at 245.

150. *Id.*

151. *Id.* at 266.

152. *Id.*

153. *Id.* at 266-67.

154. *Id.* at 187 (majority opinion) (alteration in original).

155. *Id.*

conclusive weight that Congress is permitted to amplify existing copyright and patent terms.¹⁵⁶ The Supreme Court agreed and held that in placing existing and future copyrights in parity with the CTEA, Congress acted within its authority and did not transgress constitutional limitations. In other words, the Court found that the passage of the CTEA does not exceed Congress's power under the Copyright Clause.¹⁵⁷

Once again, Justice Breyer disagreed with the majority of the Court. He reiterated that according to the Constitution, the objective of the Copyright Clause is to “promote the Progress of Science.”¹⁵⁸ The Clause exists not to “provide a special private benefit,”¹⁵⁹ but “to stimulate artistic creativity for the general public good.”¹⁶⁰ It does this by “motivat[ing] the creative activity of authors’ through ‘the provision of a special reward.’”¹⁶¹ The imperative thing to note is that the “reward” is a means, and not an end. In fact, the Court has previously held that “[C]opyright law . . . makes reward to the owner a secondary consideration.”¹⁶² For this reason, the copyright term is limited. It is limited so that its beneficiaries—the public—“will not be permanently deprived of the fruits of an artist’s labors.”¹⁶³ Overall, the objective of copyright is to increase, and not to impede, the “harvest of knowledge.”¹⁶⁴

Furthermore, in relying on the 1790 Copyright Act’s applicability to then existing copyrights under state law, the Supreme Court failed to discuss that this legal scheme occurred during the foundation of the federal law. As part of its duty under the Constitution, the Court should have taken a more thorough look into the historical context of the Act of 1790. Specifically, there would have been no point in forming a preliminary federal regulation if it did not account for existing state and common law regulations. Simply, this is all that the First Congress was doing in enacting the initial federal copyright and patent law. The circuit court should not have extrapolated the First Congress’s actions to mean

156. *Eldred v. Reno*, 239 F.3d 372, 379-80 (D.C. Cir. 2001) (Brandeis, J., dissenting) (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *McClurg v. Kingsland*, 42 U.S. 202 (1843)).

157. *Eldred*, 537 U.S. at 187.

158. *Id.* at 242 (Breyer, J., dissenting).

159. *Id.* at 245 (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984)).

160. *Id.* (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

161. *Id.* (quoting *Sony*, 464 U.S. at 429).

162. *Id.* at 246 (alteration in original) (Breyer, J., dissenting) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

163. *Id.*

164. *Id.* (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985)).

that subsequent revisions of the copyright law should also retroactively apply to existing copyrights. Consequently, the Supreme Court should not rely on the circuit court's flawed interpretation of the Framers' intent.

In his dissent, Justice Stevens disagreed with the general presumption that historic practice illuminates the need to question the constitutionality of congressional action.¹⁶⁵ The presumption is the strongest when one considers the earliest acts of Congress.¹⁶⁶ The overlap of identity between those who created the Constitution and those who first constituted Congress provides "contemporaneous and weighty evidence" of the Constitution's "true meaning."¹⁶⁷ However, this strong presumption does not attach itself to Congress's first amendment to the Copyright Clause in 1831. No member of the 1831 Congress had been a delegate to the framing convention that took place 44 years earlier.¹⁶⁸ This refutes the idea that those who first amended the Copyright Clause were undoubtedly familiar with the purpose or motivation of the founding fathers.¹⁶⁹

In retroactively applying copyright term extensions to existing copyrights, absent some form of consideration from the creator, the CTEA neglects the important element of exchange found in the Patent and Copyright Clause. Copyright protection is a right based on qualifications. For example, to be eligible for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective.¹⁷⁰ If the initial copyright term had already expired, no retroactive extensions were granted.¹⁷¹ Arbitrarily granting extensions without consideration goes against the principle behind the Clause; the CTEA's extension of existing copyrights fails to "promote the Progress of Science"¹⁷² because it does not stimulate the creation of new works, but merely adds value to works already created.

Additionally, the Court is not well supported when it points to Congress's previous patent extensions as evidence that the same can be done with copyrights.¹⁷³ It is true that the Clause empowering Congress to confer copyrights also authorizes patents. Moreover, early Congresses did extend the duration of both patents and copyrights without courts

165. *Id.* at 237 (Stevens, J., dissenting).

166. *Id.*

167. *Id.* (citing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

168. *Id.*

169. *Id.*

170. *Id.* at 194 (majority opinion).

171. Act of February 3, 1831, 4 Stat. 436.

172. U.S. CONST. art. I, § 8.

173. *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2005).

seeing a “limited Times” impediment to such extensions.¹⁷⁴ Nevertheless, patents and copyrights are two very different forms of intellectual property.

Both patents and copyrights trace their genesis to the Constitution; they exist with express constitutional authorization. The Patent and Copyright Clause of the Constitution provides that copyrights, like patents, are to be granted “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁷⁵ Yet, despite these similarities, patents and copyrights are quite dissimilar. As author Kenneth L. Port succinctly states:

The generally accepted purpose of copyright law is to grant protection to specific authors to encourage all authors to create and disseminate their works. As a result, the public at large will have access to this information. The law assumes that, without such protection, authors would not create as much as they would with the protection; that without copyright protection ensuring exclusivity publishers would not publish as much as they would with protection; and that without copyright protection authors would be more inclined to sit on their ideas and choose not to make them public.¹⁷⁶

Port goes on further to explain that while copyrights protect creative works of authorship for the life of the creator plus 70 years, “patents protect inventions of useful machines, processes, or manufactures for a much shorter period of time—20 years for most patents. . . . Whereas copyrights subsist upon creation, patents only exist with express government recognition in the form of letters patent.”¹⁷⁷

Another key distinction is that patent law protects against independent creation or development, whereas copyright law does not.¹⁷⁸ The Supreme Court itself admits that “[p]atents and copyrights do not entail the same exchange, since immediate disclosure is not the objective of, but is *exacted from*, the patentee, whereas disclosure is the desired objective of the author seeking copyright protection.”¹⁷⁹

As illustrated by Port and the Supreme Court, patentees are granted greater rights than other owners of intellectual property to encourage and promote invention, and in so doing, benefit the development of the sciences. In essence, this is an incentive theory, one in which Port says,

174. *See supra* note 18 and accompanying text.

175. U.S. CONST. art. I, § 8.

176. KENNETH L. PORT ET AL., LICENSING INTELLECTUAL PROPERTY IN THE DIGITAL AGE 79 (1999).

177. *Id.* at 16.

178. *Id.*

179. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2005).

“the patent monopoly must be granted to inventors to compensate them for the time, money, and energy they invest in the invention and to assure them any monetary gain resulting from their invention.”¹⁸⁰ Due to this incentive, a patentee receives a patent monopoly on his or her invention.

The protection for patents is greater than it is for copyrights, but patent protection lasts for a comparatively very short time. Although referred to as a “monopoly”—in light of its short duration—patent protection is much less monopolistic than is copyright protection.¹⁸¹ This is because, per the “limited Times” prescription of the Patent and Copyright Clause, Congress is aware of its duty to keep a temporary incentive-driven monopoly from becoming a permanent monopoly. Yet, Congress does not seem to follow the same rationale with regards to legislative action taken with copyrights.

To the courts, applying a copyright term extension to existing copyrights is a matter of consistency and simplicity. In the Supreme Court’s view, “Congress’ consistent historical practice reflects a judgment that an author who sold his work a week before should not be placed in a worse situation than the author who sold his work the day after enactment of a copyright extension.”¹⁸²

Yet, the benefits of new rules and regulations are generally not retroactively extended to agreements made under past law. Evolution of the law means that people today are treated more favorably than those of the past, and that the people of tomorrow will be treated even better than those of today; that is a goal of the law. It is also the way in which business, generally, is conducted. When it comes to things like mortgages and loans, the stock market, and even general consumer spending, rates, prices, and benefits all fluctuate on a daily basis. The same is true in the sports and entertainment industries. Athletes and entertainers who perform and deliver the same services as their colleagues do not necessarily have the same contract provisions or receive the same salaries.

Everyday, professional athletes negotiate employment contracts that are large enough to make history. Yet, when these groundbreaking deals are signed, the existing contracts of their fellow athletes are not then retroactively amended so that all the athletes who play that particular sport share in the same privileges and benefits.¹⁸³ There is no concern

180. PORT ET AL., *supra* note 176, at 16.

181. *Id.*

182. *Eldred*, 537 U.S. at 188.

183. Alex Rodriguez, third baseman for the New York Yankees baseball franchise, received a salary of \$25.7 million for the 2006 season. ESPN.com, MLB-Alex Rodriguez, Player Profile,

over whether those with existing contracts are now in a worse position for not possessing the same bargaining power, or for negotiating a year, or even a week, earlier. Like the world of business, and the sports and entertainment industries, copyright is market driven; hence uniform copyright protection does not make much sense.

A uniform law makes even less sense when the Copyright Clause itself states that copyright protection should be “limited.” Therefore, the crux of the CTEA controversy rests on the definition of “limited.” Historically, there is an unbroken congressional practice of granting to creators of previously copyrighted works the benefit of term extensions so that all under copyright protection will be governed evenhandedly.¹⁸⁴ Simply, a uniform regulation makes for easier administration of the law. The CTEA’s term of life-plus-70-years may qualify as a “limited Time[.]” as applied to future copyrights. However, existing copyrights extended to endure for the same amount of time are not “limited.” No matter how convenient a uniform law may be, when it comes to copyrights, a time designation, once set, should become forever fixed and inalterable.

The Court defines the word “limited” as “confined within certain bounds.”¹⁸⁵ However, if Congress continues to expand the bounds of copyright protection, how are these bounds certain? As with the 1976 Act, under the CTEA, the baseline copyright term is measured in part by the life of the author, rendering its duration indeterminate at the time of the grant.¹⁸⁶ Unlike earlier acts which had a guaranteed minimum, because they were split into original and renewal terms, today’s copyright terms have no set minimum term of duration.¹⁸⁷ The only thing that is certain is that if someone were to obtain a copyright today, protection would last at least as long as his life, plus 70 years after his death. In fact, if history is any predictor, the life-plus-70-years standard is probably the minimum protection that a work can receive, and it may be a safe bet that, with inevitable future extensions, copyright protection will last far longer, if not forever.

The Court is strongly influenced by Congress’s routine application of new definitions or adjustments of the copyright term to both future

<http://sports.espn.go.com/mlb/players/profile?statsId=5275> (last visited Jan. 12, 2007). The Player Profile average salary in major league baseball is close to \$3 million. Baseball Almanac, Major League Baseball Salaries, http://www.baseball-almanac.com/charts/salary/major_league_salaries.shtml (last visited Jan. 12, 2007).

184. *Eldred*, 537 U.S. at 188.

185. *Id.* at 187.

186. 17 U.S.C. § 302(a) (2000).

187. *See id.*

works and existing works not yet in the public domain.¹⁸⁸ In the Court's view, such consistent congressional practice is entitled to "very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive."¹⁸⁹ The historical precedent of retroactively extending the term of existing copyrights and patents, though relevant, is not conclusive of the constitutionality of the CTEA. The fact that the Court has not previously passed upon the constitutionality of retroactive copyright extensions does not insulate the present extension from constitutional challenge. There is no precedent which states that such practice is permitted; rather, there is only a lack of precedent stating that such practice is not permitted.

C. *International Synchronization*

In addition to believing that the application of a new copyright term extension to existing copyrights is justifiable, and that such an extension will encourage existing copyright holders to invest in the restoration and distribution of their works, the Court also found that the change brings U.S. law in line with international norms.¹⁹⁰ Specifically, the Court refers to a European Union (EU) Directive which harmonized copyright terms of EU member states by requiring states to extend their copyright terms to match those of the longest terms granted by any member.¹⁹¹ As a result, the uniform international copyright term became life-plus-70-years.¹⁹² U.S. copyright owners in the United States urged Congress to conform to this EU Directive.

At first glance, extending U.S. copyrights for the purpose of adhering to a world standard may seem to be an acceptable exercise of legislative authority. As a result, it is difficult to say that, on its face, a statute that extends U.S. copyright protection in accordance with a life-plus-70-year world standard is wrong. However, neither the EU, nor its constituent nation-states, are bound by the Constitution of the United States. In fact, the EU may have numerous laws about copyrights, or any other subject, which are beyond the constitutionally defined power of the central government of the United States. The absence of a duty to conform to the EU's standard suggests that there were additional motives

188. *Eldred*, 537 U.S. at 213.

189. *Id.* (alteration in original) (quoting *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 57 (1884)).

190. *Id.* at 195-96.

191. Council Directive 93/98/EEC, 1993 O.J. (L 290) 9-13.

192. *Id.*

behind the United States' decision to extend copyright terms other than uniformity. These additional motives fail to illustrate legitimate reasons for extending the duration of copyright term protection.

It is true that the economic potential of intellectual property has the ability to transcend national borders. In fact, the United States' largest export is media.¹⁹³ Therefore, it is possible that Congress saw internationally recognized protection as essential for both the collective and global welfare. Yet, although the CTEA meets contemporary standards by matching the baseline term for U.S. copyrights with those of EU member states, the synchronization of international law was not the direct purpose of the CTEA.

The concept of harmonizing U.S. law with that of the EU member states came before Congress in 1993.¹⁹⁴ Congress took no steps to comply with the Directive until five years later when it passed the CTEA in 1998. Coincidentally, no steps were taken to harmonize with international law until valuable U.S. copyrights were in danger of expiring at home without another copyright term extension. Therefore, it seems that the impetus behind enacting the CTEA was not the five-year-old EU Directive but, rather, Mickey Mouse. This five-year gap between the EU Directive and the passage of the CTEA makes Congress's motives less legitimate. Thus, the fact that the CTEA matches U.S. copyrights to the terms of copyrights granted by the EU is immaterial to the issue before the Court.

In his dissent, Justice Breyer stated that he could not find anything in the "Copyright Clause that . . . [authorizes] Congress to enhance the copyright grant's monopoly power . . . *solely* . . . to produce higher foreign earnings."¹⁹⁵ In his view, this is not a copyright objective nor, standing alone, "is it related to any other objective more closely tied to the Clause itself."¹⁹⁶ Likewise, higher corporate profits alone cannot

193. The CTEA's legislative history suggests that one of its possible justifications was the financial assistance the statute would bring to the entertainment industry, particularly through the promotion of exports. *See, e.g.*, S. REP. NO. 104-315, at 3 (1996) ("The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade . . ."); 144 Cong. Rec. 139, H9951 (daily ed. Oct. 7, 1998) (statement of Rep. Foley) (noting the importance of copyright "to America's creative community," which includes "Sony, BMI, Disney," and other companies). Congress has sometimes found that suppression of competition will help Americans sell abroad—though it has simultaneously taken care to protect American buyers from higher domestic prices.

194. *See* S. REP. NO. 104-315 (1996).

195. *Eldred v. Ashcroft*, 537 U.S. 186, 262-63 (2003) (Breyer, J., dissenting).

196. *Id.* at 263.

justify enhancing the term of copyright protection because the Clause seeks public, not private, benefits.¹⁹⁷

Even more suspect is the fact that, despite appearances, the CTEA does not create a uniform American-European term with respect to the majority of the economically significant works that it affects, including all works made-for-hire and all existing works created prior to 1978.¹⁹⁸ Under the CTEA, the copyright term for works made-for-hire by a corporation, and anonymous and pseudonymous works, lasts for 120 years from creation or 95 years from publication,¹⁹⁹ while comparable European rights in such works last for periods that vary from 50 years to 70 years to life-plus-70-years.²⁰⁰ In regard to the EU Directive, the CTEA produces uniformity only with respect to copyrights in new, post-1977, works attributed to natural persons.²⁰¹ These works, however, constitute only a minority of the works that retain commercial value after 75 years.

European and American copyright laws have always been different from each other. Moreover, despite Europe's high value on authors' "moral rights," and the nonexistence of constitutional restraints that limit copyrights to "limited Times" in Europe, European and American copyright laws have long coexisted.²⁰² Therefore, in Justice Breyer's view, this partial-future-uniformity that the CTEA promises cannot reasonably be said to justify extending the copyright term for new works, nor can it possibly justify the extension of the new term to older works.²⁰³ The fact that uniformity comes so late, if at all, signifies that the decision to align American law with European law was not politically motivated. Instead, it seems that the enactment of the CTEA was purely a business decision.

197. *Id.*

198. *Id.* at 257.

199. 17 U.S.C. § 302(c) (2000).

200. *Id.* §§ 302(c), 304(a)-(b); Council Directive 93/98/EEC, 1993 O.J. (L 290) 9-13.

201. Compare 17 U.S.C. § 302(a), with Council Directive 93/98/EEC, 1993 O.J. (L 290) 9-13, art. 1(1).

202. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 1-3 (1985).

203. *Eldred*, 537 U.S. at 260. This view of the Clause finds strong support in the writings of Madison, in the antimonopoly environment in which the Framers wrote the Clause, and in the history of the Clause's English antecedent, the Statute of Anne—a statute which sought to break up a publisher's monopoly by offering, as an alternative, an author's monopoly of limited duration. *Id.* (citing L. Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOCIETY 365, 379 (2000) (describing the Statute of Anne); L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 144-47 (1968).

D. Checks and Balances

An important element in understanding the Supreme Court's decision in *Eldred* is realizing that the Court not only reviewed whether the lower court erred in interpreting or applying the law, it also was given the task of deciding whether Congress had overstepped the bounds of its authority.²⁰⁴ The Court was extremely hesitant to make this judgment call; much deference was given to Congress's legislative authority. In regard to the CTEA's applicability to existing and future copyrights, the majority of the Supreme Court stated that "[t]he Copyright Clause . . . empowers Congress to *define* the scope of the substantive right."²⁰⁵ However, in his dissenting opinion in *Reno*, Circuit Court Judge David B. Sentelle concluded that Congress lacks power under the Copyright Clause to expand the copyright terms of existing works.²⁰⁶ He concurred with much of the majority's opinion. However, he dissented with regard to the constitutionality of the 20-year extension of copyright protection for existing works.²⁰⁷

For support, Judge Sentelle pointed to the case of *United States v. Lopez*.²⁰⁸ The governing principle in *Lopez*, as applicable in this case, is that "the Constitution creates a Federal Government of enumerated powers."²⁰⁹ The Framers of the Constitution adopted a system of limited central government to ensure protection of fundamental liberties. As such, congressional power is subject to outer limits. These limits apply to the Copyright Clause. In *Lopez*, the Supreme Court rejected an unlimited view of the commerce power.²¹⁰ In Judge Sentelle's opinion, the rationale offered by the government for the copyright extension, as accepted by the district court and the majority of the circuit court, lead to the previously rejected unlimited view of the copyright power as in *Lopez*.²¹¹ In his opinion, limitations on the commerce power are inherent in the very language of the Commerce Clause, and as such the same should be true of the Copyright Clause.²¹²

The language of the Copyright Clause authorizes Congress to do one thing, and one thing only: "To promote the Progress of Science and

204. *Eldred*, 537 U.S. at 187.

205. *Id.* at 190.

206. 239 F.3d. 372, 380-84 (D.C. Cir. 2001) (Sentelle, J., dissenting).

207. *Id.* at 380.

208. *Id.* at 381 (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

209. *Id.* (citing *Lopez*, 514 U.S. at 552).

210. *Id.*

211. *Id.*

212. *Id.* (citing *Lopez*, 514 U.S. at 553).

the useful Arts.”²¹³ This is to be done “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²¹⁴ The Clause is not an open grant of power to secure exclusive rights—rather, it is a grant of power to promote progress. This power is to be exercised by granting exclusive rights, but only for limited Times. The majority in the circuit court case acknowledged that “[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause.”²¹⁵ However, as Judge Sentelle puts it:

[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection. The Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140 [years]; and from 140 [years] to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly. This, in my view, exceeds the proper understanding of enumerated powers reflected in the *Lopez* principle of requiring some definable stopping point.²¹⁶

Therefore, by looking to the Clause itself, Judge Sentelle finds it impossible to believe that the Framers contemplated permanent protection, either directly obtained or attained through a series of extensions of existing copyrights. By extending existing copyrights, Congress is not promoting useful arts, nor is it securing exclusivity for a limited time. Rather, Congress’s actions are unauthorized by the Copyright Clause, and are thus unconstitutional.

According to Judge Sentelle, the government has offered no sensible “theory as to how retrospective extension[s] can promote the useful arts.”²¹⁷ Furthermore, he states that Congress and the courts are mistaken in relying on the actions of the First Congress to signify that extensions on existing copyrights are acceptable.²¹⁸ The enactment by the First Congress in 1790 of a federal law, which encompassed preexisting state law copyright protection appear to him to be *sui generis*.²¹⁹ He further states:

Necessarily, something had to be done to begin the operation of federal law under the new federal Constitution. The Act of May 31, 1790 . . . created

213. U.S. CONST. art. I, § 8.

214. *Id.*

215. *Reno*, 239 F.3d at 377.

216. *Id.* at 382 (Sentelle, J., dissenting).

217. *Id.*

218. *Id.* at 384.

219. *Id.*

the first (and for many decades only) federal copyright protection; it did not *extend* subsisting *federal* copyrights enacted pursuant to the Constitution.²²⁰

In other words, Congress, by way of the 1790 Act, did not sanction an existing right; it created a completely new right.

In his dissent, Justice Stevens agreed with Judge Sentelle's interpretations of the law. Justice Stevens stated that in 1790, "there were a number of maps, charts, and books that had already been printed, some of which were copyrighted under state laws and some of which were arguably entitled to perpetual protection under the common law."²²¹ The 1790 federal statute applied to these works as well as new works.²²² In some cases the application of the new federal rule reduced the preexisting protections, and in others it may have increased the protection.²²³ What is significant is that the statute provided a general rule creating new federal rights that supplanted the diverse state rights that previously existed.²²⁴ It did not extend or attach to any of those preexisting state and common law rights.²²⁵

What Congress was doing in 1790 was setting the infrastructure through which to govern the intellectual property of the new nation. Furthermore, just because the Congress of 1790 exercised its authority to create a new federal system through which to secure rights for authors and inventors, its actions do not support the proposition that today's Congress can likewise retroactively extend federal protections.²²⁶ Even this first Act required an exchange in order for the author to receive federal copyright protection. For example, in consideration of protection under the 1790 Act, the author was first required to register the work by depositing a copy with the local clerk's office.²²⁷ As applied to existing works, this essential consideration is absent from the CTEA.

In the end, Justice Stevens found that the question presented by this case did not implicate the 1790 Act, because the 1790 Act created, rather than extended, copyright protection.²²⁸ He reasoned, "By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its

220. *Id.* (citation omitted).

221. *Eldred v. Ashcroft*, 537 U.S. 186, 230 (2003) (Stevens, J., dissenting).

222. *Id.*

223. *Id.* at 230-31.

224. *Id.* at 231.

225. *Id.*

226. *Id.*

227. Act of May 31, 1790, 1 Stat. 124.

228. *Eldred*, 537 U.S. at 231 n.7 (Stevens, J., dissenting).

principal responsibility in this area of the law.”²²⁹ In concluding that Congress’s actions under the Clause are, for all intents and purposes, judicially unreviewable, the Court clashes with the basic tenets of the constitutional structure of the United States. In conclusion, Justice Stevens rests his case on the words of Chief Justice John Marshall: “‘It is emphatically the province and duty of the judicial department to say what the law is.’”²³⁰

V. SUGGESTED SOLUTIONS

Although some may argue that the intent behind enacting the CTEA may have been legitimate, the resulting effects of the Act are unacceptable. Justice Breyer argues that the economic incentives accompanying the CTEA are too insignificant to “move” any author with a “rational economic perspective.”²³¹ In his dissent he states:

The economic effect of this 20-year extension—the longest blanket extension since the Nation’s founding—is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to *promote*, but to *inhibit*, the progress of ‘Science’—by which word the Framers meant learning or knowledge.²³²

Justice Breyer feels that the economic effect of the CTEA is to make the copyright term virtually perpetual; only “a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights.”²³³ Short of that, the intellectual property world needs to look to other available solutions and alternatives on how to deal with restrictive copyrights. This Article suggests that copyright owners look to the idea of asset-backed securitization.

To completely and effectively take advantage of the opportunities that are available to copyright owners, it is imperative that they begin to think of their copyrights in terms of financial planning, and not in terms of lengthy copyright term durations. For example, copyright owners can do greater good for their grandchildren if they put a few dollars in an interest-bearing account today, rather than if they bequeath their

229. *Id.* at 242.

230. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

231. *Id.* at 254-56 (Breyer, J., dissenting).

232. *Id.* at 243 (emphasis added); *see also* EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125-26 (2002).

233. *Eldred*, 537 U.S. at 242 (Breyer, J., dissenting).

grandchildren with long-lasting copyrights.²³⁴ In fact, a Congressional Research Service study prepared for Congress indicates that only about 2% of copyrights between 55 and 75 years old retain commercial value—i.e., still generate royalties after that time.²³⁵ Therefore, very few authors can reasonably believe that they have more than a slim chance of writing a classic that will survive commercially long enough for the copyright extension to matter. If, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage of valuable works that survive after 75 years or more must be even smaller.²³⁶ As for the copyrights that still retain their value over time, 20 additional years of copyright protection will mean the transfer of billions of extra royalty dollars to holders of existing copyrights—copyrights that, together, have already earned billions of dollars in royalty “reward.”²³⁷

When Congress passed the CTEA it was not motivated by political concerns; rather, it was making a business decision. Therefore, in devising options to deal with the CTEA, or to mitigate its impact, it is important to be aware of the role that business and economics played in its enactment. As such, the issue needs to be evaluated as a business problem, and not as a political one. Business is driven by money, and so is copyright protection. Any answers to the problems surrounding copyright term extensions must take into account the incredibly important role that money plays in this dispute.

A. *The Element of Time*

When it comes to resolving the conflict surrounding copyright law, creativity is essential; the best solutions will come from innovation and ingenuity, not tradition. In his article, *Copyright and Time: A Proposal*, Joseph P. Liu believes that the solution to the copyright controversy is a matter of time.²³⁸ He argues that by focusing so narrowly on the end of copyright terms, the debate has neglected the significant issue of how time should affect the scope of copyright protection during the term of a copyright.²³⁹ In his view, regardless of whether the CTEA is warranted or constitutional, there is no getting around the fact that the duration of

234. *Id.* at 255 (Breyer, J., dissenting).

235. E. RAPPAPORT, CRS REPORT FOR CONGRESS, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998), available at <http://countingcalifornia.cdlib.org/crs/pdf/98-144.pdf>.

236. *Id.* at 7 (estimating that even after copyright renewal, about 3.8% of copyrighted books go out of print each year).

237. *See id.* at 16 tbl. 5.

238. Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002).

239. *Id.* at 411.

today's copyright term is exceptionally long.²⁴⁰ According to Liu, “[u]ntil now, courts and commentators have generally assumed that the scope of protection during this long term is constant or unaffected, at least directly, by the passage of time.”²⁴¹ Liu suggests otherwise.

In particular, Liu's article proposes that courts should consider time as one of the elements used to decide whether a use is fair.²⁴² For support, he points to the fact that “[t]he [C]opyright [A]ct itself expressly permits courts to consider additional factors” in their fair use analysis.²⁴³ It is Liu's opinion that “[b]y considering time as a factor in fair use analysis, courts can achieve a more finely-tuned balance of the various justifications underlying copyright law.”²⁴⁴ Specifically, he advocates that courts recognize the impact that time has on the “proper scope of copyright protection.”²⁴⁵

As discussed earlier, when it comes to the duration of copyright term protection, as time goes on, the elements of incentive and propriety interest decrease. Conversely, society's interests in the accessibility, use, development, and adaptation of such copyrighted work increases. Therefore, Liu argues that the element of time should be considered as a factor in fair use analysis so that courts can adjust the scope of copyright protection to respond to changes in copyright interests.²⁴⁶ In fact, Liu rightfully points out, “[t]he Copyright Act and its legislative history expressly authorize courts to consider additional factors in fair use analysis, and courts have used this authorization to consider a wide range of additional factors not expressly mentioned in the statute.”²⁴⁷ One of the concerns underlying the debate over copyright term extensions is the extent to which the CTEA, like all prior extensions, resulted from a “structural imbalance in lobbying power.”²⁴⁸

240. *Id.*

241. *Id.*

242. *Id.* at 481.

243. *Id.*; see also 17 U.S.C. § 107 (2000). Fair use allows certain uses of copyrighted works for purposes of comment, criticism, education, research, and news reporting, even if such uses would otherwise be technically infringing.

244. Liu, *supra* note 238, at 481.

245. *Id.*

246. *Id.* at 412.

247. *Id.* Congress expressly contemplated that fair use would remain a flexible doctrine that judges could freely adapt to meet changing circumstances. See *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (“The fair use doctrine . . . permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” (citation omitted)).

248. Liu, *supra* note 238, at 412. It is widely accepted that copyright legislation is a direct response to lobbying efforts of the copyright industries. The copyright industries comprise a narrow group of interests, in particular the movie, music, publishing, and software industries, who

Liu's idea of incorporating the element of time in fair use considerations rectifies this structural imbalance by providing a mechanism through which courts can incorporate the public's interest into the scope of copyright protection.

The frightening reality of copyright law, as it stands today, is that every single copyrighted work in the United States—no matter how new or old—will remain protected and out of the public domain until at least December 31, 2018.²⁴⁹ Before the CTEA was passed in 1998, copyrighted works had been passing into the public domain at a regular and steady pace.²⁵⁰ Upon expiration, these works could be freely copied, distributed, and built upon by others without having to seek a license from, or pay a royalty to, the copyright owner. It was no mistake that these works passed into the public domain; rather, it was an integral part of the design and function of copyright law. Many works were scheduled to expire between the years 1998 and 2018 but, because of the CTEA, they will remain protected for the next 14 years, frustrating the balance of copyright law.²⁵¹ The owners of these copyrights will now be able to license and profit from these copyrights for an additional 14 years. On the other hand, the public will have to wait just as long to freely enjoy access to these works. As a result, to “many opponents” the CTEA represents not much more than a transfer of wealth—both cultural and financial—from the public to the owners of existing copyrights.²⁵²

stand to benefit from expansion of intellectual property protection. See Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-71 (1987); see also William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).

249. On this date, works that were copyrighted in 1923 will pass into the public domain. The Copyright Act provides that works whose terms would technically expire during the year retain copyrighted status until the end of that calendar year. 17 U.S.C. § 305 (2000).

250. Liu, *supra* note 238, at 414 (“In 1998, for example, T.S. Eliot’s *The Waste Land*, James Joyce’s *Ulysses*, and the movie *Blood and Sand* with Rudolph Valentino all passed into the public domain. In 1996 and 1997, F. Scott Fitzgerald’s *This Side of Paradise*, D.H. Lawrence’s *Women in Love*, Edith Wharton’s *The Age of Innocence*, and the song *Over There* by George M. Cohan all passed into the public domain.” (footnotes omitted)).

251. *Id.* at 415-16. In addition to Disney’s original Mickey Mouse (originally scheduled to expire in 2003) and George Gershwin’s *Rhapsody in Blue* (originally scheduled to expire in 1999), numerous works were also affected by the CTEA including works by “Cole Porter, Irving Berlin, Hoagy Carmichael, Ernest Hemingway, and William Faulkner, as well as thousands of other books, articles, movies, songs, photographs, and artworks from the artistically productive 1920s and 30s.” *Id.* at 416 (footnotes omitted). Without the passage of the CTEA, “Pluto would have gone into the public domain in 2006, and Goofy in 2008. Similarly, the copyright in A.A. Milne’s *Winnie the Pooh*, which Disney had just recently acquired, was also scheduled to fall into the public domain.” *Id.* at 415 n.36 (citing Jon Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 523 (1999)).

252. Liu, *supra* note 238, at 418.

In all, Liu's proposal is fairly simple: "[I]n deciding whether a given use of a copyrighted work is fair use, courts should take into account how much time has passed since the work was created."²⁵³ For example, if a work is fairly new, the public should only be allowed to enjoy a limited amount of fair use privileges; conversely, if a work is older, the scope of fair use privileges surrounding the work should be greater.²⁵⁴ According to Liu, in regard to older works, "[t]he ability to make sequels, to copy portions of the work, to comment upon it, to transform and re-work it, should be greater than the similar ability to make fair use of a book written only two years ago."²⁵⁵ In other words, a work that was composed 70 years ago should be subject to a greater degree of fair use exceptions than a work that was completed only yesterday.

Liu believes that existing copyright doctrine already allows courts to implement his proposal. In assessing whether a use is fair, Liu suggests that courts consider four statutory factors: "the purpose and character of the use, the nature of the copyrighted work, the amount of the original work used, and the effect of the use upon the potential market for the work."²⁵⁶ Simply, Liu proposes that courts consider time as an additional factor in the analysis of fair use.²⁵⁷ For example, older works would still enjoy substantial protection under copyright law against infringements such as direct commercial copying.²⁵⁸ However, older works would have less protection against uses of the work that involve traditional fair uses.²⁵⁹ This give-and-take solution would allow copyright law to reclaim some of its necessary balance.

B. Support from Policy Justifications

One of the primary policy justifications for copyright law is the theory that copyright protection is necessary to provide adequate incentives for authors to invest time and energy in creative activity.²⁶⁰ The thought is that, without such protections, others would copy an artist's work, making it impossible for the artist to recoup labor costs and discourage the creation of other work in the future.²⁶¹ Yet, copyright law

253. *Id.* at 425 (footnote omitted).

254. *Id.*

255. *Id.*

256. *Id.* at 426.

257. *Id.*

258. *Id.*

259. *Id.* at 426-27.

260. *Id.* at 428.

261. *Id.*

also represents another trade-off between fellow artists. To some extent, all works draw upon prior creations. Therefore, while an increase in the protection afforded to initial works may add to the incentive to produce, excessive protection will increase the cost of production, making it difficult for new works to draw upon these initial products. As a result, if protection is too great, it may decrease the total number of both original and built-upon works.

If the goal is to provide adequate incentives for both initial and follow-up works, the strength of copyright protection needs to reflect this balance. The length of copyright terms is one way in which this balance can be struck. If the term is too short, the incentives may be insufficient to spur initial creation because authors may not have enough time to obtain adequate compensation for their efforts. On the other hand, if the term is too long, it may be difficult to disseminate the work, or to build upon it over time.

Unfortunately, the optimal or ideal copyright term is impossible to determine.²⁶² Different types of works may require different lengths of protection; therefore, it is inevitable that the precise number chosen will be arbitrary.²⁶³ For this reason, it makes sense that Congress should be given some degree of discretion in setting the term of copyright duration.²⁶⁴ Yet, even with this well-deserved degree of discretion, the current term of copyright duration, as set by the CTEA, is too long. From an economic standpoint, increases in copyright term durations add little if anything to an author's incentive to create.²⁶⁵ Furthermore, there is little demand for the vast majority of works more than 50 years after the author's death.²⁶⁶ The economic phenomenon of the time value of money proves that even for those few works that still retain some market value, the present value of any future income streams will be miniscule.²⁶⁷ This point is best illustrated by the following example:

262. The academic literature on this point has provided no firm guidance. See Saul Cohen, *Duration*, 24 UCLA L. REV. 1180 (1977); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803 (2001); Edward C. Walterscheid, *The Remarkable—And Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 233 (2001); see also LESSIG, *supra* note 27, at 251.

263. Liu, *supra* note 238, at 431.

264. *Id.*

265. *Id.* at 431-32.

266. See RAPPAPORT, *supra* note 235, at 4.

267. Aff. of Economist Hal R. Varian, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-0065), available at <http://cyber.law.harvard.edu/eldredvreno/cyber/varian.pdf> ("In my opinion, extending current copyright terms by 20 years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works.").

Assume, for simplicity's sake, that an author creates a work in 2000 at age forty and dies in the year 2030 at age seventy. The term of protection under the 1976 Act would have been until the year 2080. Under the term extension, however, the term will now expire in 2100. What was the incentive value of that additional twenty years? Let's assume a discount rate of ten percent. Let's further assume that the author is one of the very fortunate few whose work is still generating some revenue for his estate from 2081 through 2100. If the work generated one dollar each year for the period from 2081 through 2100, the net present value of that cash flow would be about 0.42 cents, or just under half a penny. If the work is successful, generating say \$100,000 per year even that far out into the future, the present value of that cash flow would be approximately \$420.²⁶⁸

In other words, in light of the time value of money, if the incentive argument for copyright protection is accepted, the value of any additional incentive to the author decreases the longer the copyright term is allowed to last.

Moreover, authors benefit from being able to build upon the prior ideas of other authors, and it seems that they too have a moral obligation to help replenish the public domain by allowing future authors to build upon their work. If one accepts the view that an author's moral claim to compensation should be limited, and that a limit on the term of the copyright is an appropriate mechanism for such a limitation, it follows that the older the work, the weaker the author's moral claim to compensation.²⁶⁹ In addition, as time passes, difficulties in defining the scope of entitlement increase.²⁷⁰ Therefore, the older the piece, the greater the chance that it has contributed to the supply of ideas to which the original author owes a debt, and upon which other authors will want to build.

The continuing success of a work, many years after its original creation, may further weaken an author's moral claim to reward. Liu asks, "If copyright is seen as a reward for creative labor, then we might ask to what extent the revenue generated by a work seventy years after the author's death is directly the result of such labor."²⁷¹ It may be that the author has little or nothing to do with the continued success of the work. In fact, the continued success of the work may have more to do with effective marketing, advertising, sales campaigns, or even contributions from society in general, which have assigned certain meanings to the work.

268. Liu, *supra* note 238, at 432-33 (footnotes omitted).

269. *Id.* at 436.

270. *Id.*

271. *Id.* at 446.

Overall, the further one moves from the original creative act, the more likely it is that the continuing success of the work is due to factors unrelated to the original creative labor. If, as time goes by, success becomes less attributable to the author, the author's moral claim for reward should also decrease. The elements of reward and integrity further decrease when, as is often the case, copyright interests are sold or transferred to corporations or other entities, and not owned by the original author. Therefore, as time passes, the interests of the author wane as the corresponding interests of society increase. As such, since the Copyright Act and strong policy reason authorize courts to consider time in their fair use analysis, Liu suggests that they begin doing so today.²⁷²

VI. ABS: BONDS, NOT EXTENSIONS

Throughout American history, Congress and the courts have responded to the needs of copyright owners by extending the duration of copyright protection. Yet, as illustrated, copyright term extensions tend to have a negative effect, causing more harm than good. In order to protect the financial and artistic interests of authors, it is unnecessary to prolong the duration of their copyrights. When it comes to copyrights, a new variation on an old Wall Street business method may resolve the competing need for (1) reasonable copyright-term durations and (2) protection, control, and compensation.

British writer, Roy Davies, reminds readers that in the past, "money consisted of gold or silver, or paper backed by precious metals"; however, today it is "increasingly intangible."²⁷³ Davies goes on to state that, "[i]n 1997, a new meaning was given to the expression *sound money* when a method of turning music into credit was invented."²⁷⁴ Musician David Bowie achieved a first in the entertainment and financial industries by issuing asset-backed bonds worth \$55 million.²⁷⁵ The revolutionary nature of this transaction was that these "Bowie Bonds" were backed by the future royalties from Bowie's first 25 albums which contained 287 copyrights.²⁷⁶ This was a novel variation on what is generally referred to in the business world as an ABS.

272. *Id.* at 481 ("[N]ow it's time for others to have a crack at Mickey?").

273. Roy Davies, Who's Who in Bowie Bonds: The History of a Music Business Revolution, <http://www.ex.ac.uk/~RDavies/arian/bowiebonds.html> (last visited Jan. 12, 2007).

274. *Id.*

275. Alex Tajirian, David Bowie Bonds, <http://www.morevalue.com/themes/bowie.html> (last visited Jan. 12, 2007).

276. Susan Lonkevich, *David Pullman: Bowie Bonds*, PA. GAZETTE, July 7, 1997, <http://www.upenn.edu/gazette/0497/0497pro2.html>.

Securitization is the process of packaging illiquid assets so that parts of them can be sold to investors, thereby making them liquid.²⁷⁷ This relatively new form of raising capital offers investors bonds that are collateralized by a company's, or an individual's, assets.²⁷⁸ Specifically, securitization and asset-backed financing allow predictable future payment streams to be converted into current cash.²⁷⁹ In other words, royalty securitization is the process of transforming the right to receive future streams of cash flow, i.e., royalties, into marketable securities. By selling the bonds, Bowie received immediate access to cash, instead of having to wait for future royalties to trickle in and, in doing so, was able to gain complete control of his music.²⁸⁰ This innovative transaction allowed Bowie to receive an assessed sum of money immediately, rather than forcing him to wait to collect over the life of his product which, in turn, made it possible for him to gain total control of his work.

This first ever securitization of entertainment royalties, and intellectual properties, was orchestrated by investment banker David Pullman. Pullman heads The Pullman Group LLC, which is a boutique investment bank and specialty finance company servicing the entertainment and intellectual property industries.²⁸¹ According to Emma Brockes, writer for *The Guardian*, “[t]he idea [for the Bowie Bond] came to Pullman when Bowie’s manager approached him with the aim of selling [the artist’s] publishing rights. Pullman had a better idea: Why not keep the rights and float bonds backed by Bowie’s future earnings?”²⁸² The beauty of this idea is that it is pro-creator: it allows artists to keep control of their copyrights, while receiving an advance on the total estimated value of their work. The creation of the Bowie Bond

277. JAMES K. DAMRON & JOSEPH L. LABBADIA, DUFF & PHELPS CREDIT RATING CO., SPECIAL REPORT: ASSET BACKED SECURITIES: DCR COMMENTS ON MUSIC ROYALTY SECURITIZATIONS (1999), available at <http://www.vinodkothari.com/dcrmusic.pdf>.

278. THOMAS LEE HAZEN & DAVID L. RATNER, SECURITIES REGULATION 87 (6th ed. 2003).

279. *Id.*

280. See Tajirian, *supra* note 275.

281. David Pullman, Pullman, <http://www.pullmanbonds.com/about.htm> (last visited Jan. 12, 2007). To date, the group’s experience includes over \$1 billion dollars in transactions. *Id.* The group originates and underwrites loans collateralized by most existing entertainment intellectual property assets. *Id.* Intellectual property owners can realize a substantial sum of their intellectual property value by financing future revenue streams and monetizing previously illiquid assets. *Id.* The Pullman Group, thus, provides a direct source of capital to entertainment intellectual property asset owners through this form of funding. *Id.* The group works specifically with each asset owner to develop a suitable and unique financing structure taking into account tax planning, marital, and estate planning issues. *Id.*

282. Emma Brockes, *Idea Keeps Star Rolling in Royalties*, THE GUARDIAN, July 1999, <http://www.pullmanco.com/article103.htm>.

opened a new avenue for artists to attain immediate financial compensation for their life's work.

A. *The Details of Securitization*

The Bowie Bond deal is made up of 10-year notes which were bought in their entirety by Prudential Insurance Company.²⁸³ The notes are rated single A-3 by Moody's Investors Service, and provide Prudential with a 7.9% return on its investment.²⁸⁴ At the time Prudential bought the bonds, they were a better investment than the 10-year Treasury note which only provided for a yield of 6.3%.²⁸⁵ Bowie's consistent sales track record, of selling more than one million albums per year, enticed private investors to put their money into the bonds.²⁸⁶ Many of Bowie's songs, some of which date back over 25 years, are still selling well today and undoubtedly will continue to sell well into the future.²⁸⁷ Therefore, although it took several months of detailed and qualitative work—from securing a rating to lining up investors—to put the deal together, it did not take long to convince Bowie of its merits. According to Pullman, “[t]here’s a huge amount of wealth in this country in intellectual property, that being record masters, publishing, syndication, TV, film libraries, high-tech licenses, biotech licenses . . . [.] You can do any deal if you do it right.”²⁸⁸ In fact, the Bowie Bond deal has caught on with other artists, as well as other investors and banking houses, who were inspired by the benefits of Pullman's innovative idea.²⁸⁹

1. *An Idea That Has Caught On Quickly*

Asset-backed securitization first began in the 1980s with bonds that derived their value primarily from monthly payments on such things as home mortgages, car loans, and credit card payments.²⁹⁰ According to Matthew Benz, writer for *Billboard Magazine*:

283. See Tajirian, *supra* note 275. Prudential Securities Incorporated, a subsidiary of Prudential Insurance Company of America, is a fully diversified, global securities firm based in New York City, serving clients in the United States and overseas through approximately 6000 financial advisors. Prudential Securities Uses Netscape Software To Create New Intranet Linking Financial Advisors and Clients, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www.story/41413&EDATE=> (last visited Jan. 17, 2007). It is the fifth-largest brokerage firm in the United States. *Id.*

284. Tajirian, *supra* note 275.

285. *Id.*

286. See Lonkevich, *supra* note 276.

287. *Id.*

288. *Id.*

289. *Id.*

290. See generally HAZEN & RATNER, *supra* note 278.

The core idea [behind ABS] is simple: . . . payments . . . o[n] almost any . . . predictable revenue stream can be packaged into securities called asset-backed securities The seller of the bonds receives money upfront that can be put to work immediately. Investors, over a specified number of years, recoup their principal investment, plus interest to compensate for the risk that the underlying payments will not be made.²⁹¹

In 1985, asset-backed bond sales totaled about \$1.2 billion.²⁹² Since the Bowie Bond deal, investors have become hungrier for the bonds. Today, due to their competitive returns and generous protections, the sale of asset-backed bonds has grown into a \$900 billion market.²⁹³ In creating the bonds and finding potential buyers, brokers like Pullman receive a typical fee of 10% of each particular deal's value.²⁹⁴ What happens next is that "institutional investors—such as pension funds and insurance companies—buy the bonds, which provide a steady 8%-10% annual return and lend some diversity to their multibillion [dollar] investment portfolios."²⁹⁵ Again, this is a win-win situation.

After the Bowie transaction, Pullman went on to strike similar music industry deals. In June of 1998, Pullman struck a \$30 million deal with the legendary Motown songwriting trio of Edward Holland, Brian Holland, and Lamont Dozier.²⁹⁶ Then, in December 1998, Pullman reached a reported eight-figure deal,²⁹⁷ which was collateralized by the intellectual property owned by Nicholas Ashford and Valerie Simpson-Ashford.²⁹⁸ Pullman has continued to negotiate such transactions, securitizing royalty streams from the music catalogs of James Brown,²⁹⁹ the Isley Brothers,³⁰⁰ and the estate of Marvin Gaye.³⁰¹ The idea spread

291. Matthew Benz, *Bowie Bonds: One-Off or a Sound Vision for the Future*, BILLBOARD MAGAZINE, June 20, 2001, <http://www.pullmanco.com/article136.htm>.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. See DAMRON & LABBADIA, *supra* note 277, at 1. Holland, Holland, and Dozier have written over 70 Billboard hit songs. *Id.* Two of their most popular songs include *Baby Love* and *Stop in the Name of Love*. *Id.*

297. See Pullman, *supra* note 281.

298. Davies, *supra* note 273. Ashford and Simpson have many Billboard hit songs including *I'm Every Woman* and *Solid*. *Id.*

299. *Id.* James Brown's catalog consists of approximately 750 songs, including many hits like *Papa's Got a Brand New Bag* and *I Feel Good*. *Id.*

300. *Id.* The Isley Brothers' catalog consists of over 200 songs, including the hit song *It's Your Thing*. *Id.*

301. *Id.* The catalog for the estate of the late Marvin Gaye includes hits such as *What's Going On* and *I Heard It Though the Grapevine*. *Id.*

further to artists like Iron Maiden,³⁰² Rod Stewart,³⁰³ and Dusty Springfield.³⁰⁴

The success of Pullman's method is assured by using mostly catalogs that are at least 20 years old. The logic here is that if a song has produced money for that amount of time, the odds are that it will continue to do so in the future. At the same time, it seems that asset-backed securitization is even a possibility for "one-hit-wonders." Joan Jett's, 1981 hit song, *I Love Rock 'N' Roll*, was the basis of a Pullman bond offer.³⁰⁵ The bond offer was atypical in that it was based entirely on a single song, whose future earnings are predicted to derive from record sales, airplay, and cover versions.³⁰⁶

2. Additional Forms of Entertainment

The idea of using ABS as a means of raising capital has also been applied to other forms of entertainment ranging from Hollywood films to the 2002 *Soccer World Cup* in Japan and South Korea.³⁰⁷ Pullman has even applied his asset-backed securitization idea to literature, film, and television and has arranged bond deals for the estate of *The Grapes of Wrath* author John Steinbeck, as well as the television program *Casper the Friendly Ghost*.³⁰⁸ Insurance companies like AmRe Capital Markets have financed upcoming films with bonds secured on the revenues from groups of old movies.³⁰⁹ In 2001, AmRe made a \$540 million deal with movie studio Dreamworks SKG based on the revenues of films such as *Saving Private Ryan* and *American Beauty*.³¹⁰

Even the sports industry has jumped on the ABS bandwagon. Professional sports programs, like the New York Islanders ice hockey team, have issued bonds using their payments from long-term television contracts as security.³¹¹ In 1998, serious efforts were made to securitize the future income of Frank Thomas, a then Chicago White Sox baseball

302. *Id.*

303. *Id.* Rod Stewart's catalog includes hits such as *Forever Young* and *Have I Told You Lately*. *Id.*

304. *Id.* Dusty Springfield's catalog includes hits such as *I Only Want To Be with You* and *You Don't Have To Say You Love Me*. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Dennis Howard, *Sports Business in the Next Decade*, 15 J. SPORT MGMT. 275 (2001).

player.³¹² Revenue-backed bonds have also been issued by several European soccer organizations such as Italy's SS Lazio, and British clubs such as Newcastle United, Leeds United, Ipswich Town, Leicester City, and Southampton.³¹³ In fact, Newcastle United used the capital generated by the bonds to build a new stadium facility.³¹⁴ The versatility of ABS has also lent itself to be used as a finance tool in Formula One motor-racing.³¹⁵

Asset-backed securitization has even been extended to international tourist destinations such as the Chinese Circus, and Madame Tussauds' wax museum, which allowed the attractions to raise millions of dollars backed by their future revenue streams.³¹⁶ Video game producer Konami Corporation took ABS to a new level when they, along with a Tokyo brokerage firm, established an investment trust known as the Tokimeki Game Fund.³¹⁷ The securities are backed by the sales of Konami's games, and have proven to be a very popular investment.³¹⁸ The fund's popularity is due in part to the brilliant business strategy of listing the names of investors in the software credits at the end of the games.³¹⁹

3. Other Types of Intellectual Property

In addition to copyrights, securitization has extended to other forms of intellectual property including trademarks and patents. In the fall of 1999, the New York law firm of Thelen Reid & Priest LLP arranged a leveraged buyout of fashion company Bill Blass Ltd. by issuing bonds backed by several different assets, including the Bill Blass trademark.³²⁰ Other members of the fashion industry followed suit, including Candie's

312. *Id.* The Thomas deal was never finalized due to limitations in U.C.C. § 9-109(d)(3) (1997), prohibiting the sale or "assignment of a claim for wages, salary, or other compensation of an employee." This issue had been previously tested in the bankruptcy case of *In re Gwynn*, 82 B.R. 121 (Bankr. S.D. Cal. 1988). In this case, First International Bank moved for relief from the automatic stay to permit foreclosure of their lien on the debtor's San Diego National League Baseball Club contract. *Id.* at 122. Anthony Gwynn, the debtor, was the right fielder for the San Diego Padres. *Id.* Gwynn contended that the alleged security interest in the wages he was to receive from the contract were void as an assignment of wages. *Id.* The court found that the lien claimed by People's Bank upon the wages of Gwynn was in fact void for violation of California Labor Code § 300(b) as well as U.C.C. § 9-109(d)(3) (2000). *Id.*

313. *See* Howard, *supra* note 311.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. Davies, *supra* note 273.

Inc., which, in 2002, entered into its own intellectual property securitization deal with UCC Capital Corporation.³²¹

Like copyrights and trademarks, the revenue streams from patents are also a valuable form of security. As a result, there has been much discussion of extending the concept of the Bowie Bond process to patents.³²² In what was not too far of a stretch of his imagination, David Pullman put two and two together and theorized that since U.S. law allows patents to be awarded for some innovative business processes, why not file for patent protection on certain aspects of his own music royalty securitization process?³²³ According to Roy Davies, Pullman did just that in July of 2002, when he filed for patent protection with the United States Patent and Trademark Office (USPTO) to protect aspects of his music royalty securitization process.³²⁴ A search of the USPTO's database and records reveals that Pullman is not the only one seeking such protection; in fact, he is only one of a handful of "inventors" who are seeking to protect systems designed to facilitate payment streams derived from intellectual properties.³²⁵ It seems that asset-backed securitization has come full circle: The concept of securitizing assets is itself now an asset.

B. *The Economics of Bowie Bonds*

As with any new innovation, Bowie Bonds have attracted their fair share of attention. At first, the idea of asset-backed securitization may have sounded ridiculous but, as of today, it is common practice.³²⁶ Davies states, "There are economists [today] who regard Bowie Bonds as a manifestation of a less publicized revolution leading to the replacement of coins and banknotes by intangible forms of money and to a weakening of government control of the financial system."³²⁷ Author and economist, Richard W. Rahn, echoes Davies sentiments:

Another major financial innovation that will accelerate the movement to non-governmental money is securitization. This is the process by which previously illiquid assets are made liquid. . . . An increasingly wide variety

321. *Id.*

322. See David Edwards, Patent Backed Securitization: Blueprint for a New Asset Class (May 2002), http://www.securitization.net/pdf/fgerlin_new_0302.pdf.

323. See Davies, *supra* note 273.

324. *Id.*

325. U.S. Patent Full-Text Database Boolean Search, <http://patft.uspto.gov/netahtml/PTO/search-bool.html> (last visited Feb. 1, 2007).

326. Edward Cone, *Bowie Bonds for IT?*, INFORMATION WEEK ONLINE (May 4, 1998), <http://www.informationweek.com/680/80iuch3.htm>.

327. See Davies, *supra* note 273.

of assets are now securitized. For instance, the expected stream of royalties from singer David Bowie's recordings have been securitized. In theory, virtually any marketable asset could be securitized.³²⁸

In fact, Stan Davis, a research fellow with Ernst & Young's Center for Business Innovation, believes that the securitization of individuals can be a way to both attract, and keep, corporate stars.³²⁹ Davis states: "If intellectual capital is the most important resource in the economy, a whole tier of financial markets will have to come into being to address those needs. . . . All it takes is one firm that believes in asset-backed securities, and succeeds with it, and the floodgates are open."³³⁰ Similarly, Michael Elkin, chair of the entertainment practice group at Thelen Reid & Priest LLP, states:

Where recording artists got psyched up about the possibility of accumulating a lot of money today so that they could cash in on their future assets, . . . securitization today is being used as it was in a more traditional manner—which is an ability to obtain financing at very, very attractive rates.³³¹

This fusion of business and art has proven to be an excellent way for copyright holders to raise capital based on the securitization of future cash flows.

Initial predictions forecasted that music royalty deals would amount to hundreds of millions of dollars on a yearly basis.³³² Despite this prediction, bond-rating analyst Jay Eisbruck of Moody's Investors Service has calculated that all of the music deals done thus far—including the Bowie Bond—have roughly totaled \$250 million.³³³ In fact,

328. See *id.* (quoting Richard Rahn). Rahn is an economic columnist, public policy executive, and business entrepreneur. Cato Institute, Richard Rahn Biography, <http://www.cato.org/people/rahn.html> (last visited Apr. 6, 2007). His current public policy work involves serving as a member of the Board of Directors of the Cayman Islands Monetary Authority (which regulates the world's fifth largest financial center), as a senior fellow of the Discovery Institute, and as an adjunct scholar at the Cato Institute. In the 1980s, Dr. Rahn served as Vice President and Chief Economist of the Chamber of Commerce of the United States, Executive Vice President and Board member of the National Chamber Foundation, and as the Editor in Chief of the *Journal of Economic Growth*. Previously, he was the Executive Director of the American Council for Capital Formation. He has advised senior government officials on tax and monetary policy matters in a number of countries, including Russia, Estonia, and Hungary. He served as the U.S. cochairman of the Bulgarian Economic Growth and Transition Project in 1990. In 1982, President Reagan appointed Dr. Rahn as a member of the Quadrennial Social Security Advisory Council. During the 1988 Presidential campaign, he served as an economic advisor to President George H.W. Bush. *Id.*

329. STAN DAVIS & CHRISTOPHER MEYER, *FUTURE WEALTH* (2000).

330. *Id.*

331. See Benz, *supra* note 291 (internal quotation omitted).

332. *Id.*

333. *Id.*

when compared to the United States home mortgage market and the asset-backed bond market—where credit card and auto finance companies go to get a large majority of their funding—securitization remains something of a quiet financial giant.³³⁴

1. The Current Struggle of ABS

Asset-backed bonds based on intellectual property could easily be a half-billion-dollar-per-year business but for the fact that artists and investors are shy of, or simply unfamiliar with, the concept and option of securitization. The securitization of intellectual property dates back only a few years.³³⁵ Like any new market, it remains a volatile mix of possibility and potential disappointment. Among the major remaining barriers in asset-backed securitization is the inability of investors to familiarize themselves with the way the entertainment industry does business, in particular record labels which invest in a hundred artists with the hope that one or two will be profitable.³³⁶ Once the investment community obtains a better understanding of the entertainment business, they will see that the pool for Bowie-type deals is actually quite large. For example, in the music industry alone, megastars such as Michael Jackson, who owned the entire Beatles catalog,³³⁷ would have been an ideal candidate for a securitization deal valued at hundreds of millions of dollars.

2. Music as a Case Study

Asset-backed securitization of intellectual property is dominated by music industry assets partly because it is where the new era of securitization began. In the case of music securitization transactions, the asset that is securitized typically consists of the revenue streams generated from ownership interests in copyrights relating to a catalog of songs. When it comes to asset-backed securitization, of all the federal protections that copyright bestows upon intellectual property, the most important of these is the right to transfer one's interests to others and

334. *Id.*

335. *Id.*

336. *Id.*

337. See Jon Wiener, *Beatles Buy-out; Nike TV Ad Uses "Revolution" Song*, THE NEW REPUBLIC, May 1987, at 3; see also John Horn, *Michael Jackson Sells Music Catalog for \$95 Million to Sony*, SEATTLE DAILY JOURNAL OF COMMERCE, November 8, 1995. Singer Michael Jackson sold the music publishing rights to as many as 250 Beatles songs to Sony Corporation for nearly \$95 million in 1995.

receive royalties.³³⁸ Therefore, ownership interests can be shared by a songwriter, performer, publisher, or manager.³³⁹ In its simplest form, owning the copyright to a song entitles the holder to exploit the music, as well as to receive royalty income from various parties. Music copyrights can be exploited in many ways and by different parties, all of which generate royalty income for the persons entitled to receive the corresponding cash flow.

The sources of revenue that a copyright can generate are varied and will often overlap with one another.³⁴⁰ Generally, a music copyright can be divided into two interest streams, that of the writer and that of the publisher.³⁴¹ Every situation in the music industry is unique unto itself. In some situations, the writer and publisher can be the same person.³⁴² In other situations, there may be many cowriters and copublishers of the same piece of music.³⁴³ This does not happen in other areas of intellectual property and is part of the reason why the music industry is such an interesting case study when it comes to securitization.

The owner of the copyright, usually the publisher, has the right to exploit the asset, and can do so by licensing, selling, or renting the composition to others in exchange for payments known as “publishing royalties.”³⁴⁴ Publishing royalties can be generated in many different ways. Most commonly, a copyright holder will receive royalties when his or her musical composition is used in a commercial, a television program, a film, or a film soundtrack, or when it is covered or sampled by another artist.³⁴⁵ Publishing royalties are divided into two parts: the publisher’s share and the writer’s share.³⁴⁶ “Whenever a song is used by a third party, a payment flows [directly] to the publisher” of the song.³⁴⁷ If the songwriter and the publisher are not the same person, the publisher will then pay the songwriter his or her share of the royalty.³⁴⁸

The music industry is a business, and like any business, its economic success is dependant on the successful exploitation of its product. In the music business, successful product exploitation involves the strategic and calculated promotion of music catalogs. A special

338. See DAMRON & LABBADIA, *supra* note 277, at 2.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

report by Duff & Phelps Credit Rating Company illustrates the pivotal role that the publisher plays in this promotion process:

The music catalog must be promoted by an entity that economically benefits from the successful exploitation of the music. In most cases the publisher's administration fee is established as a percentage of the gross revenues generated by the catalog. As a result, the administrator benefits from actively marketing the songs. The publisher typically controls the copyrights and hence determines how to administrate the music. Songwriters and co-publishers, while entitled to a portion of the songs' royalties, do not dictate the catalog's usage. Songwriters and co-publishers are in a passive role and, consequently, are dependent on the publisher's ability to generate income from the music.³⁴⁹

In fact, most often it is the record company that assumes ownership of the master recording of a song.³⁵⁰ As owner of the master recording, the record company has the right to package and sell songs as it sees fit.³⁵¹ This can include marketing and selling the song as a "single" recording, or marketing and selling it as part of a larger record.³⁵² The record company will pay the publisher periodic royalty payments based on the sale of the song or record.³⁵³ The income that is generated every time a song is recorded or sold is known as a "mechanical royalty."³⁵⁴

C. *Limitations of ABS*

Experts say that in structuring ABS deals, in-house expertise and a preexisting securitization infrastructure are essential.³⁵⁵ This is because the costs associated with structuring a securitization can reach upwards of 30% of the final deal.³⁵⁶ Given the large costs associated with a securitization deal, most securitizations, thus far, have involved at least \$25 million.³⁵⁷ However, Brian Williams, director of music private banking at Nashville's SunTrust Bank, says that:

We think we can get the number down significantly, maybe as low as \$10 million. . . . There may also be some opportunity to bundle some of these together as a group vs. a single, in which case you could have the opportunity for a smaller securitization. But, in general, you are looking at

349. *Id.* at 2-3.

350. *Id.* at 3.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *See Benz, supra* note 291.

356. *Id.*

357. *Id.*

\$10 million or more now, whereas we're doing loans against intellectual property for probably \$100,000 and up. In some cases, securitization is probably not even an option for the smaller borrower.³⁵⁸

Yet, in being an option only for major stars, the securitization of intellectual property assets fits well within the argument against copyright term extensions. It is the big money copyright holders that are pushing for copyright term extensions at the expense of less successful works. If they can get their money up front, and still retain control of their copyright, the owners of highly valuable copyrights will not need, nor will they seek, extended copyright term durations. This will allow less valuable works to lapse into the public domain at a more reasonable time, allowing for restoration, preservation, and increased exposure and circulation of the work.

Robert D'Loren, president of CAK/Universal Credit Corp., takes a "big-picture view" of the financial world's ever-increasing consciousness of intellectual properties as important and valuable assets.³⁵⁹ He says that:

Forty years ago, 90% of corporate net worth was tied up in tangible assets. . . . Today, it's reversed. So if 90% of the world's corporate wealth is tied up in intangible property, what does that tell you about the future of intellectual property and intangible finance? Either figure it out, or you're going to have a shrinking business if you're an asset-based lender.³⁶⁰

Authors Stan Davis and Christopher Meyer agree with D'Loren's assessment. In their book, *Future Wealth*, Davis and Meyer say that Bowie Bonds represent a new type of wealth that is likely to result from a "connected economy."³⁶¹ In her review of Davis' and Meyer's book, writer Terry O'Keefe says that "[t]here are two main themes that weave through th[eir] book. The first is the increasing intangibility of assets and therefore of wealth. And the second is a powerful belief in free market mechanisms as indispensable tool[s] of wealth creation."³⁶²

Davis and Meyer argue that assets and wealth in today's world have shifted from the tangible to the intangible.³⁶³ In her book review, O'Keefe explains their point by making the following illustration: "A generation ago, the most important assets were physical. Wealth was built on steel,

358. *Id.* (internal quotation omitted).

359. *Id.*

360. *Id.*

361. DAVIS & MEYER, *supra* note 329, at 47.

362. Terry O'Keefe, *Are Bowie Bonds the New Way To Create Wealth?*, ATLANTA BUS. CHRON., May 12, 2000, at B12.

363. *Id.*

glass, brick and mortar. But in the connected economy, the most important assets are intangible, and wealth is built on intellectual capital—the ideas and skills that make this economy go round.³⁶⁴ In Davis' and Meyer's opinion, this shift from the tangible to the intangible will continue to transform the way people think about wealth.³⁶⁵

In summary, Davis and Meyer base their argument on the power of intellectual capital to shift the traditional balance of wealth from institutions to individuals. O'Keefe keenly points out that, in such a system, it is David Bowie himself, and not a publishing house or record company, which will receive the greatest benefit from his artistic creations.³⁶⁶ The point is that, as time goes on, individuals will increasingly create their own wealth by cashing in on what they know, instead of making a living based on manufacturing products at the behest of others. This idea of market-driven wealth creation aligns itself well with the vision of the Founding Fathers, that each individual have the potential to be his own source of wealth—an innovator, capitalist, and laborer all in one.

D. ABS Today

To facilitate and expand the securitization of intellectual property, individual asset securitization can, and should, be significantly simplified. According to financial expert, Marcia Stigum, ABS are the most complex instruments traded on Wall Street.³⁶⁷ Since 1999, the U.S. government has taken active steps to increase the sale of ABS by simplifying the complex structure of these securities, and by decreasing its own regulatory demands.³⁶⁸ However, there is still a long way to go. When it comes to making the securitization of individual cash flows an attractive and appealing option, more changes need to take place. According to attorney John Jackson, much of the confusion and anxiety surrounding asset-backed securitization, especially individual asset securitization, stems from compliance with bankruptcy, taxation, and securities regulation law.³⁶⁹

364. *Id.*

365. *Id.*

366. *Id.*

367. MARCIA STIGUM, *THE MONEY MARKET* 62 (3d ed. 1990).

368. *See generally* HAZEN & RATNER, *supra* note 278.

369. John Jackson, *Royalty Securitization: Taking CABS to Bankruptcy Court*, 21 T. JEFFERSON L. REV. 209, 211 (1999). As Jackson puts it, business reporters appear to misunderstand the structure of these bonds as Pullman, Koppelman, and other insiders describe them. *Id.* at 210 n.16. Jackson's article focuses on the bankruptcy issues surrounding celebrity asset-backed securities. *Id.* at 211.

The largest limitation that ABS face is bankruptcy. John Jackson reasons that securitization deals must be structured in such a way as to allow bankruptcy courts to classify the asset as being sold to an entity or trust separate from the artist.³⁷⁰ If not done in this way, courts will be able to reclaim the asset backing the security.³⁷¹ If an artist files for bankruptcy, and the “secured” asset backing the bonds can be recaptured, the bonds become worthless.³⁷² Investors are aware of this risk and thus shy away from ABS. Because the possibility of bankruptcy recapture undermines the confidence in ABS, the structure of these securities is critical.³⁷³

Celebrity asset-backed securities (CABS), a subset of ABS, focus primarily on the income generated from royalties.³⁷⁴ As a result, CABS are more complex than ABS. This is because CABS deal with yet another area of intellectual property: individuals and the works which they produce. To fully appreciate the additional measures that need to be taken to complete a CABS transaction, investors first must have an understanding of the basic structure of ABS. According to Jackson, this involves a discussion of several “unsettled issues” which arise when “perfecting an interest in the royalties from a copyright licensing lease.”³⁷⁵ In addressing these unsettled issues, Jackson’s study focused on the laws of New York and California “because the majority of both the financial and entertainment industries are [located] in [those] two states.”³⁷⁶ Where applicable, Jackson has offered possible resolutions to these unsettled issues; his resolutions are echoed in this Article.

1. Understanding the Structure of ABS

The basic structure of asset-backed securitization begins with an “originator,” usually the artist.³⁷⁷ The originator is the party who created the asset subject to the securitization.³⁷⁸ Jackson maintains that “any cash flow asset can be securitized,” as long as the cash flow itself is predictable.³⁷⁹ The key to an effective asset-backed securitization is that

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. John Jackson coined the term Celebrity Asset-Backed Securities.

375. Jackson, *supra* note 369, at 212.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

the originator must sell the asset to a special purpose vehicle (SPV).³⁸⁰ This sale is known as a “true sale,” which removes the asset from the originator’s bankruptcy estate, and reclassifies the SPV as a Bankruptcy Remote Trust/Entity (BRTE).³⁸¹ In asset-backed securitization, it is then the SPV/BRTE, and not the originator, which creates and sells the security to potential investors.³⁸²

However, according to Jackson:

The unsettled nature of the laws governing CABS forces an economically burdensome, technically challenging, and logistically complicated two-tier structure. The first tier is the SPV. . . . However, now the SPV’s roles have changed. The SPV must still acquire the asset and perfect its interest in the asset, but now it must take a loan from the second tier, a master trust, using the SPV’s interest in the royalties as collateral. The master trust creates the security and sells it to the investor.³⁸³

In all of this, it cannot be understated that the single most crucial step in any asset-backed securitization is to perfect the SPV’s interest in the royalties and remove that interest from the originator’s personal bankruptcy estate.³⁸⁴ The main point is that the asset must be removed from the originator (here it is twice removed) so that the ABS is protected from any financial problems that may affect the originator. Perfecting the SPV’s interest in the royalties and removing that interest from the artist’s estate adds an important layer of security.³⁸⁵

2. The Specialized Structure of CABS

As previously mentioned, CABS are a subset of ABS in which celebrities can securitize their rights to streams of predictable future cash flows.³⁸⁶ These cash flows form an asset. According to Jackson, there are three primary steps to forming CABS: “The licensing lease, the bankruptcy remote trust, and the issuance of the security.”³⁸⁷ Depending on the nature of the underlying copyrighted material, generally, the owner of the copyright will enter into some sort of a licensing agreement, or

380. *Id.* at 213.

381. *Id.*

382. PETER H. WEIL, *ASSET-BASED LENDING: A PRACTICAL GUIDE TO SECURED FINANCING* § 2-27 (1998).

383. Jackson, *supra* note 369, at 213 (citing Sam Adler, *Using a Musician’s Assets to Structure a Bond Offering*, 13 ENT. L. & FIN. 6 (1997)).

384. *Id.*

385. *Id.*

386. Bruce Orwell, *Music: Wall Street Bets on Entertainment Idols’ Earning Power*, WALL ST. J., Sept. 26, 1997, at B20.

387. Jackson, *supra* note 369, at 213.

lease, with a publisher.³⁸⁸ The benefits derived from this lease are what will later be assigned to the BRTE.³⁸⁹ For example, in the Bowie Bond deal, the securitized asset was the royalty payments he was entitled to receive under a licensing lease with his record label, Electric and Musical Industries Ltd. (EMI).³⁹⁰ In exchange for \$55 million, Bowie leased the exclusive right to distribute his first 25 albums for 10 years to EMI.³⁹¹

3. The Formation of CABS

To create an ABS, an artist must first create a licensing lease.³⁹² A licensing lease is negotiated by the artist, the artist's attorney, and the artist's publishing house to correspond to the life of the CABS.³⁹³ The artist then awards the lessee a license to reproduce and sell the subject of the artist's copyright(s).³⁹⁴ In exchange, the lessee promises to pay the artist royalties.³⁹⁵ Upon such agreement, the artist's right to the royalty payments from the licensing lease are then sold to a SPV.³⁹⁶ Once the bond is sold and payment is received, it is the SPV who pays the artist the face value amount of the bond.³⁹⁷ This is accomplished when the SPV sells the right to the royalty payments from the artist's asset to the BRTE.³⁹⁸ Again, once the BRTE sells the bond and receives payment, the BRTE pays the SPV the face value amount of the bond. At this point, the SPV uses the money to pay the artist.³⁹⁹

It is also recommended that the artist acquire a back-up line of credit.⁴⁰⁰ This line of credit is important because it is payable to the BRTE and is used if, and when, royalty payments are insufficient to cover the debt.⁴⁰¹ The line of credit plays a dual role because, in addition to servicing the debt, it is used as a basis for rating the bond.⁴⁰² Rating companies apply a rating to the bond only after considering the entire structure of the bond, including the credit rating of the lessee, and any

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. Jackson, *supra* note 369, at 215.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

extra security which has been added to the line of credit.⁴⁰³ To sell the bonds successfully, the seller must use a sufficiently trustworthy rating company.⁴⁰⁴ In fact, often times, the buyer will have had a say in deciding which rating company was chosen.⁴⁰⁵

Again, it is the BRTE trustee that actually creates the security.⁴⁰⁶ The BRTE issues the security to the buyer who pays the BRTE for the bond.⁴⁰⁷ After the transaction, the BRTE pays the SPV who then pays the artist.⁴⁰⁸ In other words, payment is remitted to the artist, through the two trusts. To complete the operation of the bond, the buyer too needs to get paid. This is accomplished when the lessee pays royalties on the lease to the BRTE.⁴⁰⁹ Any excess royalty income, up to 5% of the face value of the bond, is placed in a “sinking fund.”⁴¹⁰ When the excess income in the sinking fund is not enough to cover the debt, the BRTE will draw on the line of credit.⁴¹¹ The BRTE then pays the periodic payments to the buyer.⁴¹² The bond is terminated upon full payment to the buyer.⁴¹³ This happens when the sinking fund is extinguished through the payment of the final 5% of the bond.⁴¹⁴ At this point, the right to royalties from the licensing lease reverts back to the artist through the SPV.⁴¹⁵

The importance of using two separate trusts in a CABS transaction cannot be emphasized enough. In a CABS-type transaction, there is a significant difference between the trust used to purchase the royalties and the trust used to securitize the royalties.⁴¹⁶ As Jackson succinctly puts it, “[w]hereas ABS require only one trust for both transactions, CABS require a two tier transaction.”⁴¹⁷ The first tier is the SPV which purchases the licensing lease from the artist and then sells the lease to the second tier, the BRTE.⁴¹⁸

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 216.

417. *Id.*

418. *Id.*

E. The Best Option for Copyright Holders

An artist should choose asset-backed securitization rather than a record company loan or advance because the artist will be paid up front and in full with ABS. Moreover, loans and advances must be paid back.

Regardless of the amount of the advances being paid, how the computation is structured, and the actual timing of payments to the artist, . . . these monies are advances; by their very nature they are totally recoupable and deductible from the future earnings of the recording artist. They are, in effect, a prepayment of royalties that may or may not be actually earned. For example, if an artist receives a \$100,000 advance and eventually earns \$150,000 from sales of albums, a check would be remitted for \$50,000. If the artist only earned \$40,000 from album sales, however, no monies would be forthcoming because there still would be a debit balance of \$60,000 in the artist's account. In addition, once multiple album advances have accumulated without substantial earnings, it is more than possible for an artist to have a hit record and not receive a royalty check or even clear the negative balance in his or her account.⁴¹⁹

In the case of CABS, the artist gets paid in full, immediately, and is not expected to pay anything back.⁴²⁰ In the case of any leftover money after the life of the bond, all the excess goes to the artist.⁴²¹ For artists, CABS are a no-loss option. In fact, CABS are a win-win transaction: they are a win for the artist, as well as for the buyers of the bond who get a substantial, above-market gain on their investment.

The securitization of a royalty stream also diversifies an artist's asset which can reduce an artist's risk in a number of ways.⁴²² First, if structured correctly, the securitization is non-recourse to the artist, meaning that if the royalties from the lease dwindle, the security holders cannot legally hold the artist liable.⁴²³ Second, "the risk of interest rate fluctuation is greatly reduced by issuing a long-term fixed rate security."⁴²⁴ Third, "by gaining control of the net sum of [their] future royalties today, [artists] can reinvest and diversify" their earnings.⁴²⁵ Regardless of whether an artist's actual royalty streams dwindle or diminish, by "putting his eggs in different baskets," an artist is guaranteed continued cash flow, steady income, and investment returns

419. JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS 83 (2000).

420. Jackson, *supra* note 369, at 217.

421. *Id.* at 216.

422. *Id.* at 218.

423. *Id.*

424. *Id.*

425. *Id.*

from other industries.⁴²⁶ In particular, with the issue of file sharing, the option of asset-backed securitization is especially attractive because it can protect artists from the fluctuations and problems that plague the entertainment industry.⁴²⁷

These immediate rewards and securities for an artist's hard work would increase productivity and decrease the need for long-lasting copyrights. As such, securitizing one's interest in a copyright is an attractive option because, as the old adage goes, a bird in the hand is better than two in the bush.⁴²⁸ With CABS, an artist can receive a lump sum of cash, today, based on the projected future earnings of past works.⁴²⁹ If an artist can receive cash today, it reduces the risk of not earning royalties if the public decides not to buy the artist's work.⁴³⁰ Liquidity and ownership, risk and diversity, and alternative financing options are all motivating factors to securitize copyrights.⁴³¹

An artist's competing need for ownership against the need for liquidity is common and plays a strong role in securitizing assets. Much like a homeowner, the owner of a copyright may want to control the use of the asset, while at the same time be able to reap the benefit of the liquidity of its sale. Also similar to a homeowner, a copyright owner may need purchase money,⁴³² such as a line of credit, or may want to refinance a copyright.⁴³³ Likewise, after death, a copyright owner may want to pass the economic value of a copyright to one heir while passing the ownership of that copyright to a different heir.⁴³⁴ Additionally, in some instances, a "deceased owner's heirs may need [immediate] cash to pay estate taxes."⁴³⁵ Asset-backed securitization is an excellent way to achieve all of these goals. For one thing, Jackson points out that a copyright owner can avoid the high taxes "on the gain on sale of his copyright by selling his rights in the lease at today's market value and only being taxed on the income from that lease."⁴³⁶ Overall, this would double the asset's

426. *Id.*

427. *Id.*

428. *Id.* at 217.

429. *Id.*

430. *Id.*

431. *Id.*

432. Purchase money is funds used to purchase an asset. This term is commonly used in the mortgage market.

433. Refinancing occurs by paying off one debt with another. Usually the new debt is on better terms.

434. Jackson, *supra* note 369, at 217.

435. *Id.*

436. *Id.*

liquidity over an outright sale.⁴³⁷ In David Bowie's case, he was able to use the funds he raised to repurchase songs he had previously sold at a time when their present liquidity was needed more than their potential for future earnings.⁴³⁸

The sale of the copyrights of the Beatles' catalog to Michael Jackson illustrates that artists—even as big as the Beatles—often times find themselves in desperate financial situations. In the early 1980s, Michael Jackson bought the rights to the Beatles' music catalog for \$47.5 million.⁴³⁹ As a result of the purchase, Michael Jackson has been in control of the sale, the copying, and the licensing of the Beatles' catalog of copyrights, a catalog which continues to break all-time sales records.⁴⁴⁰ In a \$47.5 million sale, the Beatles relinquished complete ownership and control of their product—an extremely valuable musical and cultural asset.⁴⁴¹ On the other hand, by way of asset-backed securitization, David Bowie was able to receive \$55 million and retain complete ownership and control of his music.

In fact, after his purchase, Michael Jackson entertained a \$250 million bond offer for the Beatles' catalog. Then, in 1995, much like the Beatles, Jackson fell on hard financial times, and opted not to securitize the catalog; instead, he sold the asset to Sony corporation for *only* \$95 million.⁴⁴² Even today, entertainers such as Courtney Love, are still selling their assets short by choosing traditional sales rather than securitizing their assets. In April of 2006, Love, in need of fast cash, sold a 25% share in Nirvana's song catalog to Primary Wave Music Publishing.⁴⁴³ Again, permanent sales such as these are something that could easily, and intelligently, be avoided if people in the industry were more familiar with asset-backed securitization.

As evidenced by the Beatles' case, before the issuance of Bowie Bonds, entertainers had very few financing options. Artists had a choice between an advance from their publishing house, mainstream financing at financial institutions, or simply selling off their assets. Even today, compared to asset-backed securitization, “[f]inancial alternatives are expensive, more restrictive, and in some cases, not available.”⁴⁴⁴

437. *Id.*

438. *Id.* In Bowie's case, the bond offering allowed him to acquire a former manager's interest in some songs. *Id.* at 217 n.42.

439. Wiener, *supra* note 337.

440. *Id.*

441. *Id.*

442. *Id.*; see also Horn, *supra* note 337.

443. *Kurt Cobain Tops Forbes List*, ROLLING STONE, Nov. 16, 2006, at 16.

444. Jackson, *supra* note 369, at 218.

According to Jackson, “[m]ainstream financing requires a predictable cash flow stream, liquid assets[,] or marketable fixed assets.”⁴⁴⁵ Jackson argues that this is because, depending on the asset, banks tend to lend from 80-100% on a liquid asset’s value, and no more than 80% on most tangible assets.⁴⁴⁶ The value of these loans is usually only about a tenth of what the artist can get through a securitization deal.⁴⁴⁷ This is because most banks are too conservative, and lack the structure to offer large loans and securitizations to artists.⁴⁴⁸ In addition to lending for comparatively small amounts of money, the more risk that a bank perceives, the higher the interest rate that it will charge its prospective borrower.⁴⁴⁹

As compared with ABS, Jackson argues that, by conventional measures,

even if an entertainer already has the liquidity . . . or a comparable fixed asset and the bank is willing to loan an entertainer \$50 million or more, to compensate the bank for the perceived level of risk, the entertainer will pay a higher interest rate and will be required to repay the loan over a shorter term.⁴⁵⁰

Additionally, Jackson points out that “[p]ublishing house financing usually requires the owner to pay more administrative costs and give up black box income,⁴⁵¹ resulting in an equivalent interest rate of 20%.”⁴⁵² In comparison to the available alternatives, the Bowie Bond securitization was quite the deal. The interest rate on the Bowie securitization was 10% at a time when the 10-year Treasury Note was only rated at 6.37%.⁴⁵³ The reason for this significant difference in interest rates is that the security holder looks not at the artist’s credit rating, but rather at the lessee’s credit rating—a much lower level of risk.⁴⁵⁴ In the Bowie Bond deal, the lessee, EMI, was an established publishing house, with a solid and trusted credit

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* (citing Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C. (2000))). Many banks and financial institutions are not structured to handle large entertainment loans and securitizations.

449. Jackson, *supra* note 369, at 218. “Banks measure risk based on the borrower’s credit rating, which may be low.” *Id.* at 218-19.

450. *Id.*

451. *Id.* “Black box income is an entertainment industry term that is meant to express the income the record company is able to gain from activities other than direct sales of the [artists’] recordings. The ‘black box’ obscures the source of the income and eliminates the income by allocating expenses to the artist.” *Id.* at 219 n.51.

452. *Id.* at 219.

453. *Id.*

454. Sam Adler, *Bowie Bond Buyer Explains Investment*, 13 ENT. L. & FIN. 6 (1997).

rating.⁴⁵⁵ EMI is the one that borrows the money, not Bowie; this in turn lowers the borrower's interest rate.

The end result is that securitization has the potential to effectively resolve an entertainer's concerns with liquidity and ownership, risk and diversity, and alternative financing options.⁴⁵⁶ This is because the artist is able to secure and obtain a value for his future royalty income in a situation where he is required to sell only his rights in that income stream.⁴⁵⁷ By doing so, securitization finds itself in a unique position as one of the most attractive means of obtaining capital. For these reasons, securitization can prove to be a powerful tool for financially savvy and historically popular artists.

1. Smart Investment

In addition to being attractive to artists, there are several reasons why investors are interested in purchasing these bonds. According to Jackson, the best reason to invest in CABS is diversification.⁴⁵⁸ This is because:

The risks of CABS can be segregated into copyrighted work risk, structure risk, and industry risk. . . . Economies, industries and interest rates fluctuate constantly. To smooth these fluctuations . . . and achieve a target return on investments, the investor will purchase securities in industries that are stable or have opposing Betas. Although the music industry does issue bonds on which risk can be measured by the stability of the cash flows of the copyrights they control, this risk fluctuates daily.⁴⁵⁹

However, if an investor is given an opportunity to pick one artist in whom he or she can invest, a smart investor will choose an artist who has proven to have stable royalty cash flows regardless of fluctuations in the national and international economy.⁴⁶⁰ According to Jackson, for the best results, "[t]he artist's works must have been in the market for an entire economic cycle to enable the investor to accurately estimate of [sic] the impact of these fluctuations on the cash flow."⁴⁶¹ Tracking these patterns allows an investor to make an educated prediction regarding the potential of obtaining his or her projected income.⁴⁶²

455. *Id.*

456. *Id.*

457. *Id.*

458. Jackson, *supra* note 369, at 219.

459. "Beta is a measurement of risk used in financial analysis to describe the risk of the individual investment relative to the market as a whole, which has a risk of zero." *Id.* at 220 n.58.

460. *Id.*

461. *Id.*

462. *Id.*

To further assure the success of a bond transaction, the parties must make the subject of the licensing lease an existing catalog of work.⁴⁶³ A catalog, as opposed to one or two pieces, provides much-desired diversity by spreading the risk of income over multiple works instead of basing it on the popularity of a single work or two.⁴⁶⁴ Although it is best that a catalog have been in existence for a number of years, Jackson says that there is no requisite magic number.⁴⁶⁵ Yet interestingly, on average, every catalog that has been the basis of an asset-backed bond deal has been at least 20 years old.⁴⁶⁶ Jackson predicts that this age will decrease with the increased popularity of CABS to as low as 5 to 8 years.⁴⁶⁷ This is because Jackson believes that more important than age is the requirement that a catalog have a well-documented track record.⁴⁶⁸ The valuation of the future cash flow from the catalog must be reasonably ascertainable and is dependent on accurate track records.⁴⁶⁹ Such calculations add to the attractiveness of the bond.⁴⁷⁰

Despite familiarity with ABS, their subset—CABS—are still a novel concept for institutional investors.⁴⁷¹ Part of the problem is that when it comes to CABS, the originator is an individual artist, one who is more likely to file for bankruptcy than a corporation.⁴⁷² To safeguard against this risk, Jackson says:

[I]nvestors who are willing to buy these securities require significant safety measures, including a two-tier trust structure, asset perfection, a sinking fund, high levels of back-up financing (e.g. a line of credit), guarantees from an A-rated lessee, who will be making the payments directly to the trust, and a high rating from a nationally qualified rating agency.⁴⁷³

Jackson explains that this is due in large part to the entertainment industry's image as a volatile business.⁴⁷⁴ Therefore, to alleviate some of the industry risk, Jackson recommends that potential buyers limit their dealings to the most secure institutions and artists in the entertainment

463. *Id.*

464. *Id.* at 221.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 221. A line of credit is “[a] contract where the bank is the primary promisor and promises to lend money on the underlying note upon the occurrence of certain events and provision of substantiating documentation.” *Id.* at 221 n.61.

474. *Id.* at 221.

business.⁴⁷⁵ Yet even some of the largest artists in the industry can tread on the fine line between wealth and bankruptcy.⁴⁷⁶ Despite an artist's success, some of the biggest dangers that entertainers face are the mismanagement of finances and subsequent litigation,⁴⁷⁷ both of which can have a detrimental effect on the success of an artist's image and career.⁴⁷⁸ In the end, regardless of success, the risk of bankruptcy is always a possibility.

2. Bankruptcy Factors

When an individual files for bankruptcy the first step is to declare all assets and liabilities, and then to give public notice of intent.⁴⁷⁹ This notice allows creditors, not named in the bankruptcy, an opportunity to make themselves known and to stake a claim on the assets of the filer.⁴⁸⁰ The bankruptcy court will likely also examine the individual's financial transactions and look for any preferential transfers to determine if there are any other assets, which may be included in the filer's bankruptcy estate under the Federal Bankruptcy Code.⁴⁸¹ Jackson points out that in the case of ABS, if the court finds that the individual artist has failed to execute a true sale, or if the SPV fails to perfect its interest in the royalties of the copyright licensing lease, the bankruptcy court may claim the royalties as part of the artist's bankruptcy estate.⁴⁸² In other words:

When this happens, the investor, who depends on the royalties to pay both the interest and the principal of the investment, has no recourse against the artist. The investor loses his entire investment. For example, Prudential would lose the entire \$55 million it paid for the Bowie Bond if the SPV failed to perfect its interest in the EMI lease and Bowie went bankrupt.⁴⁸³

Therefore, to prevent the recapturing of the royalties into the artist's bankruptcy estate, the SPV must perfect its interest in the royalties, thus serving as a BRTE.⁴⁸⁴ Ultimately, this means that the royalties need to be free and clear of all other creditors' claims, be acquired by the SPV in a

475. *Id.*

476. *Id.* at 222.

477. STAN SOOCHER, THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT 25 (1999) (describing how Billy Joel has been the subject of copyright infringement litigation).

478. Jackson, *supra* note 369, at 223 (citing SOOCHER, *supra* note 477, at 3-4, 22, 63, 67).

479. *Id.* at 224.

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. Schuyler M. Moore, *Entertainment Bankruptcy: The Copyright Act Meets the Bankruptcy Code*, 148 BUS. LAW 567 (1993), available at <http://www.allbusiness.com/legal/laws/359847-1.html>.

true sale, and be publicly recorded as owned by the SPV, and not the individual artist.⁴⁸⁵

Difficulty arises in the fact that, currently, there exists no per se rule on what constitutes a “true sale.”⁴⁸⁶ Therefore, in order to make a determination as to the classification of sale, courts today have few options other than to compare the sale in question to a typical sale and a typical loan, and decide which one it resembles most.⁴⁸⁷ The key, according to Jackson, is to examine the asset.⁴⁸⁸ The important variables in such an equation are as follows:

The artist should not retain the risk or the benefits associated with the asset because retention of a residual interest is inconsistent with a sale. Neither should the parties allow the proceeds of the asset to commingle with the artist’s other assets because the court may consider the proceeds tainted, and therefore part of the artist’s estate. Although the artist retains a residual interest in the royalty payments after the security holders have been fully paid, the other factors of control and possession weigh in favor of a sale. Further, security-holders should purchase their interest in a pool of specially identifiable assets, which generate most of the payments due. Finally, the price paid for the assets must fairly compare to their fair market value, otherwise a pledge of collateral is suggested resulting in a loan rather than a sale.⁴⁸⁹

The bankruptcy court will also look at the degree and nature of the artist’s legal control over the asset after the transaction has been completed.⁴⁹⁰ Concerning the asset, the buyer should have no recourse against the seller.⁴⁹¹ According to Jackson, it is usually the issuer that retains servicing functions, and not the artist.⁴⁹² In addition, Jackson cautions that “[t]he artist should not retain the right to repurchase or substitute any assets, nor be required to do so.”⁴⁹³ Finally, and perhaps not too obviously, Jackson states that the language in the document in question should say “seller” and “buyer.”⁴⁹⁴ It is after such consideration that the bankruptcy court will decide whether the transfer of the asset to the SPV was a loan or a sale.⁴⁹⁵ If the court finds that in fact it was a

485. *Id.*

486. Jackson, *supra* note 369, at 266.

487. *Id.*

488. *Id.* at 227.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

loan, the assets will be declared part of the artist's bankruptcy estate and the bonds issued under the assets will become worthless.⁴⁹⁶

3. Perfecting the Security Interest

The next step is for the SPV to perfect its interest in the royalty cash flow.⁴⁹⁷ Controversy exists as to whether the sale of royalty rights to the SPV constitutes a secured transaction and therefore must be perfected.⁴⁹⁸ Jackson supports the proposition that "[t]he basic test to determine if a security interest is created is whether the interest in [the] property was intended to serve as security for payment or performance of an obligation."⁴⁹⁹ However, a right based on federal copyright law may be exempt from these article 9 rules.⁵⁰⁰ According to Jackson:

The most conservative approach, and likely the correct approach to this issue, is to look at federal law as preemptive. When the federal copyright laws are on point, the courts must follow them. However, when they are silent or not on point, the states' UCC should be followed.⁵⁰¹

As follows, Jackson says that, "[d]ue to bankruptcy concerns, the SPV and master trust both must perfect their interest in the right to receive royalty payments from the entertainment company."⁵⁰²

Under the Uniform Commercial Code (U.C.C.), perfection requires two steps: attachment and notice.⁵⁰³ In analyzing article 9, section 203, of the U.C.C., Jackson states:

A security interest in specific personal property attaches upon satisfaction of three requirements: 1) the debtor has signed a security agreement containing a description of the collateral, 2) value has been given by the secured party, and 3) the debtor has rights in the collateral. For possessory security interests, attachment does not require a signed agreement. The secured party only needs to be in possession pursuant to the agreement. When all three requirements are met, the security interest 'attaches' and

496. *Id.*

497. *Id.* at 228.

498. *Id.*

499. *Id.* (citing RUSSELL A. HAKES, THE ABC'S OF THE U.C.C. ARTICLE 9: SECURED TRANSACTIONS 8 (1996)). "Like most rights to receive money based on a lease agreement, the royalty right would probably constitute a 'general intangible' under U.C.C. §§ 9-318(1) and 9-206." *Id.* at 228 n.104.

500. *Id.* at 228 (citing HAKES, *supra* note 499, at 10).

501. *Id.*

502. *Id.*

503. *Id.* (citing U.C.C. § 9-203 (1997)).

becomes enforceable between the parties. Conversely, the security interest is not enforceable against the debtor or third parties if it has not attached.⁵⁰⁴

It is important to follow these rules correctly because the purpose of perfection is to serve as notice to future purchasing parties of a superior interest in the security.⁵⁰⁵

Jackson rightfully points out that although “[p]erfection is not required to enforce a security interest[,] . . . it is necessary to determine priority over third party claims.”⁵⁰⁶ Yet even though perfection does not guarantee priority over all third-party claims, Jackson says “it enhances the chances of establishing priority.”⁵⁰⁷ After attachment, Jackson states that “perfection can be achieved in three ways: (1) filing a financing statement in official public records . . . ;⁵⁰⁸ (2) taking possession . . . ;⁵⁰⁹ or (3) automatically, in limited circumstances, when the notice function of perfection is deemed unnecessary or impractical.”⁵¹⁰ For added protection, Jackson encourages that possession be taken of the lease documents, and the SPV’s interest should be immediately recorded in the proper and appropriate public office.⁵¹¹

4. Recording the Interest

Determining the proper and appropriate public office in which to record a SPV’s possessory interest is a controversy unto itself. This is because there is disagreement amongst courts on where a lien holder must file in order to perfect the lien.⁵¹² The issue is which recordation authority, state or federal, has priority.⁵¹³ In the case of *In re Peregrine Entertainment, Ltd.*, the United States District Court for the Central District of California held that priority is given to filings with the U.S. Copyright Office.⁵¹⁴ Conversely, the New York Supreme Court, in the case of *MCEG Sterling, Inc. v. Philips Nizer Benjamin Krim & Ballou*, has stated that it believes that the *In re Peregrine* decision is debatable.⁵¹⁵ In effect, the issue has turned into a battle of Hollywood vs. Wall Street.

504. *Id.* (footnotes omitted).

505. *Id.* at 228-29.

506. *Id.* at 229.

507. *Id.*

508. *Id.* (citing U.C.C. §§ 9-302, 9-401).

509. *Id.* (citing U.C.C. § 9-305).

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. 116 B.R. 194 (C.D. Cal. 1990).

515. 646 N.Y.S.2d 778, 780 (Sup. Ct. 1996).

In the case of *In re Peregrine*, the federal court held that any state recordation system concerning an interest in copyrights is preempted by the federal Copyright Act.⁵¹⁶ Therefore, according to the court's logic, a security interest in a copyright will only be perfected if it is filed with the United States Copyright Office, and not by filing with the applicable Secretary of State.⁵¹⁷ The court explained:

The federal copyright laws ensure "predictability and certainty of copyright ownership," "promote national uniformity" and "avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States." . . . A recording system works by virtue of the fact that interested parties have a specific place to look in order to discover with certainty whether a particular interest has been transferred or encumbered. To the extent there are competing recordation schemes, this lessens the utility of each; when records are scattered in several filing units, potential creditors must conduct several searches before they can be sure that the property is not encumbered. . . . No useful purposes would be served . . . if creditors were permitted to perfect security interests by filing with either the Copyright Office or state offices. . . . [A] third party (such as a potential purchaser of the copyright) who wanted to learn of any encumbrances thereon would have to check not merely the indices of the U.S. Copyright Office, but also the indices of any relevant secretary of state.⁵¹⁸

The court feared that without a federal registry, interested third parties could never be certain that their search was complete.⁵¹⁹ With the costs and delays of conducting multiple—if not dozens—of searches, the federal court feared that the purchase and sale of copyrights would be hindered to the point where it would frustrate Congress's intent that copyrights be readily transferable in commerce.⁵²⁰

In *MCEG Sterling Inc.*, the New York Supreme Court did not disagree that a secured party must record the copyright with the federal Copyright Office.⁵²¹ However, it did call into question the federal court's holding that these filing requirements be applicable to licensing agreements and accounts receivable, arguing that such assets are not true "copyrights."⁵²² According to Jackson, the New York Supreme Court should have relied on the federal court's decision in *In re Peregrine* for

516. 116 B.R. at 202.

517. *Id.*

518. *Id.* at 199-200.

519. *Id.* at 201.

520. *Id.*

521. 646 N.Y.S.2d 778, 779-80 (Sup. Ct. 1996).

522. *Id.* at 780.

several reasons: “First, licenses and accounts receivable are integral to the copyright. Without the ability to license a copyright or accumulate receivables, the only value of a copyright is in its outright sale to the ultimate user. The entertainment industry is based on the ability to license a copyright.”⁵²³ In Jackson’s opinion, “[t]o hold that these rights are not integral to the Copyright is to hold against common knowledge.”⁵²⁴

Second, Jackson believes that the *MCEG Sterling Inc.* court should have recognized that, “[u]nlike real estate, which is fixed to one town, city, county, state, and country, a license and the related receivables are mobile.”⁵²⁵ In other words, when recording a piece of real estate, recordation consists of checking for liens in two places: the county recorder of the county in which the property is located, and also with the Secretary of State where the real estate can be found.⁵²⁶ Jackson analogizes that this would mean the daunting and inefficient task of checking for liens in all fifty states, as well as the Copyright Office.⁵²⁷

Jackson argues that the *In re Peregrine* decision is, “significantly more efficient in providing the notice that is at the heart of why security interests must be filed.”⁵²⁸ According to Jackson, “an attorney of even ordinary skill would know to check the Copyright Office for liens against rights associated with copyrights. [It follows that], because one would check at the Copyright Office, all copyright associated liens should be filed there.”⁵²⁹ To Jackson, the solution is “simple:” give priority to filings which have been filed with the United States Copyright Office.⁵³⁰ Again, if the purpose of filing is to give notice, and seeing as the federal copyright office is a logical central source for copyright interests, the best notice is given by filing federally.⁵³¹

Additionally, filing federally allows for the greatest possible protection because a filing in the Copyright Office is valid in every state.⁵³² On the other hand, unless a creditor can get another state to recognize the creditor state’s priority, a state filing is only good in the state in which it is filed.⁵³³ Finally, Jackson states: “Having one central

523. Jackson, *supra* note 369, at 232.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* at 232-33.

528. *Id.* at 232.

529. *Id.* at 232-33.

530. *Id.* at 233.

531. *Id.*

532. *Id.*

533. *Id.*

filing site is the most economically efficient and judicially fair method of deciding priority. Because there is only one site to review, as opposed to fifty-one, the expense is significantly less. [With] . . . only one site to record one's interest, the first one to file wins."⁵³⁴ This is the point of perfection.

Overall, asset-backed securitization offers an attractive way for an artist to reduce the risks associated with future income streams, as well as to limit poor management activities, by allowing him or her to enter into long-term licensing leases whereby a third party is as interested in the artist's royalty income as is the artist. Such entertainment securitizations will involve a delicate weave of copyright, contract, tax, securities regulation, and bankruptcy law. As Jackson summarizes, to avoid bankruptcy-related issues, the title to the copyright(s) at issue must be free and clear.⁵³⁵ The next step is for the artist to negotiate a waiver of the lessee's defenses to the licensing lease.⁵³⁶ After such negotiation, the SPV must then buy the rights to the royalty income from the artist in a true sale, make certain that those rights have attached, and then perfect its interest in the royalty stream by filing with both the United States Copyright Office and the local Secretary of State.⁵³⁷

Since their issue, Bowie Bonds have annually yielded a steady 8-10% return on investment.⁵³⁸ Especially in this economy, compared with other music investments (or other investments in general) asset-backed bonds have proven to be an intelligent investment strategy. While the music world has seen industry-wide drops in sales due to Internet piracy from file-sharing sites like Napster, the value and ratings of ABS have largely been unaffected. This is because ABS rely on additional revenue streams besides CD sales, including everything from background music for advertisements to hold music played by telephone systems.⁵³⁹ The only real downside is that large insurers, like Prudential, have the market cornered, making ABS an unavailable investment option for fans. The good news is that Pullman is working on ways to allow future deals to go public.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

538. *See Benz, supra* note 291.

539. Jackson, *supra* note 369, at 224.

VII. CONCLUSION

There are two dimensions to the Copyright Clause. The first dimension, the grant of exclusive powers over one's writings and discoveries, is intended to encourage the creativity of authors and inventors. The second dimension, the requirement that those exclusive rights be for limited times, serves the ultimate purpose of promoting the progress of science and useful arts by guaranteeing that innovations will enter into the public domain as soon as the period of exclusivity expires. This limited protection is designed as much for the benefit of the public as it is for the author.

Copyright law represents a carefully crafted bargain that encourages both the creation and the public disclosure of creative work in return for monopolistic protection for a limited period of time. It would be unacceptable for Congress to modify the copyright bargain by shortening the term of copyrights in order to accelerate public access to the work. The fairness considerations that underlie the constitutional protections against such *ex post facto* laws should also prevent Congress from making a retroactive change in the public's bargain with authors and creators without providing compensation. Similar considerations should protect members of the public who make plans to exploit a copyrighted work as soon as it enters into the public domain.

Unfortunately, today's copyright system perpetuates an intellectual purgatory. Generally, the older the work, the less commercial value it retains. Likewise, as a work ages, it becomes increasingly difficult to locate its current copyright holder. Ironically, the older the work, the more useful it may be to historians, artists, or teachers. Moreover, the older the work, the less likely it is that a sense of author's rights can justify a copyright holder's decision not to permit reproduction, for the more likely it is that the copyright holder making the decision is not the work's creator, but rather a stranger to the creator, such as a corporation or a great-grandchild.

Congress may not have intended to act unconstitutionally, but in passing the CTEA, it tests the Constitution's limits. It is telling that the Act was named after a member of Congress, who, the legislative history records, "wanted the term of copyright protection to last forever."⁵⁴⁰ In

540. 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono); see also *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong. 94 (1995) (statements of Reps. Bono, Berman, and Hoke) (discussing the concept of a perpetual copyright term). Compare *id.* (statement of the Reg. of Copyrights) ("The Songwriters Guild suggested a perpetual term [during copyright office proceedings.]", *with id.* at

the end, the CTEA creates no economic incentive at all. The incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension's economic-incentive effect could justify its serious expression-related harms. Fundamentally, if people genuinely cared about their work and were as attached to their creations as the Court seems to think they are, why would these creators not take it upon themselves to preserve their work, even if only for legacy reasons? If Congress were truly interested in the preservation and restoration of copyrighted work, the government could, as an arts initiative, invest the time, money, and resources needed to save these creations, as it does with other valuable cultural assets. This would be a much less harmful way for Congress to accomplish its goal than to continue extending the length of copyright terms. As it stands today, the prohibitive nature of the CTEA threatens the existence of any common culture.

When the system of copyrights is altered, its precious balance is destroyed. The best evidence of the devastation sustained to the system is that under the series of extensions to copyrights, only one year's worth of creative work—that copyrighted in 1923—has fallen into the public domain during the last 80 years. Yet ironically, case after case repeatedly and consistently emphasizes that public access is the ultimate and overriding purpose of the constitutional provision for copyright protection. Ex post facto extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the Copyright Clause. The CTEA is invalid because it extends the life of unexpired copyrights. The Supreme Court's contrary conclusion rests on the mistaken premise that the Court has virtually no role in reviewing congressional grants of monopoly privileges to copyright holders. The result is serious public harm and a virtually nonexistent public benefit.

Instead of lobbying Congress for copyright term extensions, the owners of valuable copyrights should look to other ways in which to maximize their copyright privileges. ABS allow artists to raise money without selling off their works completely, and to reap financial rewards on royalties earlier than otherwise would be possible. In raising cash for

234 (statement of Quincy Jones) ("I'm particularly fascinated with Representative Hoke's statement. . . . [W]hy not forever?"), and *id.* at 277 (statement of Quincy Jones) ("If we can start with 70, add 20, it would be a good start."). The statutory debate ended up creating a copyright term so long that, were the vesting of nineteenth-century real property at issue, it would typically violate the traditional rule against perpetuities. See 10 RICHARD POWELL, REAL PROPERTY §§ 71.02[2]-[3], at 71-11 (M. Wolf ed., 2002) (giving traditional rule that estate must vest, if at all, within lives in being plus 21 years); see also *id.* § 71.03, at 71-15 (describing modern statutory perpetuity term of 90 years, which is 5 years shorter than 95-year copyright terms).

talent, investment bankers have taken a financing technique widely used on Wall Street and are now making it available to the dynamic entertainment and information industries. Entertainment and information are thriving American businesses. Not only are they the engines that drive American culture, but they are the leading U.S. export industries. Therefore, with the increasing flexibility and decreasing burden of regulations, the securitization of individual cash flows continues to grow. In response to the success and interest in ABS, financial institutions have opened divisions dedicated to the securitization of celebrity asset-backed bonds.

Like most of the market-driven wealth creation seen of late, ABS have a limited range. It is not likely that teachers, or bus drivers, or flight attendants will be able to convert their intellectual capital into capitalized wealth. The option of asset-backed securitization affects only those whose intellectual capital is already highly valued in the marketplace. Some argue that because they only apply to a small slice of the population, ABS exacerbate existing wealth distribution problems. Yet, so do copyright term extensions. The difference is that the option of asset-backed securitization allows major copyright holders to receive complete compensation for their work today, as opposed to receiving periodic, smaller payments over time. Because major copyright owners have the option to receive their money today, they will be less inclined to lobby Congress for copyright-term extensions. This will allow less successful works to fall into the public domain where they can be used, preserved, and restored more easily. The more popular asset-backed securitization becomes, the faster the copyright flood gates can be opened to allow works to flow steadily into the public domain. Fortunately, neither the novelty, nor the complexity, of asset-backed securitization appears to dishearten those who understand and believe in this new security.