COMMENTS

TAILORING COPYRIGHT DURATION

by
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Copyright law is intended to serve the public interest in learning and culture. The largely uniform application of copyright protection, however, is a significant way in which copyright does not serve the public as well as it could. This Comment discusses how copyright duration is a particular aspect of copyright law that is ripe for change. It then identifies three different mediums of expression as examples of how the economic realities within each medium can inform the duration of protection necessary to effectuate copyright's foundational purpose. This Comment acknowledges the obstacles that a copyright regime of tailored durations might face, focusing primarily on the potential constitutional issue presented by the First Amendment. This Comment concludes that tailoring copyright duration by medium of expression holds the potential to balance the interests of the public that wants access to works and the authors that are essential to creating them.

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INTRODUCTION

Nearly four decades have passed since the last significant overhaul to copyright law.[1] But since then, Congress has increased both the duration of copyright protection[2] and the ability of content providers to control access to digitized information.[3] Unfortunately, what is largely ignored when copyright law changes is the original purpose that copyright is meant to serve: the public interest in learning and culture. As energy builds for a critical reevaluation of how copyright law operates,[4] the public interest should play a defining role in changes to the copyright regime.

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[1] *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–805 (2012)).

[2] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302 (2012)).

[3] *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–76 (1998) (codified as amended at 17 U.S.C. §§ 1201–05).

[4] Among those acknowledging the need for reform is the Register of Copyrights. *See The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the Comm. on the Judiciary*, 113th Cong. 6–8 (2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office) [hereinafter Pallante], http://copyright.gov/regstat/2013/regstat03202013.html.

The largely uniform application of copyright protection is a primary source of the tension between authors' rights and the public interest.[5] This uniform application is particularly problematic in light of the breadth of copyrightable works and the technologically advanced world that copyright serves. At the heart of copyright's uniformity is its duration. The duration of copyright protection has consistently increased,[6] frequently blind to its effect. Often these changes are singularly focused on the benefit to copyright owners. The result is that sometimes the changes to duration benefit no one but the copyright owner, and perhaps no one at all.[7]

Any substantive change to copyright is likely to involve a change to today's largely uniform grant of copyright protection. The duration of copyright is an area ripe for change, and tailoring the duration of copyright protection by the medium in which a copyrightable expression exists provides an opportunity to reduce uniformity costs. A copyright regime of tailored durations holds the potential to balance the interests of authors and the public alike. By accounting for the fundamental differences in the mediums of work that copyright protects, tailored durations can account for the forces that affect the creation and distribution of an expression.

This Comment proceeds as follows. Part I surveys the history of copyright duration in both England and the United States. Part II details some of the problems created by the largely uniform application of copyright duration. Part III identifies a potential approach to tailoring durations and briefly explores how tailored durations could apply to three mediums of copyrighted works. Part IV addresses obstacles to tailoring durations by medium, particularly emphasizing copyright's relationship with the First Amendment's free-speech guarantee.

Approaching copyright reform from the public-benefit perspective involves more than paying lip service to the public interest and accepting attenuated connections to its outcome. Rather, a change to the copyright regime requires an emphasis on how copyright law enables the monopolies it creates to add to their bodies of work. Because copyright duration is the sword that the law needs to accomplish its objective—as well as the sword on which it can fall—tailoring durations might be the best way to wield that sword. Although speech-abridging effects are inherent in copyright law, tailoring copyright duration can enhance the law's complementary relationship with the First Amendment by accounting for the realities of when copyright's incentivizing motivation is needed and when it

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[5] *See infra* Part II.

[6] *See infra* Part I.

[7] *See infra* Part II.

is not. Because a copyright is the grant of a statutory monopoly,[8] it is a grant that should be made judiciously.[9]

I. COPYRIGHT'S DURATION AND PURPOSE

The United States' Constitution gives Congress the power "[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."[10] Congress has exercised this power through a series of copyright acts.[11] These acts are the sole source of copyright protection for nearly all works.[12] Each statutory implementation of the Constitution's "limited times" prescription has involved an increase in copyright duration. The current copyright term—life of the author plus 70 years[13]—is a significant change from the initial 14-plus-14 years of the United States' first Copyright Act.[14]

A. Copyright Duration in England

The original copyright term in the United States paralleled the copyright term that existed at that time in England. This is not surprising because the statutory copyright protection recognized in the United States today dates back to England's Statute of Anne, which was enacted in 1710.[15] The Statute of Anne granted copyright for an initial 14-year term; the term renewed for a second 14 years if the author was still alive at the expiration of the first term.[16] Over time, copyright duration in England increased—and not always uniformly. In 1767, for example, the copyright term was extended to 28 years for engravers only.[17] Starting in 1814, all

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[8] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (acknowledging that copyright is a limited monopoly).

[9] For an argument that the boundaries of copyright law lack purpose-driven limits and that the incentives that exist when an author creates a work should inform the scope of an author's copyright, see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1581, 1588–89 (2009).

[10] U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

[11] 17 U.S.C. §§ 101–1332 (2012).

[12] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (citing Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661–62 (1834)). One exception is sound recordings created before February 15, 1972, which could receive state-law copyright protection until 2067. 17 U.S.C. § 301 (2012).

[13] 17 U.S.C. § 302.

[14] Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802). The Act offered an initial 14 years of protection upon the recording of a work. Rerecording after the initial 14-year period provided an additional 14 years of protection. *Id.*

[15] Copyright Act 1709, 8 Ann. c. 21 (Gr. Brit.).

[16] *Id.* § 11.

[17] *See* Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary*

authors received 28 years of protection, plus the remainder of the life of the author if he or she was alive at the end of the term.[18] Then in 1842, the term changed to 42 years or life of the author plus 7 years, whichever was longer.[19] Today's copyright term in England is life of the author plus 70 years for most works.[20]

B. Copyright Duration in the United States

The first change to U.S. copyright duration occurred in 1831, when the original 14-year term expanded to 28 years.[21] Then in 1909, as a part of the first major overhaul to copyright law,[22] the renewal term extended by 14 years, providing a total of 56 years of copyright protection if renewed.[23] In 1976, Congress abandoned the fixed term of protection that had existed to date and adopted a term that spanned the life of the author plus fifty years.[24] Additionally, the 1976 Copyright Act commenced copyright protection from the moment a work is fixed in a tangible medium, regardless whether the work is published.[25] Thus, when the 1976 Copyright Act went into effect, the copyright in unpublished works was no longer perpetual. Congress added 20 years to the copyright term in 1998,[26] bringing the term of protection to today's life of the author plus 70 years.[27]

U.S. Copyright, 25 BERKELEY TECH. L.J. 1475, 1484 n.39 (2010) (citing 7 Geo. 3 c. 38, § 7 (1766) (Gr. Brit.)).

[18] STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., DURATION OF COPYRIGHT 57 (Comm. Print 1957) [hereinafter DURATION OF COPYRIGHT], http://www.copyright.gov/history/studies/study30.pdf.

[19] *Id.*

[20] The Duration of Copyright and Rights in Performances Regulations 1995, SI 1995 No. 3297 (UK), http://www.legislation.gov.uk/uksi/1995/3297/regulation/5/made/data.pdf.

[21] Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (amended 1870).

[22] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976). The notable changes included extending protection to all writings of an author, not only those explicitly enumerated in the statute, and creating derivate-work and public-performance rights. *Id.* at 1075–76.

[23] *Id.* at 1080.

[24] Copyright Act of 1976, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302(a) (2012)).

[25] *Id.* § 102(a), 90 Stat. at 2544–45 (codified as amended at 17 U.S.C. § 102(a)).

[26] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302).

[27] 17 U.S.C. § 302(a).

C. Copyright's Original Purpose

The original conception of statutory copyright[28] focused its protection on authors.[29] The Statute of Anne countered the censorship that pervaded the book trade in England before the statute's passage.[30] The statute also emphasized copyright as a tool to promote learning, a fact evidenced by its official title, "Act for the Encouragement of Learning," and the requirement that books be delivered to university libraries.[31] Moreover, booksellers could not price books in a way that made them unaffordable. The statute provided a mechanism by which a person could challenge a bookseller's pricing scheme.[32] To strike a balance between an author's interest in producing and benefiting from his or her work, and the public interest in accessing the work, the Statute of Anne "secured the continued production of useful books through the striking of a culturally significant social bargain, a trade-off involving the author, the bookseller and the reading public."[33]

This same idea inspired the founders of the emerging United States. Not only did the original copyright term match the Statute of Anne, but the Constitution's framers embedded copyright's learning purpose within the grant of congressional authority to make copyright law.[34] In addition to the Constitution's language that states copyright's learning purpose, the Supreme Court has recognized that "the primary object in conferring [copyright's] monopoly lie[s] in the general benefits derived by the public from the labors of authors."[35] With each change to the duration of copyright protection, however, the public-benefit focus has been largely ignored in favor of the interests of copyright owners.

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[28] Scholars debate whether a common law copyright existed in England in the late 18th century notwithstanding the Statute of Anne. *Compare* H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1 (2014) (arguing that it did exist), *with* Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L.J. 106 (2003) (arguing that it did not exist).

[29] *See* Bently & Ginsburg, *supra* note 17, at 1479. But not everyone believes that authors actually benefited. *See* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 25 (2010).

[30] ALEXANDER, *supra* note 29, at 18. Although the Statute of Anne limited prepublication censorship by granting to everyone the right to register a written work, it did not preclude post-publication censorship because an author did not have a right to print his or her work. *See* 8 Ann. c. 21, § 1; ALEXANDER, *supra* note 29, at 25.

[31] 8 Ann. c. 21, § 5.

[32] *Id.* § 4.

[33] Deazley, *supra* note 28, at 108.

[34] *See* U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science"); Golan v. Holder, 132 S. Ct. 873, 888 (2012) (explaining that "Progress of Science" means the promotion of learning).

[35] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

II. PROBLEMS WITH THE CURRENT DURATION OF COPYRIGHT

Congress has increased copyright duration on a mostly indiscriminate basis. As various interested parties have pushed for longer protection, Congress has responded. But sometimes, indiscriminate application of the copyright grant is not the most efficient. Despite the technically limited copyright term of life of the author plus 70 years,[36] copyright effectively operates as a perpetual right.[37] This lengthy copyright term presents real issues for authors, the public, and the copyright regime itself.

Copyright, like intellectual-property law in general, involves a balance between the rights of those who create and the rights of those who consume. That balance, however, is not struck automatically. In some instances, copyright protection does not benefit anyone but the author because an author's works are inaccessible—either because the copyright owner cannot be located[38] or because a person is not willing to pay the price to access them.[39] In other instances, the benefit extends almost exclusively to the author because a work's contribution to the public is de minimis, and might not contribute to learning at all.[40]

Increased copyright duration comes with costs. Every work that is protected is not in the public domain. A person must pay to access it, and copyright allows for that price to be high because of the monopolies it creates.[41] The longer the duration lasts, the higher the costs will be, with little return benefit to the public.[42] Because copyright grants a statutory

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[36] This duration applies to works created after January 1, 1978. 17 U.S.C. § 302(a) (2012).

[37] *See, e.g.*, WILLIAM PATRY, HOW TO FIX COPYRIGHT 200 (2011) (acknowledging that the current copyright duration is perpetual in all but name because it provides 99.88% of the value of a perpetual copyright); *see also* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 252 (2001) ("The term of copyright for software is effectively unlimited."); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 721 (2000) (suggesting that the anti-circumvention measures of the DMCA turns limited copyright protection into a perpetual right).

[38] *See* PATRY, *supra* note 37, at 190 (noting that identifying who owns a particular copyright can be difficult because of death, the transfer of rights, and the demise of businesses).

[39] *See* Balganesh, *supra* note 9, at 1578 (noting that people are often willing to pay for access, but not at the high price made possible by the monopoly that copyright creates).

[40] One example is the ability to copyright a candlestick. L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), *printed in* 46 HOUS. L. REV. 215, 309 (2009) (citing Mazer v. Stein, 347 U.S. 201, 221 (1954) (separate opinion of Douglas, J.)).

[41] Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, 10, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

[42] *Id.* at 5–8.

monopoly over an author's expression,[43] the duration of that monopoly matters. The monopoly primarily exists, after all, to serve the public interest.[44] The basic justification for granting an exclusive right to authors[45] in their works is that it incentivizes the creation of new works.[46] These works, in turn, form building blocks on which all authors can build, in accord with copyright's learning purpose.[47] The sensibility of this justification appears when considering that the United States was just forming when its first copyright law took effect.[48] Now, as then, a rich body of material enhances public knowledge and culture.

But today copyright operates in a world quite different from that in which early U.S. copyright laws existed. One difference is the extent to which science has progressed. These changes include our collective capacity to understand phenomena in the natural world, advances in healthcare that extend lifespans and enhance lifestyles, and developments in technology that spur innovation and the distribution of knowledge. Today, copyright owners can increasingly control the use of information by consumers, which contrasts with the original conception of copyright as a tool to control use by competitors.[49] Additionally, the need for the artificial scarcity that copyright creates is gone.[50] Many creators can produce and distribute at low costs and generate profit from a plethora of widely available transactions that are largely independent of copyright.[51] These changes have thrown out of balance the focus on author' interests and the public interest. The uniform application of copyright duration stands out as a primary culprit.[52]

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[43] *See, e.g.*, *Eldred*, 537 U.S. at 219; LESSIG, *supra* note 37, at 251 (calling copyright a "state-backed monopol[y] over speech").

[44] *See, e.g.*, PATTERSON & BIRCH, *supra* note 40, at 314 (identifying copyright as a limited monopoly that should exist to serve the public interest).

[45] "Author" refers to the creator of any copyrightable work. *See* 17 U.S.C. § 102 (2012).

[46] *See* Balganesh, *supra* note 9, at 1577. But Balganesh notes that "few dispute the fact that copyright's theory of incentives today functions as little more than a trope" and argues that the incentive theory distracts from the tradeoffs that copyright entails. *Id.*

[47] *See, e.g.*, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of petition for reh'g en banc) ("[E]ach new creator build[s] on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture."); PATRY, *supra* note 37, at 132.

[48] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 133 (2004).

[49] PATTERSON & BIRCH, *supra* note 40, at 303; *see also infra* notes 62–63 and accompanying text.

[50] PATRY, *supra* note 37, at 2–3.

[51] *Id.*

[52] *See* Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009) [hereinafter Carroll, *One Size*] (arguing that uniformity is at the heart of intellectual-property problems); Michael

When Congress grants the duration of copyright protection indiscriminately,[53] it does not account for the contexts in which works are created or the ends that any particular work serves.[54] Under the most recent copyright-term extension, for example, one study suggests that 97% of the books kept under protection (that is, out of the public domain) were no longer in print.[55] Another study suggests that 94% of the movies, music, and books created between 1923 and 1946 are not commercially available.[56] But because these works are caught in the net of indiscriminate extensions of copyright duration, the public cannot access them. The lack of context sensitivity also does not account for the fact that some authors might not want to limit access to their works;[57] that copyright law ignores whole segments of the population;[58] and that copyright generally takes money out of the economy.[59] Furthermore, works in the public domain can inspire the creation of new works that contribute to education and culture, particularly because institutions that play educational and culture-enhancing roles (schools and libraries, for example) do not have extensive resources to spend on access to works.[60] And even

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W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006) [hereinafter Carroll, *One for All*]; Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 92 (2004) (critiquing the lack of flexibility and void of empirical data in copyright policymaking). William Landes and Richard Posner, who once considered the life-plus-fifty term economically efficient, call for reducing the uniformity costs of copyright law. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 362–63 (1989). Although they do not call for tailoring the duration of copyright, they advocate for reinstating formalities that operate to limit protection to those who actively demand it. *Id.* at 361–63; *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 249 (2003). Whatever the effectiveness of an approach that involves registration renewal, tailored durations can target areas that have a demonstrated need for a longer (or shorter) term of protection. This approach does not require action on the part of a copyright holder, and it more directly embraces copyright's purpose because the term of protection directly connects to how works in a particular medium are created and distributed. *See infra* Part III.

[53] *See* 17 U.S.C. § 302(a) (2012). Works made for hire are an exception. They receive 95 years of protection from publication or 120 years from creation, whichever expires first. *Id.* § 302(c).

[54] Although congressional studies have been done, those that highlight different market-impacts have not ultimately influenced copyright duration. *See, e.g.*, EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998).

[55] PATRY, *supra* note 37, at 201.

[56] LESSIG, *supra* note 48, at 228.

[57] *See* PATRY, *supra* note 37, at 193.

[58] *Id.* at 10 (identifying, for example, copyright's effect of preventing publication of books for the blind).

[59] *Id.* at 11.

[60] RAPPAPORT, *supra* note 54, at 3–4.

if there are no direct access costs because copyright owners will grant access for free, the cumbersome process of securing multiple permissions can foreclose an attempt to use those works.[61] Laws that work in conjunction with copyright, particularly the Digital Millennium Copyright Act (DMCA), compound the duration problem.[62] These laws further restrict access to works that carry public benefit, some of which is in the public domain.[63] Thus, economic sensitivity is important when considering copyright duration, particularly in areas in which the market consistently fails to support the varied interests that copyright serves.[64] Context-sensitivity also has a role in addressing this problem.[65]

This leads to the question of what interests should drive copyright's focus. The more copyright is viewed as a proprietary right, the harder it is to target the public interest.[66] As copyright protection has expanded, it has increasingly been treated as a property right rather than as an "instrument of expressive diversity."[67] And the more it is treated as a property right, as opposed to a tool of free expression, the less effective its communicative impact becomes.[68] Creativity might not be objectively measurable, but how copyright affects markets is.[69] An evidence-based approach to copyright duration, then, can fairly balance the interests of copyright owners and the public.

None of this suggests that a long duration is never appropriate. Less copyright protection will not always equate to more public access. A shorter duration, for example, could conceivably lead to higher access

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[61] *Id.* at 4.

[62] Neil Weinstock Netanel, *Copyright and the First Amendment: What* Eldred *Misses—and Portends*, *in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 127, 145 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (describing the anti-circumvention measures of the DMCA as a "paracopyright," which allows content providers to control access to content).

[63] NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 6–9 (2008).

[64] Liu, *supra* note 52, at 133 (identifying that uniform copyright terms do not make economic sense because of market differences in fields such as photography, software, and music); *see also* Landes & Posner, *supra* note 52, at 361–62 (suggesting that the commercial life expectancy of a work should affect the copyright protection it receives).

[65] *See, e.g.*, Carroll, *One for All*, *supra* note 52, at 900; Liu, *supra* note 52, at 92 (noting how the copyright-policymaking process does not effectively use expertise and empirical data).

[66] PATTERSON & BIRCH, *supra* note 40, at 313.

[67] Netanel, *supra* note 63, at 7.

[68] *Id.* at 217; *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589–90 (1985) (Brennan, J., dissenting) ("To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right.").

[69] *See, e.g.*, Landes & Posner, *supra* note 52; RAPPAPORT, *supra* note 54, at 3; RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 7 (2001).

prices because copyright owners will have less time to profit exclusively from their works. Of course, consumers might not be willing or able to pay that price.[70] And because most works naturally become less commercially viable over a short period of time,[71] an incentive already exists to initially charge as much as consumers will tolerate, so shortening the duration of protection could have little effect on the prices consumers pay. But this consideration highlights that the important question is what length of duration is necessary for authors to create works and for the public to access them. This is not a new question, but rather one that harkens back to the "social bargain" of the Statute of Anne.[72] Unfortunately, this bargain has been lost each time Congress has extended the duration of copyright protection. Copyright will always operate as a limited monopoly; that is its nature. But copyright is not naturally unlimited. Because copyright is constitutionally authorized and statutorily created, it should operate within its prescribed bounds: as a limited monopoly that is, in fact, limited, as opposed to effectively perpetual.

Because creation often depends so little on copyright protection,[73] using an evidence-based approach that seeks to maximize the production and distribution of authors' creative efforts makes sense.[74] The Register of Copyrights asserts that keeping the public interest in mind is a primary challenge, but that bold adjustments are needed, in part because of the problems posed by the "pressure and gridlock brought about by the long copyright term."[75] Tailored durations hold the potential to be a successful bold adjustment.

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[70] *See supra* notes 39 & 60 and accompanying text.

[71] RAPPAPORT, *supra* note 54, at 4–5 (noting that the "wildest dreams" of artists and producers probably include no more than ten years of healthy sales and that few works have a commercial life anywhere close to a period of 75 years).

[72] *See supra* note 33 and accompanying text.

[73] *See, e.g.*, HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 9 (Victor A. Ginsburgh & David Throsby eds., 2006) (highlighting the inner drive to create within many artists); TOWSE, *supra* note 69, at 6 (identifying that copyright does not *make* authors but can protect them).

[74] *But see* Mark P. McKenna, *Fixing Copyright in Three Impossible Steps: Review of* How to Fix Copyright *by William Patry*, 39 J.C. & U.L. 715, 717–19 (2013) (book review) (noting that an evidence-based approach to changing copyright law faces resistance in part because those on whom copyright exerts significant economic effects care a lot about what the regime looks like and resist change, and because lawyers are wedded to the current copyright system).

[75] Pallante, *supra* note 4.

III. THE IDEA OF TAILORED DURATIONS

> The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.*[76]

As the Supreme Court explicitly recognizes, stimulating artistic creativity should drive copyright's focus. But the primary focus of that stimulation is not to reward the author; it is to benefit the public.[77] Tailoring the durations of copyright protection by the medium[78] in which the copyrightable work exists should fuel that public-interest-focused drive. Because mediums of expression vary in the amount of funding required to spur the creation, distribution, and restoration of works, an economic sensitivity to these differences offers an evidence-based framework in which to determine how long copyright protection should last. By heeding the call that production can only be encouraged through an understanding of the markets in which copyright operates,[79] tailored durations hold the potential to reap copyright's intended benefits for the public and authors alike.

This is not a novel idea.[80] But the considerations that might inform a copyright regime with tailored durations remain unexplored. There is room for copyright to use an evidence-based model to achieve its end.[81]

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[76] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added).

[77] *Id.* ("[T]he primary object in conferring [copyright's] monopoly . . . lie[s] in the general benefits derived by the public from the labors of authors.") (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

[78] "Medium" here refers to a broad category of works—a film or a piece of music, for example. Of course, within each medium, expression takes on different forms. A film, for example, consists not only of the moving picture, but also of the written screenplay. Music, similarly, entails not just the sound recording, but also the written music and lyrics. This Comment does not attempt to differentiate among the different forms of expression within mediums. Although important, the focus here is only to highlight the type of considerations that might influence how to allocate tailored copyright durations.

[79] PATRY, *supra* note 37, at 77.

[80] *Id.* at 201 ("The length of copyright has to be dramatically cut back and tailored to each type of work. The failure to do so will continue to be devastating to the creation of new works and to the preservation of our cultural heritage. The time to act is now."); *see also* Carroll, *One Size*, *supra* note 52, at 1369 (assuming "that it would be more efficient to tailor intellectual property rights within the respective domains of patent and copyright law"). Notably, the U.S. Senate at least considered the possibility of tailored durations in the decades-long process that led to the 1976 Copyright Act. *See* DURATION OF COPYRIGHT, *supra* note 18, at 79–80. The report notes that the commercial value of a work could provide a basis for tailoring durations and highlights the tension between authors' interests and the public interest that lies therein. *Id.*

[81] *See, e.g.*, Pamela Samuelson, *Should Economics Play a Role in Copyright Law and*

By accounting for economic realities, copyright protection can focus on what is required to both stimulate the creation of new works and to enable public access to them. The ultimate aim is to balance the incentive for distribution with copyright's public-interest-oriented purpose.

A regime of tailored durations would not evaluate the capacity of a work to "promote the Progress of Science." Administrative complexity[82] and free-speech concerns[83] all but foreclose that possibility.[84] Thus, such a regime does not alter what works are copyrightable. But it would target areas that need a longer duration—less as an incentive and more as a legitimate means of actually creating works. Empirical evidence allows an objective analysis of classes of works that *generally* promote the public-oriented purpose that serves as the foundation of copyright law. This economic-driven approach, then, can "[s]trike[] the correct balance between access and incentives [that] is the central problem in copyright law."[85] This approach also comports with the Register of Copyrights' call to keep copyright "relevant and functional."[86]

Although tailored durations would not focus on the beneficial significance of a specific work, the broad benefit to the public lies in the background. Accordingly, the benefit to the author is not the guiding principle. Profit-related considerations notably impacted the duration of copyright protection in the 1976 Copyright Act.[87] But those considerations centered on the benefit to the author.[88] Under a regime of tailored durations, however, profit is relevant to the extent that it perpetuates the creation and dissemination of works within a medium. This type of approach is in line with the Supreme Court's repeated emphasis that copyright serves the public primarily and the author secondarily.[89] A brief

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Policy?, *in* DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT: RESEARCH AND ANALYSIS 1, 9 (Lisa N. Takeyama et al. eds., 2005) (observing that the absence of impartial economic analysis contributed to the passage of the Copyright Term Extension Act and the "overbroad and anti-competitive" DMCA).

[82] Carroll, *One for All*, *supra* note 52, at 900 ("[P]olicymakers have limited capacity for aggregating and acting on the necessary information about information-production.").

[83] See *infra* Part IV.A for a discussion of free-speech obstacles to the tailored-duration regime proposed here.

[84] Perhaps this is one reason why nothing came of the notion of tailored durations in the 1976 Copyright Act. *See supra* note 54.

[85] Landes & Posner, *supra* note 52, at 326.

[86] Pallante, *supra* note 4.

[87] *See* H.R. REP. NO. 94-1476, at 134 (1976) ("The tremendous growth in communications media has substantially lengthened the commercial life of a great many works.").

[88] *See id.* at 135 (highlighting the "striking statistical increase in life expectancy since 1909").

[89] *See supra* note 35 and accompanying text.

look at the stimulating effects of copyright in the movie, music, and book industries provides a glimpse of the tailored-duration approach.

A. Movies

Continuing profits from existing films provide critical capital to invest in new works.[90] Because of how the film industry funds new works and maintains existing works, film is a medium in which a longer duration of copyright protection provides public benefit. One estimate based on gross-profit data reflected that 22% of movies made during a 13-year span were profitable.[91] And 35% of those films earned 80% of those profits.[92] The uncertainty over how successful a particular work will be, based on both the feasibility of its production and the ultimate demand for its consumption, furthers the need to recoup money on films that succeed.[93] Thus, because these films will fund other works that are otherwise less likely to be created, the longer a successful film remains within the protection of copyright, the more that work spurs copyright's aim.

The expense of producing films highlights the risk that film studios take. A single feature film costs on average $50 million to create.[94] An additional $25 million might be spent on marketing.[95] Some of these films will produce a nice return on their investment; others will not. But for each successful film, there are hundreds of others that are beneficial to the public, if not to the producers. It is the profits from successful films that enable the production of the majority of films.[96] Because of the uncertainty over the financial success of a film, a continuing return on investment—even decades later in the form of television screenings, DVDs,

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[90] Brief for Amicus Curiae Motion Picture Association of America, Inc. in Support of Respondent at 12, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) [hereinafter MPAA Brief].

[91] Arthur S. De Vany & W. David Walls, *Motion Picture Profit, the Stable Paretian Hypothesis, and the Curse of the Superstar*, 28 J. ECON. DYNAMICS & CONTROL 1035, 1039–40 (2004).

[92] *Id.*

[93] *See* Carroll, *One for All*, *supra* note 52, at 855–56.

[94] MPAA Brief, *supra* note 90, at 12.

[95] *Id.*

[96] For a discussion of the increasing importance of the success of a few blockbuster movies in the film industry, see Jehoshua Eliashberg et al., *The Motion Picture Industry: Critical Issues in Practice, Current Research, and New Research Directions*, 25 MARKETING SCI. 638, 647 (2006), http://www.people.hbs.edu/aelberse/publications/Eliashberg_Elberse_Leenders_2006.pdf. As one film theorist states, "[a]lthough studios sink huge resources into blockbusters and tentpole pictures, they can absorb many weak films because income streams in from many other sources, from ancillary rights and television sales to DVD revenues and assets arising from large libraries of older films." KRISTIN THOMPSON, THE FRODO FRANCHISE: *THE LORD OF THE RINGS* AND MODERN HOLLYWOOD 258 (2007).

etc.—is important to the continuing production of works in the medium of film.

B. Music

The music industry similarly relies on the success of a few works to fund the majority.[97] But technology and the Internet have significantly changed the funding dynamic within the music industry. In 2008, for example, the website MySpace generated the same amount of new-talent discovery as professional referrals.[98] In fact, not only have the opportunities for self-promotion increased—sometimes self-promotion is necessary because music labels increasingly focus on promoting artists who are already known.[99] Thus, neither the creation nor distribution of musical works depends on music labels to the extent that it once did. The success of websites like YouTube further highlights the opportunities for self-promotion and distribution of an author's artistic labors.[100] The easy access and eager audiences of today's technologically advanced world allow music to be created and heard at little cost. Music can also be consumed quickly, with most songs lasting between three and four minutes, which increases accessibility and fosters the promotion of musicians by their fans. Because copyright protection does not influence this reality, the duration of copyright protection for music could reflect that. Whereas movies require large sums of money for both their creation and distribution, music reaches audiences in a different way. And because both new and established artists can self-publish and control the copyrights in their works, they largely circumvent the traditional music industry. Additionally, musicians can profit from more than just the music itself. They can, for example, perform live, which is an experience that cannot be copied, and sell merchandise to fund their creative endeavors. These economic realities reduce, at a macro level, the importance of a steady flow of profits in the music industry. Compared to movies, a longer copyright duration for music is less likely to spur the musical production from which the public and other authors benefit.

C. Books

The economics of the book industry also differ from those of the film industry.

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[97] *See, e.g.*, IVAN L. PITT, ECONOMIC ANALYSIS OF MUSIC COPYRIGHT: INCOME, MEDIA AND PERFORMANCES 13 (2010).

[98] *Id.* at 82.

[99] *Id.* at 83 ("Labels are no longer willing to risk resources on 'unknown' artists.").

[100] Indeed, YouTube can serve as a celebrity-making tool. *See, e.g.*, Tad Friend, *Hollywood and Vine*, The NEW YORKER, Dec. 15, 2014, at 42.

Books are not as costly to create: they do not require a comparable upfront investment from their authors and distributors.[101] Rather, a single person can both create and distribute a book, similar to the current realities in the music industry. Book publishers can play an important role in the traditional distribution and marketing of books, which are areas where funding is necessary. But the rise of digital books reduces costs without sacrificing revenue.[102] Moreover, because the book industry involves an oligopoly structure, published books are less diverse in content than they might otherwise be.[103] The result is that the less economic potential a book has, the less likely it is to reach the market.[104] Thus, unlike with movies (and to a lesser extent, music), economically successful books play less of a role in enabling books with an uncertain investment return to reach the market. And because digital books make self-publishing possible at low costs, the role of book publishers is further diminished. This counsels against a longer copyright duration because the funding stream that copyright protection supports is more attenuated from delivering both new and existing books into the hands of the public.

The inherent educational quality that books possess also carries significance.[105] Because knowledge flourishes when shared,[106] pooling knowledge is important to the progress of an educated public. Biographers and historians are two examples of authors whose educational efforts depend on the work of others.[107] But too great a focus on a proprietary copyright curtails the sharing of knowledge because copyright limits access to that knowledge.[108] When copyright ignores the social di-

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[101] *See* Alfred Hitchcock, *Films We Could Make*, LONDON EVENING NEWS, Nov. 16, 1927, *reprinted in* HITCHCOCK ON HITCHCOCK: SELECTED WRITINGS AND INTERVIEWS 165, 166 (Sidney Gottlieb ed., 1995). A single feature film costs on average $50 million to create, with up to $25 million spent additionally for marketing. *See* MPAA Brief, *supra* note 90, at 12. Costs to publish a book, on the other hand, vary widely, but one literary agent estimates that the average for a mid-list book is well under one-hundred thousand dollars. *See* Rachelle Gardner, *How Much Does It Cost to Publish a Book?*, RACHELLEGARDNER.COM (Feb. 5, 2008), http://www.rachellegardner.com/how-much-does-it-cost-to-publish-a-book/.

[102] *See* ALAN B. ALBARRAN, MEDIA ECONOMICS: UNDERSTANDING MARKETS, INDUSTRIES AND CONCEPTS 180 (2d ed. 2002).

[103] *Id.* at 178.

[104] *Id.*

[105] *See* PATTERSON & BIRCH, *supra* note 40, at 319 (emphasizing the concern with limiting access to books because of their role in learning).

[106] Giovanni B. Ramello, *Private Appropriability and Sharing of Knowledge: Convergence or Contradiction? The Opposite Tragedy of the Creative Commons*, *in* DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT: RESEARCH AND ANALYSIS, *supra* note 81, at 120, 124–25.

[107] PATRY, *supra* note 37, at 197.

[108] Ramello, *supra* note 106, at 132.

mension of learning, it also ignores one of its primary aims. A context-sensitive, discriminate application of copyright duration can balance both authors' interests in benefiting from their creations and the public interest in sharing knowledge, which is fueled by a robust creative commons.[109] Additionally, the fact that early copyright law focused primarily on books[110] and provided much shorter copyright terms than today's copyright law further suggests that a continuing expansion of copyright protection does not require more protection for the creation or dissemination of books.

D. Balancing Interests

Movies, music, and books contribute to both learning and culture. These are the public interests that copyright advances. To these ends, they should be valued. But copyright assures that authors (or their assigns) will receive compensation for their work. Even if this does not incentivize the creation of a work,[111] it will likely incentivize the distribution of it. And distribution allows the work to benefit the public. This highlights the need to balance copyright's benefit to the public and its benefit to the author. Generally, the public benefits from shorter durations while authors benefit from longer durations. But the economics within given mediums of works can shift that balance. Thus, when the current return on investment plays a more direct role in the creation and distribution of new works and the preservation of old ones, a longer duration is important to benefit both the public and the author.

The fact that authors frequently create regardless of an immediate reward affects this balance.[112] But just because inner artistic drives lead to creation independently of financial motive does not mean that authors do not deserve financial rewards for their work.[113] Tailored durations do not diminish this fact. That reward, however, should not be a monopoly that lasts indefinitely. The public interest cannot be lost, as the Supreme Court recognizes, and the realities of what spurs the creation and dissemination of works offer a practical way to avoid monopolies that provide little public benefit.

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[109] *Id.* at 136.

[110] For a survey of copyright-law language and proposals that focused on books and other written works, see Bently & Ginsburg, *supra* note 17, at 1588–95.

[111] *See supra* note 73. And in many instances, an automatically renewing copyright term cannot incentivize creation at all because the original author is dead. PATRY, *supra* note 37, at 197.

[112] *See* HANDBOOK OF THE ECONOMICS OF ART AND CULTURE, *supra* note 73, at 9 ("the 'inner drive' to create art may dominate financial incentives").

[113] Financial reward no doubt leads to the creation of more works. If authors can make a living on their artistic abilities, they will have greater time and incentive to produce more works.

Notably, copyright law already influences particular markets, particularly the music market, in targeted ways. Musicians' rights, for example, are limited by compulsory licensing,[114] which reduces the effect of market forces that would otherwise influence what musicians would receive for granting to someone else a right to use the original artist's work. Copyright law can exert a similar market influence by tailoring durations in light of how copyright duration affects markets. As a result, other authors (and, in turn, the public) will benefit because they can use predecessors' creations to create a larger body of works.[115]

Tailored durations hold the potential to balance the simultaneously competing and complementary interests[116] of authors and the public when they are based on economic realities. For some mediums, like movies, stimulating new works might require a longer duration, at the expense of the public domain. In others, like books, a shorter duration might be appropriate to give the public the same return on its investment. And still in others, like music, the changes that technology brings to the production and distribution dynamics must be accounted for. Markets can fail to regulate in ways that best achieve copyright's end. But the copyright regime itself should not fail its own purpose. A data-driven approach that grants copyright protection for a term of years that is suitable to the medium of expression can balance the learning purpose of copyright, the interests that lead creators to seek copyright protection in the first place, and the free-speech concerns of the First Amendment, to which I turn next.

IV. OBSTACLES TO TAILORED DURATIONS

A. First Amendment Objections

1. History of Copyright's Interplay with the First Amendment

Copyright inevitably implicates the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[117] But this is exactly what copyright does: it abridges speech. Of course, the abridgment arises from the Constitution's grant of power to do just that. But this does not mean that the abridgment of speech pays off. Ultimately, tailored durations can serve as a mechanism by which speech is abridged to promote copyright's original purpose.[118]

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[114] 17 U.S.C. § 115 (2012).

[115] *See* LESSIG, *supra* note 37, at 57.

[116] *See* Pallante, *supra* note 4 (highlighting that the issues of authors are intertwined with those of the public).

[117] U.S. CONST. amend. I.

[118] The fact that Congress's authority to grant copyright predates the First Amendment might suggest that the Copyright Clause carries more weight than the First Amendment's limits on Congress's ability to restrict expression. *See, e.g.*, Eldred

They hold the potential to find the appropriate balance in copyright's complementary relationship with the First Amendment.[119]

Because copyright is intended to be "the engine of free expression,"[120] and the Copyright Clause itself does not contain any content-related prohibition, the First Amendment is particularly relevant. Past First Amendment challenges to copyright-term extensions, however, have been unsuccessful.[121] In addition to the fact that copyright by its nature abridges speech, the Copyright Act's fair-use doctrine[122] and its protection of expression but not ideas[123] operate as sufficient safety valves to deflect free-speech concerns.[124] And granting copyright for only a limited time further reduces the burden on speech.[125] In the concluding words of Justice Ginsburg, writing for the Court in *Eldred v. Ashcroft*, "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[126]

Golan v. Holder,[127] the Supreme Court's most recent encounter with copyright's interaction with the First Amendment, further highlights the wide First Amendment latitude that Congress has when making changes to copyright. There, the Court permitted Congress to take works out of the public domain so that U.S. copyright law would conform to the Berne Convention.[128] The decision emphasized that the creation of new works is

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v. Ashcroft, 537 U.S 186, 219 (2003); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 910 (2003). But others argue that the contemporaneous adoption of the Copyright Clause and the First Amendment should not detract from free-speech concerns. *See* Netanel, *supra* note 62, at 140–42.

[119] Several commentators emphasize the importance of First Amendment considerations when considering changes to copyright. *See, e.g.*, NETANEL, *supra* note 63, at 10 (emphasizing that copyright should be tailored so that it best serves as an "engine of free expression"); PATTERSON & BIRCH, *supra* note 40, at 299–301 (highlighting that copyright cannot be understood without understanding its relationship with the First Amendment); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 893–94 (2002) (noting that the First Amendment does not immunize Congress's copyright authority but rather limits it to constitutional means).

[120] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[121] *E.g.*, Golan v. Holder, 132 S. Ct. 873, 878 (2012); *Eldred*, 537 U.S. at 194.

[122] 17 U.S.C. § 107 (2012).

[123] 17 U.S.C. § 102(b). This is commonly known as the "idea/expression dichotomy." *See, e.g.*, *Eldred*, 537 U.S. at 219.

[124] *See Eldred*, 537 U.S. at 219.

[125] Patterson & Joyce, *supra* note 118, at 915.

[126] *Eldred*, 537 U.S. at 221.

[127] 132 S. Ct. 873 (2012).

[128] *Id.* at 877–78; *see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 12, 102 Stat. 2853, 2860. Complying with the Berne Convention is a potential obstacle to tailored durations, as they would mark a shift from the largely

not the sole reason for Congress's ability to grant copyright protection.[129] It also reiterated that only an author's *expression* receives protection, leaving the facts and ideas expressed available for public use.[130]

2. Tailored Durations and the First Amendment

Because the duration of copyright triggers free-speech concerns, a nonuniform change could break the bounds of copyright's "traditional contours." Although not all works currently receive the same duration of protection,[131] the length of duration is not decided by the medium of expression. Thus, the "'talismanic immunity' from appropriate First Amendment scrutiny"[132] that courts have given copyright could weaken.

Tailored durations could be seen as altering the contours within which copyright has traditionally operated because there has not been a targeted focus on prescribing "limited times," which tailored durations require. But because copyright protection in published works arises solely from Congress's grant of it,[133] and because tailored durations would still operate for limited times, there seems to be nothing contour-changing about them. This, however, does not rule out the possibility that tailored durations implicate free-speech problems. The thought and expense required by implementing a regime of tailored durations highlights the importance of considering its constitutionality.

a. The Framework for a Free-Speech Challenge to Tailored Durations

Tailored durations shift the spotlight of free-speech concerns. Whereas challenges to the "limited times" provision focus on the right to use another's expression, here the potentially abridged right is the right to make one's expression exclusively. Thus, the people challenging tailored durations on free-speech grounds would not be the same as those who assert that retroactive extensions of copyright protection abridge free speech. Rather, the objection would come from people who believe that a nonuniform copyright duration unfairly favors some speech over other speech by discriminately granting the right to exclude others from speaking in a particular way[134] or denying the right *not* to speak.[135] Notably, a free-speech objection to tailored durations would challenge a re-

uniform application of copyright duration.

[129] *Golan*, 132 S. Ct. at 889.

[130] *Id.* at 890.

[131] *See supra* note 53 and accompanying text.

[132] Eric Barendt, *Copyright and Free Speech Theory*, *in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES, *supra* note 62, at 11, 29.

[133] *See supra* note 12 and accompanying text.

[134] Opponents of the Copyright Term Extension Act, however, also made this argument—unsuccessfully. *See* LESSIG, *supra* note 48, at 234, 240–41.

[135] *See infra* Part IV.A.2.f.

gime that ultimately has the effect of reducing speech burdens. Although such a claim might not be meritless, it is unlikely to be meritorious.

b. What the First Amendment Means for Tailored Durations at a Broad Level

The First Amendment limits the government from favoring some viewpoints at the expense of others.[136] When the government tailors access to some works to a different degree from others, it can be seen as censoring works, in direct contravention of the First Amendment's purpose.[137] This implicates the defining role that governmental purpose plays in First Amendment jurisprudence.[138]

The inquiry into governmental purpose informs whether a regulation on speech is content-based or content-neutral. Content-based challenges face strict scrutiny. The government must show that it has a compelling interest in the speech regulation and that the regulation is the least restrictive means of achieving that interest.[139] This essentially means that the government cannot restrict expression *because of* its message or content.[140] Content-neutral regulations, on the other hand, must be "narrowly tailored to serve a significant governmental interest."[141] A narrowly tailored regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests."[142]

But placing a speech regulation in the content-based or content-neutral category is not as obvious as it might seem. Nor is it as significant.[143] Because the Court at times dispenses with prescribing a level of

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[136] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

[137] *See* PATTERSON & BIRCH, *supra* note 40, at 317–18.

[138] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 60 (2001). A leading example of governmental purpose playing a role in First Amendment jurisprudence is *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), in which the Court struck down a ban on fighting words that targeted specific subjects and viewpoints. *Id.* at 386. Even though fighting words generally could be proscribed, targeting only specific expressions within the fighting-words category could not. *Id.* at 383–84 (providing that even wholly proscribable categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination").

[139] McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

[140] *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95, 102 (1972) (striking down a picketing ban that excepted only "peaceful labor picketing").

[141] *McCullen*, 134 S. Ct. at 2534 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989)).

[142] *Id.* at 2535 (quoting *Ward*, 491 U.S. at 799).

[143] *See* Erwin Chemerinsky, Lecture, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 213 (1994) ("[T]he prohibition against content-based discrimination is not useful in evaluating the

scrutiny and instead simply balances the nature of the regulation with First Amendment interests,[144] identifying the "right" scrutiny-level classification might be not only unhelpful, but also unnecessary. A court's focus could instead involve balancing the nature of the regulation and the First Amendment interests that the regulation accommodates.[145] The Supreme Court's "rational basis" approach to First Amendment challenges to copyright reflects this type of balancing.[146]

A content-based copyright surely would run contrary to free-speech rights.[147] But because Congress does not target specific messages or viewpoints when it enacts copyright law,[148] a rational-basis approach to challenges to the law's validity makes sense. Tailored durations do not change this fact. But even if tailored durations were to effectively regulate content, they are not necessarily doomed. This is likely true not only because of the lack of viewpoint discrimination in the government's purpose, but also because a regulation that is neutral to content on its face survives First Amendment challenges despite impacting particular messages in effect.[149]

c. Heightened Scrutiny

Despite the rational-basis approach with which the Court has evaluated changes to copyright, tailoring the duration of copyright protection based on medium of expression could be viewed by the Court as contour-changing. This perspective would probably trigger increased scrutiny, which means that a copyright regime containing tailored durations of

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conditions the government can impose when it is facilitating speech."). Because copyright facilitates speech, it operates as a communications policy. *See* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 366 (2004). Accordingly, "it is essential that judges, lawmakers, and academics understand the effects of the law on parties other than authors." *Id.*

[144] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[145] *See id.* Because copyright's protection of expression is inextricably linked to free speech, its role as a First Amendment institution demands that the First Amendment be "responsive" and "account for the variety of factual circumstances and contexts . . . in which public discourse actually takes place." PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 69 (2013).

[146] *See* Golan v. Holder, 132 S. Ct. 873, 889–90 (2012); Eldred v. Ashcroft, 537 U.S. 186, 213 (2003).

[147] PATTERSON & BIRCH, *supra* note 40, at 308.

[148] *See, e.g.*, Netanel, *supra* note 138, at 49 ("Copyright law stands outside [the] content-based rubric. . . . Its target is not the viewpoint, subject matter, or even communicative impact of the infringer's speech . . . ."). The content of expression enters the equation, however, when infringement is at issue. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) ("Copyright liability turns on the content of what is published.").

[149] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014); Hill v. Colorado, 530 U.S. 703, 719–20 (2000).

protection could not burden more speech than necessary if it is to survive.[150]

Here, again, remembering copyright's origin is critical. The nature of copyright arises from Congress's constitutional authority to create it, and fair use sufficiently accommodates the right to speak freely. Tailored durations would not negate the fair-use and idea/expression free-speech safeguards. In fact, tailored durations involve minimizing copyright's free-speech impact while furthering its public-oriented purpose. Notwithstanding calls to abandon copyright completely, this governmental interest is inarguably a legitimate one—and probably a compelling one, too, in light of the issues with copyright duration and uniformity.[151] The question then becomes whether the speech burden is greater than necessary. Answering this question requires understanding the areas in which the government already discriminates, and why it permissibly can.

The concern with the government's discriminating against the content of speech rests on the fear that the government could drive certain ideas or viewpoints from the marketplace in the absence of a court's exacting scrutiny of the regulation.[152] Because copyright endorses a rich marketplace of ideas, a content-discriminating regulation would disserve both the First Amendment and copyright—a constitutional double-whammy. But the entire purpose of tailored durations involves bolstering both copyright and the First Amendment by accounting for market influences on the creation and dissemination of expression within various mediums. This approach is blind to content and viewpoint alike.

d. The Funding Analogy

The government frequently discriminates against certain expression. Every time the government funds something with its limited resources, it chooses one expression at the expense of another—and permissibly so.[153] As long as the government maintains viewpoint neutrality when it makes content-based choices, it does not run afoul of the First Amendment.[154] Copyright similarly involves the grant of a right by the government—the right to exclude others from making the same speech. Because "copyright is a right against the world,"[155] the public interest is arguably stronger when the government grants copyright than when it funds art muse-

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[150] *See supra* notes 138–141 and accompanying text.

[151] *See supra* Part II.

[152] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[153] *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) (upholding mandatory student-activity fees even if students opposed some uses of those fees); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (upholding the government's "decency and respect" condition when funding art).

[154] *Southworth*, 529 U.S. at 230.

[155] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996).

ums and schools and libraries that select which speech they will distribute. Nor does funding have the same property-right gravitas of copyright. But because the government would not favor any particular message or viewpoint with tailored durations, would suppress less speech, and would exercise its broad copyright power, the "funding" analogy merely reinforces that the government can discriminate in the speech context.

A transparent and empirically inspired process to decide what durations of protection to give to particular mediums of expression would effectively negate an argument that the government is suppressing particular speech. Freedom of speech supports a robust marketplace of ideas, and tailored durations support copyright's contribution to it. Indeed, the entire purpose of tailored durations is to strike a balance between adding to the marketplace of ideas and reducing the burden on accessing that marketplace.

The fact that the government provides funding does not invariably mean that it can control the content of expression.[156] But the government can limit the speech for which that funding is used.[157] Thus, in *Rust v. Sullivan*, the government permissibly restricted medical providers that received government funding from offering abortion counseling or referrals.[158] Assigning tailored durations based on medium of expression would involve no consideration of the content of that expression. Rather, classifying copyright protection as government funding equates to the government's directing how that protection is used. In this light, the use of copyright protection targets the creation and dissemination of copyrighted works.

But the extent to which an expression's content or viewpoint factors into the government's decision does matter. Thus, the framework that the government employs to tailor copyright duration has significance. Tailoring durations based on content would be problematic.[159] This would be equivalent to requiring specific speech in order to receive a benefit—an unconstitutional condition.[160] Tailoring durations by medium, however, does not discriminate based on content or viewpoint because the medium of expression is open to everyone.[161] Ultimately, a reg-

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[156] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 199 (1991).

[157] *Id.*

[158] *Id.* at 179.

[159] *See supra* note 139 and accompanying text.

[160] The government can fund speech that favors particular viewpoints, but it cannot attribute that speech to particular people because then the funding would be conditioned on the content of the speech or the viewpoint of the speaker. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 73 (4th ed. 2008).

[161] A concentration of viewpoints within a particular medium of expression, which could result in de facto discrimination, would not be the result of government action.

ulation on expression is content-neutral if it can be justified without reference to content.[162] And even a speech restriction that effectively regulates content can pass constitutional muster if the content regulation is neutral on its face.[163] Thus, as unlikely as de facto discrimination would be as applied to a particular medium of copyrighted works, its existence would not necessarily be detrimental.

What is obvious is that the government must discriminate against certain content to efficiently and productively provide for the people it governs. This fact applies with equal force in the copyright realm, an area expressly created to serve the public interest. Not only does the government already discriminate through its grant of copyright,[164] it also discriminates through the fair-use defense by allowing others to use copyrighted expressions in only certain contexts.[165] And because the inquiry into fair use focuses on the "purpose and character of the use" of a work,[166] the fair-use determination depends on the content of the work. Fair use, of course, serves as a primary mechanism by which copyright *complies with* the First Amendment's free-speech concerns.[167] Because the considerations of character and use would similarly drive congressional determinations of how to tailor copyright durations, which hold the potential to reduce speech burdens, they should pass constitutional muster. And to the extent that the government "funds" expression with various grants of copyright protection, it would not be discriminating against the expressions that receive shorter copyright durations.[168]

e. Discriminating by Source of Speech

Discriminating against speech by source is not unconstitutional if there is not a threat of suppressing viewpoints and the regulation applies generally.[169] Thus, the government can impose taxes discriminately on some sources of speech.[170] Similarly, a law that prevents the dissemination of speech obtained by illegal means does not run afoul of the First

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[162] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[163] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014); Hill v. Colorado, 530 U.S. 703, 719–20 (2000).

[164] Not only do works made for hire receive a different copyright term from other works, *see supra* note 53, but some types of works receive additional rights. Works of visual art, for example, receive the "moral rights" of attribution and integrity. 17 U.S.C. § 106A (2012).

[165] *See* 17 U.S.C. § 107.

[166] *Id.* § 107(1).

[167] *See supra* note 122 and accompanying text.

[168] *See* ROTUNDA & NOWAK, *supra* note 160, at 72–73 ("The government does not discriminate on the basis of viewpoint if it merely chooses to fund one activity instead of another.").

[169] Leathers v. Medlock, 499 U.S. 439, 448–49 (1991).

[170] *Id.* at 448–53.

Amendment.[171] This, too, is because the law discriminates against source, not content, and aims to respect privacy.[172] Tailored durations fall within this source-discriminating framework. They do not target content or viewpoint, and they aim to support copyright's purpose.

f. The Right Not to Speak

Free speech also includes the right to choose what *not* to say.[173] From this perspective, a person who receives a shorter duration of copyright protection more quickly loses the ability to prevent others from making his or her expression than does someone who has a longer duration of protection. The shorter duration in which to make one's speech exclusively, however, does not depend on the content of the expression or on the speaker who is making it. Instead, the medium of expression operates as the distinguishing characteristic.

Tailored durations would aim to enhance copyright's constitutionally embedded purpose while simultaneously reducing its cumulative impact on the First Amendment. Because the government permissibly favors certain forms of expression in areas that more strongly implicate content, tailored durations likely pass First Amendment muster. And because copyright inherently burdens expression, a legitimate attempt to reduce that burden is unlikely to be too great.

B. Other Objections

1. Equal Protection

The significant leeway that Congress has been afforded within its copyright-lawmaking authority suggests that the First Amendment probably cannot combat tailored durations. But because the effect is to grant longer rights to speech that exists in particular mediums, the possibility of an equal-protection claim arises. Such a claim, however, is unlikely to succeed. As John Nowak and Ronald Rotunda explain, "If a statute regulating the use of public places for speech activities does not conflict with First Amendment principles, it almost certainly will be held not to violate equal protection because it does not improperly allocate the ability to engage in a fundamental right."[174] Tailored durations do not prevent a person from speaking. Rather, they inject certain expression into the

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[171] Bartnicki v. Vopper, 532 U.S. 514, 548–49 (2001) (Rehnquist, C.J., dissenting).

[172] *Id.* at 533–34 (majority opinion).

[173] *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985).

[174] ROTUNDA & NOWAK, *supra* note 160, at 77; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983). *But cf.* United States v. Kokinda, 497 U.S. 720, 733 (1990) (plurality opinion) (suggesting that the concern about disparate treatment of different forms of speech, rather than content categories, is better addressed under the equal-protection doctrine than under the free-speech doctrine).

public domain more quickly than other expression. Importantly, the favored expression would be based on its medium, which is independent of the personal characteristics of the speaker. Thus, the government would not be improperly targeting any person or characteristic of a person that could provide a basis for an equal-protection claim. Because the right to exclusively make one's own expression for a period of time is a statutory grant, Congress should have discretion as to how best to grant that right.

2. Lobbying Influence

Money from lobbying undoubtedly would influence the process of tailoring durations.[175] The fact that industries are built around mediums of expression amply demonstrates this likelihood. History reflects this, too. The decades-long process that led to the 1976 Copyright Act drew a lot of attention and resources from interested parties. These interest groups achieved success from their efforts.[176] But just because their attention will be piqued again is no reason to avoid a substantive change. Any substantive change to copyright will draw this attention. And the proposed regime of tailored durations can tap into empirical data to cut through much of the hyperbole and uncertainty that will surround the process. Industries with a vested interest in copyright will still hold some sway; that influence is inevitable. But it need not be undue. Those voices have a place at the table, but they should be heard in light of the reality of how copyright operates in specific markets.

3. Complexity

The process of deciding how to specifically tailor copyright durations seems like a Herculean task. The stakes for differently situated parties would inevitably contribute to lengthy hearings, as history suggests. And the fact that markets are dynamic invites one to wonder how prudent such an effort would be.[177] But at macro levels, more stability exists. Thus, a tailored approach to copyright duration that differentiates by medium of expression can offer a balanced approach to the granting of copyright's statutory monopoly. As the energy for a comprehensive change to copyright continues to build, a lengthy discussion is all but assured.

CONCLUSION

The First Amendment serves "a spirit that demands self-expression."[178] Copyright both promotes and inhibits such expression. It promotes expression by encouraging the sharing of ideas. It inhibits ex-

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[175] *See, e.g.*, LESSIG, *supra* note 37, at 267.

[176] Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 359 (1989).

[177] *See* Carroll, *One Size*, *supra* note 52, at 1391 (noting that complexity results in higher administration costs and that markets are likely to change).

[178] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

pression by discouraging others from expressing an idea in a substantially similar way. But the tension is not what it might initially seem. The reason copyright encourages ideas is to promote the public interest. And the public interest in learning furthers another frequently identified objective of the First Amendment: the discovery of truth.[179] Moreover, the self-expression that the human spirit needs is original expression. What lifts the spirit is not making someone else's speech, but rather expressing the feelings and ideas that flow through a person as a consequence of living.[180] Copyright does not abridge this sort of expression at all.

To the extent that copyright is a government-backed monopoly, it should be a monopoly that serves its purpose. Tailored durations could go a long way to revitalizing the learning and culture-enhancing purposes that inspired the first U.S. copyright law. Although untethered from its moorings, copyright need not be forever adrift. The increasing attention to copyright law's current problems provides energy for a change. The duration of the copyright term is widely critiqued. Equally criticized is the uniformity that predominates copyright law. What has received less attention is the potential to reduce uniformity by tailoring durations of copyright protection. Using mediums of expression as the primary factor in allocating copyright duration has the potential to be a workable solution to the uniformity problems.

Inevitably some content will be regulated through such a copyright regime, but the government's firmly established ability to limit expression through copyright is likely to mitigate a free-speech challenge, particularly in light of Congress's attempt to better effectuate copyright's purpose by tailoring its duration. To the extent that tailored durations do not achieve their goal, what might be an unsuccessful policy does not mean that it runs afoul of the law. Copyright has not faced First Amendment issues as Congress has pushed the law further from its limited nature. So the First Amendment should not stand in the way of an effort to bring copyright back to its purpose. There is nothing per se wrong with extending duration. But that duration should be extended discriminately if copyright is to uphold its bargain with the public.

However a person feels about the current state of copyright law, one thing is indisputable: the system is imperfect. Any meaningful change will necessarily be a substantive one. Getting the change right must account for the effect that copyright law has on the public interest, which remains as relevant today as it did in 1790 in the United States and in 1710 in

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[179] *See, e.g.*, Kagan, *supra* note 138, at 424. Some people advocate that the scope of copyrightable expression should be more directly limited, including in the areas of pornography and hate speech because of the injurious effects that they have on the spirit of others. *See, e.g.*, Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2174, 2192, 2233 (2015).

[180] Moreover, fair use expands the potential to tap into the expression of others, which tailored durations would not diminish.

England. Tailoring copyright duration based upon medium of work holds the potential to balance authors' interests in creating and benefiting from their work with the public interest in accessing that work and learning from it. Any copyright regime necessarily involves tradeoffs and will surely be imperfect. But by accounting for how copyright operates in particular markets, the law can move closer to its original public-interest purpose. This is, after all, the reason copyright law exists. It might as well work to achieve its objective the best that it can.