

Abstract:
Copyright's Hidden Assumption:
A Critical Analysis of the Foundations of Descendible Copyright

By
Deven R. Desai

Copyright operates under a hidden, erroneous assumption: heirs matter in copyright. This Article examines the possible historical and theoretical bases for the heirs assumption and finds that neither supports it. In short, the assumption is a myth that harms copyright policy and ignores a less obvious, but quite important, heir: society in general. An examination of the historical debates shows that the idea of providing for heirs through copyright has played a minor role in U.S. copyright history. Instead, heirs have been props to advance an agenda of furthering term extensions, advancing rent-seeking opportunities, and allowing authors to exert power against publishers. In addition, although copyright policy makers point to Europe and the Berne Convention as a key source for the heirs assumption, European debates that serve as the basis for the Berne Convention offer surprising and almost prescient sensitivity to ideas that are found today in the access to knowledge movement. One figure in particular, Victor Hugo, made an impassioned speech arguing that literary property protection must be operate as a way to found the public domain and asserting that when choosing between authors' rights and the public domain, the public domain must win. Furthermore, when one examines the dominant theories offered to justify copyright—from Lockean labor to Hegelian personhood to utilitarian theories—no justification for descendible copyright is found. Nonetheless the analysis of this material offers a way to understand that another heir, society, ought to be considered in copyright policy as a matter of intergenerational equity.

Rhetorical analysis of the historical and theoretical material investigated in this Article reveals that many seemingly different perspectives converge on two points. First, creativity is a communal, feedback-driven process involving a give and take between the current generation and previous generations. Second, the longer inputs to creativity are locked up, the more creativity and innovation are hindered and harmed rather than increased. These results pose an additional problem as they limit the material available for individuals to use as they develop what Martha Nussbaum has called the basic capability to experience and create expressive works. In short, despite the lack of support for the role ascribed to heirs in today's copyright policy, heirs have taken on a mythological importance that distracts copyright policy from its proper goal: promoting progress. As copyright extension debates continue world-wide and loom with the coming expiration of the Copyright Term Extension Act, this Article seeks to dispel the mythology and provide a more solid basis from which to determine copyright policy.

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By Deven R. Desai [‡]

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[‡] Associate Professor, Thomas Jefferson School of Law.

Introduction

Modern copyright law operates with a hidden, unsupported assumption: heirs matter for copyright policy. Simply put, the heirs assumption holds that copyright should extend beyond the life of the author because a key goal of copyright policy is to use copyright to provide for an author’s children.¹ This view privileges an author’s heirs and generates significant social costs by allowing heirs to extract rent and obstruct creators who wish to use material for further creation.² Despite these costs, the heirs assumption has animated and continues to inform copyright policy so that the assumption has now become a seemingly inviolable part of how one explains copyright policy. Yet, much to the detriment of copyright theory and policy, whether copyright should fulfill this function, was ever intended to fulfill this function, and the possible problems created by policy informed by such concerns have been under-theorized. This Article addresses these issues.

Although the standard or most popular explanation for intellectual property protection in U.S. law is utilitarian, with the goal of maximizing of social welfare,³ copyright policy in general—and the heirs assumption in particular—mixes Lockean labor and Hegelian personhood theories with economic arguments to support its presentation of copyright as real property. This blending of theories allows the heirs

¹ See 141 CONG.REC. S3390-02 (statement of Sen. Hatch) (assuming that “the postmortem protection of copyright was designed to benefit” “descendants” and “heirs” but not questioning or supporting that position); *Eldred v. Ashcroft*, 537 U.S. 186, 207-08 (2003) (discussing the legislative history and Congress’s focus on providing for children as part of the reason for the term extension); see also *infra* Part I.A.

² See *infra* Section II.C.2.a.

³ See e.g., William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169 (Stephen Munzer ed., 2001); accord Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 *CORNELL L. REV.* 1278, 1306 (2003) (“The economic rationale is widely accepted as the primary philosophical underpinning for U.S. copyright law and policy.”).

assumption to fashion a seductive myth whereby the author labors and should reap all the fruits of his labor. He also gives birth to his work, which is an extension of his personality. When he dies, this work lives on as his children manage, nurture, and grow the work so that it thrives for all to enjoy. This view then adds the economic claims that without descendible copyright, authors would lack incentive to create and, even if they did, their works would be lost, for no one would develop and exploit the works after the author died.⁴ An examination of the debates surrounding the Copyright Term Extension Act (CTEA)⁵ shows how powerful this story is for those seeking to expand copyright's duration.

At the time of the CTEA debates, copyright already lasted for the life of the author plus fifty years. The CTEA sought a term of life of the author plus seventy years: a twenty-year increase. Given the utilitarian/economic foundations of copyright law, one would expect that utilitarian/economic analysis considered in the debates would have supported such an extension. Yet, numerous Nobel laureates demonstrated that extending the then term by another twenty years would have little to no effect on the incentives already in place under a life plus fifty term.⁶

To be clear, this Article is not arguing about the propriety of the Supreme Court's ruling in *Eldred v. Ashcroft*,⁷ which upheld Congress's passage of the Copyright Term

⁴ See *infra* Section II.C.2.

⁵ 17 U.S.C. § 302 (2008). CTEA also extended copyright from seventy-five to ninety-five years for works made for hire, i.e., institutional or corporate works.

⁶ See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); (group of seventeen prominent economists, including Akerlof, Kenneth Arrow, Ronald Coase, Milton Friedman, and Hal R. Varian arguing that the extension from 50 years after life to 70 years provided miniscule increased incentive ("less than 1%") from the current life plus 50 term).

⁷ 537 U.S. 186 (2003).

Extension Act (CTEA)⁸ and can be understood as vindicating Congress's ability to do as it wishes regarding copyright.⁹ Instead, this Article considers that something other than utilitarian or economic theory must have been and continues to be at work whenever copyright's term is extended, as it was in *Eldred*. This Article argues that the heirs assumption is that something else.

The assumption invokes notions regarding the just disposition of property such that copyright in some sort of moral sense should be treated as real property that an author can leave to heirs.¹⁰ Yet, once one probes the heirs assumption, one finds it lacks any historical or theoretical basis. Instead, the assumption hides rent-seeking behavior, clashes between authors and publishers regarding who can extract that rent, and political maneuvering by the copyright industry; all of which are behaviors that copyright policy ought to avoid and/or prevent. In addition, the image of stealing food from heirs permits the debates to marginalize society's interest in a robust creative system with lower costs regarding the access to and use of knowledge and information.

As a policy matter, because current and future copyright debates do and will seek extensions, the question of descendible copyright must be addressed. For example, the European Union seems to be mimicking events surrounding the passage of the CTEA. Despite a report by Cambridge University's Centre for Intellectual Property and

⁸ 17 U.S.C. § 302 (2008). CTEA also extended copyright from seventy-five to ninety-five years for works made for hire, i.e., institutional or corporate works.

⁹ Indeed, the questions on certiorari were "whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights violates the First Amendment." *Id.* at 199. The Supreme Court answered both "in the negative." *Id.*

¹⁰ In that sense the heirs assumption parallels the romanticized view of the home in American law which arguably vaunts broad claims about the way home functions in society and ignores evidence of the way in which home ownership law foster rent-seeking and other less desirable behaviors. *See generally* Stephanie Stern, *Residential Protectionism and the Legal Mythology of the Home*, 107 MICH. L. REV. (2009) (forthcoming) available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1147714#.

Information Law¹¹ and several other studies¹² showing that extension is not necessary for performers and sound recordings, the European Union has proposed a copyright term extension for those categories.¹³ In addition, the copyrighted material at issue when Congress passed the CETA will enter the public domain in the next decade. With another round of term extension debates occurring overseas and the way in which the copyright industry fought for the last round of term extensions, further term extension debates are almost guaranteed to occur here in the United States.¹⁴ Indeed, one author and policy writer has already argued that Congress ought to extend copyright once more “as far as [Congress] can throw,” which for the author would be a never-ending, perpetual term.¹⁵

In other words, copyright extension questions arise and will continue to do so. The justification for such extensions is the key issue. When Congress is asked to extend copyright again, the alleged importance of heirs¹⁶ and the role they play in copyright policy must be better understood. For, as demonstrated within, the CTEA and *Eldred* are not the first time that heirs were used as a prop to support copyright term extension. The

¹¹ Centre for Intellectual Property and Information Law, *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings* (2006) available at http://www.hm-treasury.gov.uk/media/B/4/gowers_cipilreport.pdf

¹² See Comment, *Copyright extension is the enemy of innovation*, TIMESONLINE, July 21, 2008, (editorial signed by seventeen professors and noting the “a study conducted by the Amsterdam Institute for Information Law for the Commission itself (2006); and the Bournemouth University statement signed by 50 leading academics in June 2008” as additional information available but not considered by the EU in crafting its proposal) available at <http://www.timesonline.co.uk/tol/comment/letters/article4374115.ece>

¹³ See Nate Anderson, *EU Caves to Aging Rockers, Wants 45-year Copyright Extension*, ARS TECHNICA, July 16, 2008, available at <http://arstechnica.com/news.ars/post/20080716-eu-caves-to-aging-rockers-wants-45-year-copyright-extension.html>

¹⁴ See William Landes and Richard Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 483 (2003) (“There will always be some copyright holders whose income will be diminished when their works fall into the public domain, and they have an incentive to seek retroactive extensions as the end of the copyright term draws near.”)

¹⁵ Mark Helprin, *A Great Idea Lives Forever. Shouldn't Its Copyright?* NY TIMES, Section 4, May 20, 2007

¹⁶ See *Eldred supra* note 1, 537 U.S. at 207-208 (discussing the legislative history and Congress’s focus on longer life span and providing for children as part of the reason for the term extension).

mythological importance of heirs to copyright has often offered a moving but baseless way to expand copyright while advancing other agendas.

Proposals for extension go to the heart of how one justifies the copyright system and the way in which copyright does or does not operate as an engine of creation and innovation. Current doctrine accepts that heirs are essential to the copyright system, yet the doctrine fails to offer a coherent explanation as to why heirs matter *at all* and to consider whether society's interests outweigh whatever heirs' interests may exist. In addition, there is little evidence to support the idea that heirs play the role ascribed to them. As such this Article uses historical, philosophical, and economic analysis to fill this gap in understanding so that future debates regarding copyright extension may focus on building a system that fosters innovation and are not distracted or driven by myth.

Several matters must be addressed to unravel the roots of the heirs assumption and whether descendible copyright is the correct way to think about copyright's duration at all. Part I of this Article examines the way in which current and past debates regarding copyright duration perceived heirs. This Part uses close reading and rhetorical analysis of the debates to show how the heirs assumption manages to capture the imagination of policy makers. In addition, it shows that although heirs are part of the debates, they do not have the importance or traditional role ascribed to them in the assumption's current formulation. Instead, this Part shows how several other concerns animated the duration debates such as whether copyright should last at least as long as an author lives to whether authors or publishers should benefit after a copyright expires to the nature of copyright as property to the importance of the public domain. Furthermore, although the European view of copyright which is typically characterized as being highly author-

centric, is a key source offered to support the heirs assumption, an examination of the European debates leading up to the passage of the Berne Convention reveals that Europe placed society's interest in having a public domain that fed the creative cycle on par with, if not superior to, authors' property interests in their work.

Part II looks to the major philosophical justifications of copyright to see whether theoretical arguments ever support expanding copyright's duration beyond an author's life. As part of the analysis, the section on draws on recent economic and empirical studies regarding creation and copyright to show what other copyright-related interests are affected by descendible copyright and to demonstrate where heirs fit into those understandings. Although the theories offer compelling arguments for copyright to last as long as an author is alive, they provide little support for the idea that heirs ought to inherit copyright. Moreover, recent empirical and economic work indicates that delegating control over these works to heirs unnecessarily reduces the availability of inputs needed for creation and so curtails or retards the pace of new creation and innovation. Although the heirs assumption claims that heirs will be good custodians of an author's works,¹⁷ evidence suggests that heirs are often poor custodians of works¹⁸ who extract rent and do not appreciate the way in which the actual author required inputs to foster the creation in the first place. Thus, both historical arguments and philosophical theories demonstrate that a just copyright system would curtail heirs' control over copyrighted works. In addition, both history and theory recognize a different heir that the current heirs assumption ignores: society.

¹⁷ See *infra* notes 30 to 33 and accompanying text.

¹⁸ See *infra* Section II.C.2.a.

As such Part III explores society's place as an heir to creative works. Although there is a tradition of descendible tangible property, intangibles—such as copyrights—have less reason, and perhaps no reason to be descendible. Intangible property's nonrivalrous nature alters the analysis of the issue. Unlike tangible property intangible property is capable of simultaneous use by many. In addition, intangibles such as copyrighted works serve as inputs to creation. They are part of a cycle in which an author takes someone else's output, uses it to create, and then that new creation serves as the input for yet more creation by others. Furthermore, the concept of intergenerational equity—what one generation owes future generations—militates in favor of allowing society in general increased access to the copyrighted material which it helped spawn in the first place. In short, society may be as much an heir to copyrighted work as an author's lineal descendents.

Simply put, as a question of historical, philosophical, and economic inquiry, this Article finds that although there is strong support for copyright to last as long as an author's life, there is little, if any, support for descendible copyright. Heirs don't matter, or at least should not matter, in copyright policy. In addition, once one considers the way in which such material fits into creative systems as spillovers (as inputs for further creation), not only is descendible copyright not supported, but strong arguments point to limiting it.

As a point of clarification, this Article does not argue that copyright cannot have a relatively long term. Instead, it rejects the idea that protecting heirs was part of copyright's policy and the idea that heirs provide a coherent basis for establishing and justifying what the proper duration of copyright should be. Furthermore, this Article

argues that focusing on heirs of authors vaunts near-term, narrow beneficiaries of creation and neglects the long-term, broader beneficiaries of creation, namely society in general. As such, although full consideration of what the proper length of copyright's term should be is beyond the scope of this Article, Part IV offers some theoretically coherent examples of alternatives to the current model of heirs-based duration and invites further discussion of that topic.

I. Historical Analysis: An Examination of Heirs' Role in Copyright Debates

Currently the heirs assumption is an accepted truth in copyright doctrine. To understand how the assumption has taken hold, section I.A analyzes the recent ways Congress has embraced and deployed it. Section I.B then traces the evolution of the expansion of copyright duration in U.S. copyright history to see whether the assumption has any basis in that history. Last, because U.S. copyright law invokes the Berne Convention as part of the justification that copyright doctrine must protect heirs, section I.C looks to European copyright history to see whether it supports the myth that part of copyright's purpose is to protect heirs.

A. The Recent Past: CTEA's Invocation of the Heirs Assumption

In passing the CTEA, Congress faced a problem. The Copyright Act already provided a term of life of an author plus fifty years. The call was to add another twenty years to the term for individual authors making the term life plus seventy years. How,

then, could one support a claim for another twenty years of protection? Congress first claimed to be addressing the “question of whether the current term of copyright adequately protects the interests of authors and the related question of whether the term of protection continues to provide a sufficient incentive for the creation of new works of authorship.”¹⁹ In claiming that term length “relate[s]” to the “interests of authors” and to “incentives to create” Senator Hatch’s language reveals some assumptions: creators will only create if given an incentive and term length somehow informs the incentive model.²⁰ Whether these views are supported is to be seen. For now, it is important to discern the assumptions as they will later connect to heirs.

Senator Hatch also noted that the life plus fifty term came from the Berne Convention and offered “While the Berne Convention's prescriptions as to duration are quite precise, there has never been any real effort made to justify why, or to explain how, these terms have come to be adopted.”²¹ He even declared that despite the Berne Convention and almost one hundred years of life plus fifty in international copyright, “I do not believe that [life plus fifty] should be accepted uncritically as an ideal or even sufficient measurement of the most appropriate duration for copyright term.”²² At this point one might think that Senator Hatch intended to question the idea of copyright persisting past life. But given that he was sponsoring an extension of the term, his critical examination focused only on reasons to support the additional twenty years such as other country’s longer copyright terms.²³

¹⁹ 141 CONG.REC. S3390-02 (statement of Sen. Hatch) (citing and quoting SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC RIGHTS 1886-1986, 321 (1987)).

²⁰ *But see* Akerlof et al., *supra* note 6.

²¹ *Id.*

²² *Id.*

²³ *Id.* (“[W]e should be aware of the many nations that have historically provided longer terms of copyright as well as the recent developments to extend copyright in Europe.”).

Senator Hatch looked at one other perspective to support the extension:

Also, we need to examine the real-life experience of creators, their reasonable expectations for exploiting their works, and the concerns and views of the descendants, heirs, and others whom the postmortem protection of copyright was designed to benefit.²⁴

Here one sees the myth in stark form. The CTEA never questioned the idea of descendible copyright. It only considered authors' *and their heirs'* views; no one else's. In addition, the phrase "whom the postmortem protection of copyright was designed to benefit" reveals a lack of critical thinking about postmortem rights in favor of a simple acceptance of the idea as sound.

Furthermore although Hatch appeared to look at a range of views to assess the "practical aspect[s]" of the proposed extension,²⁵ Hatch only looked at how the CTEA "matters to some of the most distinguished members of America's cultural and artistic community."²⁶ He then evoked nostalgia by noting how songs by George Gershwin, Irving Berlin, George Cohan and others had fallen into the public domain despite being "widely performed in theaters and through media around the world."²⁷ If that is not enough, Hatch offered that without fast action other works such as "'Rhapsody in Blue' by George Gershwin; 'My Buddy' by Walter Donaldson and Gus Kahn; 'What'll I Do' by Irving Berlin; 'Georgia' by Walter Donaldson and Howard Johnson; 'It Had To Be You' by Isham Jones and Gus Kahn; 'Showboat' by Jerome Kern and Oscar Hammerstein II'" would have entered the public domain.²⁸ Yet why should this possibility matter? Is there a problem with having more people being able to perform and

²⁴ *Id.*

²⁵ *Id.* ("What works are we talking about? Who is affected by this legislation?").

²⁶ *Id.*

²⁷ *Id.*; see also William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 908 (1997) (calling the parade of names "horror stories").

²⁸ See *supra* note 19 (statement of Sen. Hatch).

sing songs? These song writers are dead. No incentive could make them generate more music. To support the extension, Hatch needed a more compelling image than the dead so he turned to pathos and heirs.

Hatch begins this switch by focusing on one songwriter:

I would like to draw particular attention to the career of Walter Donaldson. ... If the present copyright law had been in effect in the 1920's, all of Walter Donaldson's compositions would fall into the public domain within the next 2 years. Yet these historical facts should not mislead us into thinking that the copyright status of his works is an academic issue.²⁹

Then comes the move to heirs: “For it was Ellen Donaldson, the composer’s daughter, who first alerted me to the importance of this issue only 2 years ago.”³⁰ To Hatch the fact that Ms. Donaldson “remains extremely active in publishing and exploiting her father's music and in protecting his copyrights” supports extension and “Like the children of composers such as Richard Rogers, Irving Berlin, Richard Whiting, Hoagy Carmichael, and many, many others, her legitimate interest in her father’s copyrights.”³¹ Indeed,

Hatch asserts:

from interviews I have had with writers, authors, and artists of all kinds, and from the hearings we have held on issues of concern to authors in the Judiciary Committee over the past 18 years, I have come to the conclusion that the vast majority of authors expect their copyrights to be a potentially valuable resource to be passed on to their children and through them into the succeeding generation.³²

One should not be surprised that precisely those benefiting from the extension might believe that copyright was designed to care for heirs and that its term should be extended. The views (or assertions) of the authors and their heirs who now extract rent from royalty streams is poor evidence as to whether copyright was designed to protect heirs. Even if

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

one accepts the idea of descendible copyright, the views fail to show why it should be extended. Yet Hatch's argument worked. Why?

Hatch accomplishes several things that can lull one into thinking he has offered a sound basis for extension. He uses the memories of long dead composers and famous songs with which many associate warm feelings to draw one into a sense of worth for the creation. Then the false problem is stated: some copyrights have already fallen into the public domain.

He extends the problem and the supposed threat by layering on name after name of songwriter to give the appearance of loss to individuals as songs enter the public domain but never states the harm to those composers. And indeed he cannot state it just yet, for the composers are dead. Hatch then tells the tale of one composer but cautions that it is not "academic," because his daughter now manages the copyrights. She does not just manage them; instead she is "extremely active in publishing," "exploit[s] her father's music," and "protect[s]" his copyrights." Who would not want to protect such an industrious child? She and many other children—children in their fifties, who may or may not be such good custodians—have "a legitimate interest" in the copyright and its extension. All of which allows Hatch to proclaim "[T]he inescapable conclusion must be drawn that copyrights in valuable works are too often expiring before they have served their purpose of allowing an author to pass their benefits on to his or her heirs"³³ without ever showing that this purpose was ever in place let alone it being underserved.

As such when the CTEA was passed Congress assumed that copyright is designed to protect heirs. Nothing supported that assumption. Nonetheless, it may be that this

³³ *Id.*

assumption was accurate at some time in copyright history. The next sections address this issue.

B. Historical View of Heirs in U.S. Copyright Law

A brief history of U.S. copyright elucidates that although heirs played a role in the copyright debates, rather than being a central concern, heirs were used as props to advance other interests at stake regarding copyright's duration. Students of copyright history know that U.S. copyright law traces its origins to England's Statute of Anne.³⁴ Following the English model, under the 1790 copyright statute, U.S. copyright had an initial term of 14 years with the possibility of an additional 14 year term if the author was alive at the end of the first term.³⁵ England moved away from this model such that in 1842 the term was "42 years or the life of the author plus seven years whichever should be longer."³⁶ By 1911 England had moved to the continental European model of life of the author plus 50 years.³⁷

In contrast, despite modifications to the Copyright Act such as making the first term 28 years but retaining a 14 year renewal term,³⁸ and further extending the potential term so that the first term was 28 years and so was the renewal term,³⁹ the United States

³⁴ See e.g., James J. Guinan, DURATION OF COPYRIGHT, COPYRIGHT OFFICE STUDY NO. 30, 57 (1957), in 1 STUDIES ON COPYRIGHT 473, 475 (1963).

³⁵ *Id.*, accord 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 7:7 (2008).

³⁶ Guinan, at 57.

³⁷ *Id.*

³⁸ See PATRY, *supra* note 35, § 7:8.

³⁹ See 17 U.S.C.A. § 24 (1909, repealed in 1947); accord, PATRY, *supra* note 35, § 7:10.

did not adopt a life of the author plus an additional number of years approach to duration as England and continental Europe had done until the Copyright Act of 1976.⁴⁰

One may think that arguments for life of the author and pleas about penury during the author's life and/or for the children did not arise in the United States. That is not so. U.S. authors knew of Europe's life-plus-fifty model and sought similar, longer protection for copyright. Throughout the history of copyright term expansion, authors offered several arguments to obtain and justify that expansion. Although it was not until 1976 that the United States embraced a copyright term that mirrored Europe's approach, the myth of authors needing longer terms to provide for heirs can be found in the first and succeeding extension pleas. As shown below these tales were nothing more than tales. Nonetheless, understanding them demonstrates the way heirs were used to support extension and mask economic grabs and reveals how this myth grew over time.

1. The 1831 Revision

By the time of the first major revision of U.S. copyright law, prominent writers focused on obtaining a longer term including the possibility of perpetual copyright.⁴¹ Indeed, the revision itself arose in part because of Noah Webster's relationship (father-in-law) to William Ellsworth, the man who introduced the revision legislation.⁴² Webster was concerned that the copyright for one of his books was about to expire and asked

⁴⁰ See PATRY, *supra* note 35, § 7:10. ("Whatever the reason, the decision not to provide a term measured from the life of the author was not reversed until the 1976 Act.")

⁴¹ See PATRY, *supra* note 35, § 7:8 (detailing Noah Webster's letter to Daniel Webster "advocating perpetual protection.") Although the two men shared the same last name, they were not related.

⁴² *Id.*

Ellsworth for a special law to protect the copyright.⁴³ When that effort failed, Ellsworth proceeded to introduce the revision legislation.⁴⁴ The report on the proposed bill was based on Noah Webster’s views of copyright.⁴⁵ The arguments expressed by Webster touched on several points, but the underlying theme was that perpetual copyright should be the norm.

First, although the committee was cleaning up “provisions which are useless and burdensome,” the claim was that the project was “chiefly to enlarge the period for the enjoyment of copy-right, and thereby to place authors in this country more nearly upon an equality with authors [in] other[] countries.”⁴⁶ The report starts with the familiar plea of the poor family lacking a means to sustain itself if the author dies.⁴⁷ It then looks to England to show how its copyright law had progressed and was arguably superior to the United States:

In England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided in Parliament, by a small vote, in the case of *Millar vs. Taylor* in the year 1769, and contrary to a decision of the same case in the King's Bench, that the statute of Ann had abridged the common law right, which, it was conceded, had existed, instead of merely guarding and securing it by forfeitures for a limited time, as was obviously intended. But Parliament, feeling the injustice of the statute of Ann, thus construed, afterwards passed a statute, which is now the law of that kingdom, securing to an author a copy-right for twenty-eight years, and if he be living at the end of that period, for his life.⁴⁸

By starting with the claim—an overstated one—that England had perpetual copyright, the report suggests that a long, as in unending, term for copyright is just, but even when a

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* (“In the United States, by the existing laws, a copy-right is secured to the author, in the first instance, for fourteen years; and if, at the end of that period, he be living, then for fourteen years more; but, if he be not then living, the copy-right is determined, although, by the very event of the death of the author, his family stand, in more need of the only means of subsistence ordinarily left to them.”).

⁴⁸ *Id.*

country decides otherwise, it should approach a life term length. The report hammers this idea of a life term, if not perpetual term, by noting that France moved from life of the author then “to his widow for her life and then to his children for twenty-six years” to life plus fifty; that Russia had life plus twenty, and that Germany, Norway, and Sweden recognized perpetual rights.⁴⁹ In short just as modern copyright debates have claimed that term extension was required in part because the United States was behind the rest of the world,⁵⁰ the 1831 report argued that the United States lagged behind the rest of its peers.⁵¹

The report explicitly expands the perpetual copyright theme by tying it to labor, justice, and shame. The labor appeal is a distinctly Lockean view: “Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor.”⁵² Again the idea of perpetual copyright is offered to show just how far one might go with copyright term. In addition, given the audience—members of Congress a.k.a. men of letters—when the report admits that literary property is “peculiar” but asserts “it is not the less real and valuable,” it sets up the unspoken justice claim: “If labor and effort in producing what before was not possessed or known, will give title, then the literary man has title, perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman.”⁵³ By equating the manual labor of the mechanic and husbandmen with

⁴⁹ *Id.*

⁵⁰ See Neil Netanel, COPYRIGHT’S PARADOX 182 (2008).

⁵¹ See PATRY, *supra* note 41. (“It is believed that this comparison shows that the United States are far behind the States of Europe in securing the fruits of intellectual labor, and in encouraging men of letters.”)

⁵² *Id.*

⁵³ *Id.*

the labor of the writer,⁵⁴ the report not only says writing is real work but that it should have the same reward—“title”; not just title but “title, perfect and absolute.”⁵⁵ Put differently, how could the high work of men of letters not receive the same protection as the manual laborer’s? This pure property view might support the ability to leave copyright to heirs, but it would also allow an author to leave the copyright to someone other than an heir.

Indeed, other than a brief mention that under the prior law an author’s heirs may lose out if the author died before renewal,⁵⁶ the report never provides more as to why heirs matter, nor offers a theoretical foundation or reason *for trying to protect heirs*. Arguably the Lockean theory animating the author’s stake provides her with “title, perfect and absolute”⁵⁷ and thus implies an author should be able to bequeath the title to heirs. Yet, as discussed below, whether natural rights theory supports that view of inheritance is suspect.⁵⁸ In addition, heirs do not explicitly enter the report save for some notion that authors seem to fail to care for their heirs and the law must do so. Furthermore the view of another possible heir’s interest, the public as heirs at large, is not even acknowledged in the report. It was only during the floor debate that this interest received attention.

During the debate one person, Rep. Hoffman, argued that “The people had rights to be secured as well as authors and publishers.”⁵⁹ Indeed, in language presaging some of today’s arguments about copyright, Hoffman asserted that “There was an implied

⁵⁴ *Id.* (“The scholar, who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors: the planter, the mechanic, the professional man, cannot prefer a better title to what is admitted to be his own.”)

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *infra* Section II.A.2.

⁵⁹ PATRY, *supra* note 41.

contract between them and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate; and the latter, therefore, had the right to avail themselves of the work, when the copyright expired.”⁶⁰ Several members attacked this view. Some argued that there was not a contract,⁶¹ and others that the current law ignored the requirements of the justice due to one who labors.⁶² Nonetheless neither perpetual nor life plus a number of years became the term. It was only after the debates that one can see what consideration heirs may have played for the man who had lobbied for the extension.

After the decision Noah Webster stated his pleasure at being able to “add much to the value of my property, and I cannot but hope I may now make dispositions of copyright which will make me comfortable during the remainder of my life, and secure to Mrs. Webster, if she should survive me, a decent independence.”⁶³ This statement shows that because of the term structure in place Webster did not have the full opportunity to benefit from his work during his life—a problem with which theory and intuition may agree requires a solution. But it also suggests that an author does not have to exploit copyright and manage the income well during his life and thus provide for heirs based on that income. Instead, an author can fail to provide for a spouse or heirs, because the copyright will provide rent in years to come.⁶⁴ In addition, the idea that property must be descendible and that inheritance poses no problems for society has been questioned by Locke and Blackstone—the very theorists often called on to support the real property

⁶⁰ *Id.*

⁶¹ *See id.* (Statement of Huntington arguing the act was one “of pure justice.”).

⁶² *See id.* (Statement of Verplanck: “There was no contract; the work of an author was the result of his own labor.”).

⁶³ *Id.*

⁶⁴ *Cf. Stern, supra* note 10.

treatment of intellectual property. Indeed this revision went away from the pure property approach in its treatment of alienability and the surviving spouse and heirs question.

The revision provided for surviving spouses and children by securing renewal rights to them even after an author's death.⁶⁵ But as William Patry notes, in deleting the term "assigns" from the act, pure alienability by will was eliminated.⁶⁶ The act protected specific relations and took a paternalist view that the rights could only go to those relations. The reason for this shift was the animosity between living authors and publishers;⁶⁷ *not a concern for heirs as needing succor*. So the protection of heirs does not seem to have been the real focus of the extension; and if it was part of the goal of the revision, exactly what grounded that goal is unclear.⁶⁸ For now, it is important to see that the labor and justice arguments drove the debate. Heirs enter as an afterthought at best. Nonetheless this early debate shows the seeds of copyright views to come and how heirs are more of a prop rather than a central concern to those who wish to expand copyright's term.

2. The 1909 Revision

The 1909 revision extended the renewal term from 14 years to 28 years for a total initial term of 28 years and a renewal term of 28 years.⁶⁹ Again given the result, one might think that longer duration such as life of the author or perpetual copyright did not

⁶⁵ See PATRY, *supra* note 41.

⁶⁶ *Id.*; accord Pierre N. Leval and Lewis Liman, Are Copyrights For Authors or Their Children? 39 J. COPYRIGHT SOC'Y U.S.A. 1, 2-3 (1991)

⁶⁷ See PATRY, *supra* note 41. ("The limitation on the renewal term for the benefit of the author's surviving spouse and children was expressly directed against publishers[.]").

⁶⁸ See Leval and Liman, *supra* note 66, at 1.

⁶⁹ See PATRY, *supra* note 35, § 7:10.

enter the debate. Again that is not so. Life plus a term of years was presented as an option in Congress. In addition, another important literary figure, Samuel Clemens (a.k.a. Mark Twain) influenced the views.⁷⁰ An examination of the Congressional positions and especially Clemens's statement shows that arguments began by Noah Webster persisted and indeed grew. Once more solid foundations for their positions were not offered. Nonetheless they pressed for an expanded copyright term by again invoking notions of literary labor, justice, shame, and more directly tugging at heart strings through images of impoverished descendants.

a. Views in Congress

Several interested trade representatives testified regarding the proposed changes to the copyright act.⁷¹ The Authors League,⁷² The American Copyright League,⁷³ The Music Publishers' Association of the United States,⁷⁴ and National Institute of Arts and Letters,⁷⁵ supported life plus fifty years as the term.⁷⁶ A prime reason offered for the life plus fifty term was that European countries had moved to such a system.⁷⁷ The American

⁷⁰ See e.g., Siva Vaidhyanathan, ©OPRIGHTS AND ©OPYWRONGS, 35-80 (2003) (surveying and examining the way in history around the idea of "literary copyright" and Clemens's role and influence in a particular view of copyright); accord PATRY, *supra* note 35, § 7:10.

⁷¹ See 1 Legislative History of the 1909 Copyright Act, Part C, at xv, E. Fulton Brylawski & Abe Goldman eds. (1976) [hereinafter 1 Legislative History, Part C] (listing more than twenty seven different trade groups encompassing publishers, authors, performers, artists, photographers, advertisers, musicians, and more interests).

⁷² See 2 Legislative History of the 1909 Copyright Act, Part D at 23 (statement of Bowker noting French term length) [hereinafter 2 Legislative History, Part D].

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 11. The group had initially sought life plus 30 years but altered the suggestion to life plus fifty years after looking at French law. *Id.* at 78.

⁷⁵ Both representatives were also members of the American Copyright League. *Id.* at 14, 46. The group had initially sought life plus seven years but changed its mind to harmonize with Russia etc. *Id.* at 77.

⁷⁶ *Id.* at 25.

⁷⁷ See *id.* at 75, 77-78; accord PATRY, *supra* note 35, § 7:10.

Publishers' Copyright League supported life plus thirty because they feared the fifty year term would not pass Congress and noted that thirty was the standard in Germany and England.⁷⁸ So it appears they wanted a longer term but took a tactical stance as to what could get through the legislature.⁷⁹ Some questioned the life of an author plus a number of years as indefinite,⁸⁰ and noted that the system would drive up the price of what would otherwise enter the public domain.⁸¹ Still others opposed revision rights that belonged to heirs and favored fully alienable copyright so that publishers could have all the rights an author had.⁸²

So there was more discussion of the possibly extended term. And many supported the extension, although some voiced their objections too. Nonetheless, the idea that copyright should last as long as an author is alive had taken hold. In addition, the idea that the term should extend beyond an author's life arguably so that the author could care for surviving spouses and/or offspring is asserted. Yet just as with the 1831 revision there is little justification for the idea that copyright should provide for heirs.

As the Senate Report summarizes:

In considering what the term should be your committee *have assumed* that-
(a) It ought at least- (1) To assure to the author provision for his old age; (2) To assure to the community the benefit of his own revision of his works as long as he lives (only a complete control of them will do this); (3) To enable him to provide for his children until they reach the age where they are likely to be self-supporting, or, if daughters, married; but that
(b) (In the effort to meet the above needs) the provision ought not to tie up automatically all copyrights whether or not they require a term so long. Experience shows that a large percentage of them do not.⁸³

⁷⁸ See 2 Legislative History, Part D, *supra* note 72, at 24.

⁷⁹ Cf. RICKETSON, *supra* note 19 at 321 (noting that although perpetual copyright was a goal for continental European authors, the term advanced in the debates was for the "the longest possible term" that was "politically feasible.").

⁸⁰ See 2 Legislative History, Part D, *supra* note 72, at 26-27 (testimony of Beverly Smith).

⁸¹ *Id.* at 27; see also 4 Legislative History of the 1909 Copyright Act, Part H at 53.

⁸² See 1 Legislative History, Part C, *supra* note 71, at 10.

⁸³ See S. Rep. No. 6187, 59th Cong., 2d Sess. 6 (1906) (emphasis added).

Here one can see that there are assumptions, but as detailed above, little supports them. Indeed, the assumption for inheritance is that the author needs to have copyright to provide “for his children until they reach the age where they are likely to be self-supporting, or, if daughters, married.” It rests on a notion of providing for heirs but only so long as they are dependants.⁸⁴ The idea does not, however, support that copyright should be a way to provide for adults capable of sustaining themselves. The roots of this idea are best illustrated by another famous author, Samuel Clemens, who, as Siva Vaidhyathan and William Patry describe, exerted great influence on the way in which Congress viewed the Copyright Act and how it functioned.⁸⁵

b. The Author’s Plea

Just as Noah Webster had made sure to have his view of copyright reach Congress, so did Samuel Clemens.⁸⁶ Clemens testified before the House and Senate Committees on patents on December 7, 1906.⁸⁷ As Vaidhyathan details, Clemens was a sensation.⁸⁸ He testified after other famous authors had already appeared, yet many more came to hear *the* American author speak.⁸⁹ Despite the cold season, Clemens wore a “cream-colored flannel suit,” the same suit that is part of his image to this today even though he was only four years from his death.⁹⁰ Like Webster’s actions years prior,

⁸⁴ Today this argument would be copyright ought to provide for minors in general as opposed to couching the idea as women can do nothing for themselves unless married.

⁸⁵ See *supra* note 70.

⁸⁶ *Id.*

⁸⁷ See PATRY, *supra* note 35, § 7:10.

⁸⁸ See Vaidhyathan, *supra* note 70, at 35.

⁸⁹ *Id.*

⁹⁰ *Id.*

Clemens's reveal much of the underlying views to the call for copyright change in the air at the time. Indeed, Vaidhynathan's study of Clemens's role in copyright history shows that his testimony may be understood as the culmination of years of advocacy based on his experience as a writer and as a publisher.⁹¹ It is a brilliant bit of oratory.

Before the official testimony, Clemens threw off his overcoat to reveal his now iconic white suit and declared it “the uniform of the American Association of Purity of Perfection” and that he was “the only man in the United States eligible to membership.”⁹² Nonetheless Clemens began the official testimony with a false humility, “I think no one but a practiced legislator can read the bill and thoroughly understand it, and I am not a practiced legislator. I have had no practice at all in unraveling confused propositions or bills. Not that this is more confused than any other bill. I suppose they are all confused.”⁹³ Even this seeming soft introduction has a message: you all are confused, but I will show the way.

His first substantive statement supported the expanded term of life plus fifty years because it would “satisfy any reasonable author, because it will take care of his children. Let the grandchildren take care of themselves. ‘Sufficient unto the day.’ That would satisfy me very well. That would take care of my daughters, and after that I am not particular.”⁹⁴ And here one sees the idea that children would be taken of. As for support for the notion all he offers is “I think it is just. I think it is righteous, and I hope it will

⁹¹ See generally, *id.* at 55-80 (surveying the course of Clemens's writings and testimonies regarding copyright). Vaidhyanathan offers a fascinating account of how Clemens's views of copyright can be seen in his unpublished work, “The Great Republic's Peanut Stand.” Although providing valuable insight about the man's view, the writing, given its unpublished status, did not reach Congress. See *id.* at 70-78. As such for the purposes of this Article the testimony is more important.

⁹² *Id.* at 35.

⁹³ Samuel Clemens, *Copyright in Perpetuity*, 6 GREEN BAG 2d 109, 110 (2002) (reprinting Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on S. 6330 and H.R. 19853, 59th Cong. 116-21 (1906)).

⁹⁴ *Id.*

pass without reduction or amendment of any kind.”⁹⁵ At this point one might think that Clemens accepted some limit on copyright. Such was not the case.

His next statement reveals his disdain for the idea of limited term:

I understand, I am aware, that copyright must have a term, must have a limit, because that is required by the Constitution of the United States, which sets aside the earlier constitution, which we call the Decalogue. The Decalogue says that you shall not take away from any man his property. I do not like to use the harsher term, ‘Thou shalt not steal.’ But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land.⁹⁶

By juxtaposing the Constitution with the Ten Commandments, Clemens explicitly indicates that the current laws of the land are suspect. By using the technique of praeteritio—“the inclusion of something by pretending to omit it”,⁹⁷ here the idea of stealing—Clemens of course is calling the Copyright Clause, and all that flows from it, theft. In case the audience did not understand that point he asserts “but” Anglo-American law “take[s] away property” (i.e., steals) and worse this law only does so to those who “create the literature of the land.”

Clemens then mocks the praise given for literature for “In the midst of their enthusiasm [those who praise literature] turn around and do what they can to crush it, discourage it, and put it out of existence.”⁹⁸ In his view “there should [not] be a limit at all,” because he cannot fathom “why there should be a limit to the possession of the product of a man's labor. There is no limit to real estate.”⁹⁹ According to Clemens,

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ The term for when one says she will not say a thing and then says it. See Arthur Quinn, FIGURES OF SPEECH, 103 (1993). For examples of the technique see *id.* at 70-71.

⁹⁸ See Clemens, *supra* note 93, at 110.

⁹⁹ *Id.*

writing is a form of labor that creates property which the laborer owns, and all property should be treated the same.

To be fair Clemens draws out a problem in copyright: the tension between author and publisher. According to him the law does not really give the work to the public domain.¹⁰⁰ Instead the system in place “takes from his children the bread and profit of that book, and gives the publisher double profit.”¹⁰¹ According to Clemens, “The publisher and some of his confederates who are in the conspiracy rear families in affluence.”¹⁰² Here Clemens paints an image of rich, nefarious people plotting to further their families’ wealth. When he is done, publishers are a veritable aristocracy leading parasitic lives well into eternity: “they continue the enjoyment of these ill-gotten gains generation after generation. They live forever, the publishers do.”¹⁰³ In contrast Clemens offers that the poor author should be rewarded or more importantly the author’s helpless offspring.

Clemens knew he could not claim poverty too easily so he raises the image of his children to justify the extension:

My copyrights produce to me annually a good deal more money than I have any use for. But those children of mine have use for that. I can take care of myself as long as I live. I know half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years' extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do anything. So I hope Congress will extend to them that charity which they have failed to get from me.¹⁰⁴

¹⁰⁰ *Id.* (“The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind.”)

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 110-111.

¹⁰⁴ *Id.* at 111 (“My copyrights produce to me annually a good deal more money than I have any use for.”)

Again images of helpless women and children somehow justifies extending copyright's term. Daughters are "[in]competent" "ladies." Who would ask them to earn a living? In addition, Clemens almost gleefully admits that he wants the law to take care of his failing "I hope Congress will extend to them that charity which they have failed to get from me." How this image is different than the publishers is unclear. Clemens's argument turns mainly on the idea that if anyone should benefit from an author's work, it should be blood rather than publishers.

Clemens then delivers on the confusion idea with which he began as he explains his view of why one should not care about a long term:

One author per year produces a book which can outlive the forty-two year limit, and that is all. This nation cannot produce two authors per year who can create a book that will outlast forty-two years. The thing is demonstrably impossible. It cannot be done. To limit copyright is to take the bread out of the mouths of the children of that one author per year, decade, century in and century out. That is all you get out of limiting copyright.¹⁰⁵

In other words, most written work dies. No one wishes to read that material. But one author per year, "only about one book in a thousand,"¹⁰⁶ lives on. Denying those rare works made by rare individuals eternal copyright "is to take the bread out of the mouths of the children of that one author per year, decade, century in and century out."

Clemens here tells Congress that they are unnecessarily addressing outlier behavior that will sort itself out.¹⁰⁷ So what if a few people have eternal control over their work? Only a few children will have that position. Furthermore, not giving this power to heirs means that children go hungry while "those few books [that have value after the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* (arguing that a copyright law that addresses few great books produced is as useful as passing a law preventing families from having more than 22 children because both acts are rare, harm no one, and so are "not worth the while at all.")¹⁰⁷

term expires] into the hands of the pirate—into the hands of the legitimate publisher—and they go on, and they get the profit that properly should have gone to wife and children.” And here one sees how Clemens uses heirs to transition to his real concern: publishers who in Clemens’ view are pirates.

Previous testimony had explained that the copyright limits in the English system were designed to protect authors. Clemens called that view an old man’s “charitable” view as opposed to his version of copyright history where “a lot of publishers had got together and got it reduced.”¹⁰⁸ As Clemens’s saw it, all property begins with ideas so the claim that intangibles could not be the subject of property is absurd.¹⁰⁹ The current treatment was a blip, an error.

Properly understood writing is “property, like any other property, and should not be put under the ban of any restriction, but that it should be the property of that man and his heirs forever and ever ... I don't care what it is. It all has the same basis. The law should recognize the right of perpetuity in this and every other kind of property.”¹¹⁰ For those who worry that this term is what he supports, Clemens calms “But for this property I do not ask that at all” just the life plus fifty years. Like Webster, the contrast is almost a threat: the correct answer, and one they could in justice demand, is perpetual copyright. But as reasonable people, they seek only life plus fifty years. Indeed, the movement towards longer copyright term addresses the English “errors” and “disaster” of limited

¹⁰⁸ *Id.* at 113.

¹⁰⁹ *Id.* (“That there could be no such thing as property in an intangible idea. He said, ‘What is a book? A book is just built from base to roof with ideas, and there can be no property in them.’ I said I wished he could mention any kind of property existing on this planet, property that had a pecuniary value, which was not derived from an idea or ideas.”).

¹¹⁰ *Id.* at 113-114.

term imposed by Lord Macaulay, as copyright naturally “undergo[es] regular and slow development—evolution.”¹¹¹ Now the story is complete.

Legislators are confused. Writers know the world of writing and publishing. Writing is labor and thus creates property; it has always been so. The previous limits of copyright term are ill-advised mistakes. They run contrary to nature, to evolution. As part of evolution, copyright term expansion is natural and inevitable. So the expansion to a life plus fifty year term is but a small step forward on an inevitable path. And like evolution smaller steps forward is the right way to go. The final, proper result will arrive in time when the Decalogue, God’s law, is back in place and people are told thou shalt not steal.

In sum, Clemens wanted longer copyright and rallied all his skills to persuade Congress to grant it. He mixed the grand image of the genius author, beliefs about labor and just rewards, a pure property view of literary work, visions of women and children in poorhouses, and characterizations of publishers as evil aristocrats and pirates to support the view that copyright should be perpetual; and if not that, at least extended as far as possible. Nonetheless, other than Clemens’ open admission that he would rather have the option of wasting his money and knowing that copyright would provide for his family where he did not, no support is offered for the idea that providing for heirs is a key, justifiable function of copyright. Indeed, Clemens’ testimony tracks the perennial tension between authors and publishers and authors’ desire for real property rights in literary work as the driving force behind lengthening copyright’s term. Heirs again are props that

¹¹¹ *Id.* at 114. Clemens conveniently ignores that Macaulay agreed with the idea of a life term. *See* Parliamentary Debates on the Copyright Bill, Hansard, 3rd Ser., 56 (1841): 345-346 (5 Feb.) (“For the existing law gives an author copyright during his natural life; nor do I propose to invade that privilege, which I should, on the contrary, be prepared to defend strenuously against any assailant.”) available at http://copyright-project.law.cam.ac.uk/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1841c%22.

help hide the true motivations at work. And again, nothing of substance is offered to explain why or how copyright ought to provide for heirs.

C. Before Berne: The Early European View of Descendible Copyright

Those in favor of extending copyright's term in the United States often point to the practices of other countries as justification for such a change. In Webster's era several arguments about how Europe offered longer and arguably better protection for writers arose.¹¹² After the adoption of the Berne Convention, the argument that the United States should adhere to international standards increased. Berne does, indeed, have descendible copyright and recall that the CTEA explicitly looks to Berne for the idea that copyright is designed to protect heirs. Yet, as Sam Ricketson explains "While [the Berne Convention's] prescriptions as to duration are quite precise, there has never been any real effort made to justify why, or to explain how, these terms have come to be adopted."¹¹³ So, when the European Council addressed term extension under the Berne Convention in 1993, its Directive explicitly states that providing for heirs is a goal of copyright: "Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants" as part of the explanation for the project.¹¹⁴ Nonetheless, the foundations of that position are unclear. As Ricketson put it "during the lifetime of the Convention" "ideology has replaced critical inquiry"

¹¹² See *supra* notes 48 to 51 and accompanying text.

¹¹³ See RICKETSON, *supra* note 19, at 321.

¹¹⁴ See Council Directive 93/98/EEC of 29 October 1993.

regarding the ideas of “uniform term for all works and the length of that term.”¹¹⁵ But Ricketson points out that at one time, 1858 to be precise, debates about perpetuity were had.¹¹⁶

Thus, although one standard explanation for the long duration of copyright in continental Europe is that its approach to copyright draws on a tradition that favors author’s rights and that long duration is simply a subset of that view, that tradition was not always dominant and there are periods where the conclusions were not forgone.¹¹⁷ Work by Jane Ginsburg shows that during their respective revolutionary periods, the French and Anglo systems had much in common.¹¹⁸ And as discussed above, although the laws of the United States rejected the author-focused system with its long duration, the logic later seen in Europe was present but unsuccessful in the United States.¹¹⁹ So rather than offering a clear source as to why copyright should be descendible, and if so for how long, copyright debates in Europe parallel debates in the U.S. with diverging views regarding the nature of literary property, fights between authors and publishers, and concerns about the way in which lengthy copyright terms impact the public domain.

To be clear, the source of the view of descendible copyright was authors, but an examination of the early discussions of copyright reveals that not all authors agreed that perpetual copyright was proper. In addition, the public domain informed and played an important role in European views of copyright. Thus, it appears that at least between

¹¹⁵ See *supra* note 19, at 323.

¹¹⁶ *Id.* at 321, note 4.

¹¹⁷ See *id.* at 321; accord Jane Ginsburg, *A Tale of Two Copyrights*, in *Of Authors and Origins, Essays on Copyright Law*, 131 (1994).

¹¹⁸ See Ginsburg at 158 (summarizing how both systems looked to copyright as a way to develop public knowledge, wished to reward authors’ labors, and employed formalities to limit the reach of copyright protection).

¹¹⁹ See *supra* Part I.B.1; accord Ginsburg at 138-139 (noting Webster’s influence on United States copyright law and the Lockean labor view embedded in early copyright discussions of the era).

1858 and 1878, the early stages of the continental European view of copyright that led up to the Berne Convention, respect for the public domain and a vision of society as the true heir of creation were as important, if not more important, as advancing an author-centered copyright system. Last, although heirs were mentioned as a possible concern, nothing shows that they have the allegedly central role attributed to them today.

1. The Starting Point: The Congress of 1858 in Brussels

As Ricketson explains the idea of a universal copyright can be found in documents from around 1840¹²⁰ but “the first organized expression of the opinion is to be found in the resolutions of a Congress on Literary and Artistic Property which was held in Brussels in 1858.”¹²¹ One may wonder whether the discussion of copyright in Europe at this early stage provides insight as to why children ought to inherit copyright. As one might suspect, it did not. Instead, the debate followed the same pattern seen in discussions in the United States described above: one side argues for a full property view of copyrightable material and a perpetual term for that copyright while the other argues against perpetual copyright because of the power such a system would give over ideas.

Indeed, the 1858 Congress stated the duration question as a choice: once a work is published should the duration of copyright be continuous (perpetual) or temporary?¹²² As the report put it there were two banners: one in favor of permanent or perpetual copyright

¹²⁰ See RICKETSON, *supra* note 19, at 41.

¹²¹ *Id.* (also noting the area was known for Congresses as a way to address major questions society faced); accord STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY*, 73 (1938).

¹²² See ANNALES DE LA PROPRIETE INDUSTRIELLE, ARTISTIQUE ET LITTERAIRE, 433 (1858) [Hereinafter “ANNALES”] (“Le droit de l’auteur sur son ouvrage imprimé et livre à la circulation doit-il être perpétuel ou temporaire?”).

sees literary work as property that belongs to the author.¹²³ Those opposed to that view held that literary work does not have the characteristics of property but instead it is *sui generis* with special characteristics relating to its objective and end.¹²⁴

In elucidating the property view, the report describes how possession was offered as the foundation of property,¹²⁵ but two further ways to understand property were offered as well. One view grounded property in the idea that property interests are honored because one affixes one's mark of personality to a work and society allows that person to be the owner of the work forever as a reward.¹²⁶ That view then argued that the same protection should be extended to literary work.¹²⁷ In addition, the report noted that some who looked for the metaphysical sources of ownership took a Lockean view that God provides natural resources and one who produces something or generates value has a right to that which has been produced.¹²⁸

Implicit in the first view is a distinction between non-literary (perhaps tangible) work and literary work and the idea that such a distinction does not make sense. Furthermore one sees that under one view of property for any type of work the mode of possession here is about the way in which one's personality is implanted in the work; not a Lockean labor-based possession.¹²⁹ But rather than stopping at the personality based view (which perhaps does not reach the possible metaphysical foundations of property), the Lockean natural rights approach is *also* offered as grounds for the property view. So here one sees how advocates of extension were blending theories to support their goal.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (citing Locke among others).

¹²⁹ *See infra* Part II.B.

Despite these strong property views, a strong argument for limits on copyright emerged too.

Whereas Webster and Clemens looked to the practices of other countries to justify expanded copyright, those in Brussels in favor of *limiting* copyright exhorted the members to open the legislation of France, England, America, and Germany and argued that no matter how the right is couched, be it as privilege or copyright, when the public had the strength to intervene, all the countries limit the right.¹³⁰ Those in favor of limits then anticipated objections and offered that limiting the right permits thought to be emancipated; to disengage from the links of exclusive rights benefiting one person so that the thought can soar free vested in (or acquired by) humanity and the public domain.¹³¹

So unlike the American debates which sought to expand the term, the 1858 Congress offered a robust view of the public domain as a way to show why copyright term must be limited. It had to do so as a counter to the strong views regarding literary work as property. Thus the public domain must function as a trump to the powerful place the author held. As such those in favor of limiting copyright offered a view of the public domain as an integral resource for all humanity and where each individual takes what she needs for inspiration, creation, and to fashion their personal mark on the world.¹³² In addition, this view described the process as cyclical with each generation building on the last and furthering humanity's progress.¹³³ Most importantly for this Article, the argument continued and asserted in language that tracks current economic ideas

¹³⁰ See ANNALLES, *supra* note 122, at 434-435.

¹³¹ *Id.*

¹³² *Id.* at 435.

¹³³ *Id.* at 435.

regarding spillovers,¹³⁴ that the cycle opens new doors or paths that belong to and fertilize *future generations'* labor and creation.¹³⁵ Finally, this continual cycle of labor and creation is part of God's design.¹³⁶

Now one can see that those seeking to limit copyright present a different story regarding authors and their relationship to society. Authors have a special place in the world but that place exists as part of a grand plan where everyone labors and creates to move society forward. That process is a cycle of give and take. All, including authors, use creative resources, create their own work, which in turn fuels others' creations.¹³⁷ One can almost envision an invocation of ashes to ashes dust to dust here. For this work, labor, and creation is continual and if one ignores or tries to avoid it, one misses God's plan for future creation based on what came before.

At this point one must remember that the session posed the issue as a binary choice between perpetual or limited copyright term. Yet the arguments on either side of the choice converge. Both recognize the importance of the author, and both look to ideas of justice and metaphysical questions as the foundations for their views. But these two views also collide.

As the report put it: If one gives authors perpetual copyright, the public loses and the system establishes fiefdoms for children and grandchildren of industrialists.¹³⁸ There was a fear that work will be taken for public utility, while there was also fear that authors would not allow a work to be copied or deny society the continued pleasure or use of the

¹³⁴ See *infra* Section III.A.

¹³⁵ See ANNALLES, *supra* note 122, at 435.

¹³⁶ *Id.* at 435.

¹³⁷ *Id.* at 435.

¹³⁸ *Id.* at 437.

work.¹³⁹ So for this Congress, the public domain matters and must be built while still protecting authors' interests. As such the Congress offered a compromise.

First, the report denies that the solution will somehow take (literally pluck out)¹⁴⁰ rights from an author. Yet by using “la puissance publique,” images of power, force, dominion, and empire are linked to the way the public domain operates. In other words, because “puissance” can mean more than simply power, the report is noting that the public domain can run amok. Nonetheless, in language that tracks current views regarding how copyright ought to operate, the report asserts that authors' rights would be strong and broad but only during the term of copyright; after that they expire, and the work would move to the public domain.¹⁴¹ And again the report offers that the authors' side could run amok too for a copyright system without limits issues a warrant on independent and free thought in favor of enslaved thought.¹⁴²

Only after setting the issue as a balance between authors and the public as part of the creative cycle, do heirs enter the debate. The reporter notes that authors have made arguments regarding how the public domain might strip them of their power before,¹⁴³ and as before, the solution is to give authors a just and legitimate reach: provide exclusive copyright power to authors and spouses during their life and their representatives for a limited number of years so that they may be properly remunerated.¹⁴⁴ So here there is arguably a sense that heirs matter. Yet, the recounting of how authors have made this argument before and that providing for life plus some years is the just and legitimate

¹³⁹ *Id.*

¹⁴⁰ *Id.* Dépouille is removal of one's belongings or things but also means stripping the skin off an animal. The image is vivid as a violation of an author in that it evokes yanking something connected to or part of the author's person from the author.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

model, does not explain exactly why heirs should be part of the equation. Instead it seems to have been a way to mollify the authors group at the Congress. Indeed, the report immediately argues that authors should consider that by dedicating work to the public, they leave the author's posterity an even more precious heritage: the name genius and the status of being an example of a community author.¹⁴⁵

The ideal of being a community author presents the possibility that there are two types of heirs: the lineal descendents of an author *and* society at large. Indeed, the report builds on the idea of being community author when it claims that the government is happy to forgive the debts of the author's children (or perhaps take care of them) in return for the debt society owes to whomever has endowed the country with new glory.¹⁴⁶ So authors should be compensated especially during their life, but justice demands that the work be available for the other heirs, the public, to use. Heirs are taken care of through some sort of government support but not by having full property rights in the author's work. The report concluded that having considered all these issues, the majority of the committee decided to reject perpetual copyright in favor of circumscribing an author's and his representative's rights to a limited time.¹⁴⁷

In sum, this analysis of the 1858 Congress reveals several points. First, there was not automatic agreement that a strong author view with extremely long if not perpetual copyright term was proper. On the contrary, the session revealed a deep concern for the public domain and the need to limit copyright. And, although provision for heirs is mentioned, the vague promise of forgiven debts and the emphasis on the pride heirs should have in the glory of their parents' work, indicates that pecuniary returns for

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

authors and heirs was decidedly not an overriding factor in how the Congress approached the question of copyright and duration. Indeed, it appears that the Congress was quite aware that a long term for copyright creates rent-seeking behavior as evidenced by the discussion of the public domain's importance which explicitly argued against a long copyright because such a system would generate mini fiefdoms for children and grandchildren of industrialists. As shown below, the same can be true for authors' heirs.¹⁴⁸ Finally, nothing in the Congress shows what theoretical foundations might support providing for heirs, and at this stage the critical inquiry argued strongly against extended terms based on the practices of other countries and the problems extended terms posed for the interaction between the public domain and the generation of new ideas and works.

2. Victor Hugo and the Literary Congress of 1878

The Literary Congress of 1878 is another important source for understanding the ideas behind the Berne Convention. The Congress passed a set of resolutions that embraced the idea of perpetual copyright and heirs are again mentioned. Yet again, however, heirs fit into the discussion not as a main reason for descendible copyright and instead as part of a claim that they are better recipients than publishers of the money public domain works might generate. And yet again a major literary figure makes the argument for the way copyright should operate. This time it was Victor Hugo. As shown below, Hugo's speech mirrors much of the flare and claims to superior insight Clemens later employed. But unlike Clemens, Hugo's vision of what authors offered and

¹⁴⁸ See *infra* Section II.C.2.a.

literature's place in the world was grander. Indeed, Hugo argues that precisely because literature is so important to society, when facing a choice between authors' interests and society's interest in access to literature, society, not authors, should win. As such, Hugo's view may be seen in some ways to build on arguments from the 1858 Congress and to presage current arguments regarding the importance of access to knowledge.¹⁴⁹

a. The Context and Ideals of the 1878 Congress

The Literary Congress's recommendations and Hugo's role at the Congress caught the attention of the United States and England.¹⁵⁰ At the end of the Literary Congress five resolutions reflecting certain ideals for literary work were passed.¹⁵¹ First, an author's right in his work was not a "grant of law" but one of property that the legislature must guarantee.¹⁵² Second, the right of authors, heirs, and legal representatives is perpetual.¹⁵³ Third, after any country's durational limit expires, anyone may reproduce the work subject to a fixed royalty to heirs or legal representatives; heirs may not prevent an accurate reproduction but must obey the wishes of the author.¹⁵⁴ Fourth, "Literary, scientific, or artistic work," will be treated the same as in the country of origin.¹⁵⁵ Fifth,

¹⁴⁹ See *infra* Section III.

¹⁵⁰ See *The Literary Congress in Paris*, N.Y. TIMES, JUNE 29, 1878 (noting Hugo's involvement and some of the Congress's recommendations); *Results of the Literary Congress*, N.Y. TIMES, August 1, 1878, (reprinting letter of Blanchard Jerrod to London *Standard* regarding his role as delegate to the Congress),

¹⁵¹ See LADAS, *supra* note 121 at 73-74. It should be noted that The Artistic Congress, as opposed to the Literary Congress, met just before the Literary Congress and, among many resolutions adopted, resolved that artists had a property right in their work and that the duration should be limited to one hundred years from the date of publication. *Id.* at 73.

¹⁵² *Id.* at 74.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

compliance with formalities in the country of first publication will constitute compliance with the formalities in all other countries of publication.¹⁵⁶

Here one sees the minimum standards approach for country of origin or first publication that allows later arguments of unfairness. For example, authors can now point to other countries that are more generous than their home countries and claim that their countries are shameful in their disrespect for authors or that trade concerns demand harmonization. This move allows for and perhaps explains the apparent inconsistency among some of the resolutions. The claim that an author's right is one of property and is perpetual conflicts with the idea of limited durational terms requiring mandatory licensing. But if one accepts the first two resolutions as ideals with their elements, the other three become practical, tactical moves. If one can have just one or two countries accept the larger claims, sooner or later other countries will follow. In addition, as Ricketson explains, the ideals offered differed from what the Congress thought it could achieve as "politically feasible"¹⁵⁷ so the resolutions do not comport with the final results. Nonetheless, as a way to foster broad acceptance of the goals and structure over time, the system proved quite powerful.

The acceptance of limited duration in countries that may stay with such an approach and the idea of a mandatory license seem to be reasonable accommodations for the fact that not all will see copyright the same way. Hidden in the approach is the trick that if just one country has lower formalities all must accept them and that if one country has perpetual copyright, all would have to respect that copyright. So the key for authors is to convince just a few countries to accept the principles. Once that happens, the rest

¹⁵⁶ *Id.*

¹⁵⁷ See RICKETSON, *supra* note 19, at 321.

follow in time. Thus at most, this practical analysis shows that other than political maneuvering and desire for perpetual copyright, little seems to support the idea that copyright was designed to protect heirs. Indeed, as the next section shows, heirs were not vital to the way a key figure at the Congress understood copyright's purpose.

b. Another Author's View: Victor Hugo, Mandatory Licensing, and the Public Domain

Hugo's apparent defense of the public domain and the balance between authors' rights and the public domain require some study. First, it shows that even one ardently in support of author's rights had an appreciation of the public domain's importance to future creation.¹⁵⁸ Second—perhaps in part because of his view of the relationship between literary work, creation, and the public domain—it reveals that heirs may fit into copyright questions but that heirs were a tangential concern at best.

Like the views offered at the 1858 Congress, Hugo saw the 1878 Literary Congress as the culmination of Progress.¹⁵⁹ He began his speech by declaring that human effort has a triple goal of the useful, true, and beautiful which leads to civilization among

¹⁵⁸ It should be noted that some thirty years earlier Hugo along with Alphonse de Lamartine and Honoré de Balzac were quite vocal about author's rights and opposed the idea of the public domain as a good idea. See Calvin Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 450-451 (1999). Peeler notes that Hugo presided over the International Literary and Artistic Association (ALAI) and was forceful about his views. The material Peeler cites, however, is from Hugo's statements in 1849. See *id.* at 451 notes 187 to 189 and accompanying text. As such it appears the Hugo's views changed by the time he delivers his 1878 speech.

¹⁵⁹ See Victor Hugo, *Speech at the Opening of the International Literary Congress of 1878* in CONGRES LITTERAIRE INTERNATIONAL DE PARIS 1878, 104 (1878). ("Ce qui fait la grandeur de la mémorable année où nous sommes, c'est que, souverainement, par-dessus les rumeurs et les clameurs, imposant une interruption majestueuse aux hostilités étonnées, elle donne la parole à la civilisation. On peut dire d'elle : c'est une année obéie. Ce qu'elle a voulu faire, elle le fait. Elle remplace l'ancien ordre du jour, la guerre, par un ordre du jour nouveau, le progrès.") Here Hugo praises the year as a grand one that must obey a forward movement that replaces the old order of the day, war, with the new order of the day, progress.

all and peace among men¹⁶⁰ and that authors are members of a universal city seeking to enter a land of justice which in ideal terms is truth.¹⁶¹ Here it appears that Hugo is privileging authors, but he immediately asserts that literature, progress, and civilization are part of the universal human spirit in which all partake.¹⁶²

In contrast to Clemens who played the role of pseudo-humble author educating the legislators—legislators who could not help but make mistakes as they knew neither authorship nor publishing, Hugo is more direct. He tells the group that they are engaged in a high mission and although authors cannot pass laws, they can tell what is fair and true. Then to re-emphasize his grand vision Hugo asserts that literature is a universal fact and that it is the government of mankind by the human spirit; to go against that view is against nature and the essence of humanity.¹⁶³ So what was this view and against what was Hugo arguing?

Hugo's speech came after a system of entitlements and publishers rights trumped author's rights.¹⁶⁴ As such, when part of his speech makes the point that books have value as property and as literature, he acknowledges the fact that one can generate economic returns from books but also reminds the audience that the old system left authors poor compared to publishers.¹⁶⁵ Again Clemens's later view echoes the tension between authors and publishers Hugo describes. But whereas Clemens derided notions that monopoly and perpetual rights would impoverish the public domain, Hugo argued

¹⁶⁰ *Id.* at 105.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 106 (“Vous allez faire comprendre aux législateurs qui voudraient réduire la littérature à n’être qu’un fait local, que la littérature est un fait universel. La littérature, c’est le gouvernement du genre humain par l’esprit humain, (Bravo !)” The statement was well received and praised as indicated by “Bravo” from the audience.

¹⁶⁴ *Id.*; accord Peeler, *supra* note 158, at 428; Ginsburg, *supra* note 117, at 136-137.

¹⁶⁵ See Hugo, *supra* note 159, at 106; accord *The Literary Congress in Paris*, *supra* note 150.

that the public domain must be maintained. Indeed given Hugo's notion of literature as an expression of human spirit and part of progress, he must support the public domain. For Hugo, the public domain is integral to his view of literature.

He explains this idea by first contrasting literary property with the public domain: “[L]e principe: le respect de la propriété. Constatons la propriété littéraire, mais, en même temps, fondons le domaine public.”¹⁶⁶ Hugo demands that a system of literary property recognizes and respects literary property, but that it simultaneously found the public domain. To accomplish this task, he offers a mandatory licensing system: After an author's death, publishers may publish a work at-will provided that they pay the author's heirs a mandatory royalty which is not to exceed five or ten percent.¹⁶⁷ So rather than supporting a general notion that copyright must be descendible as matter of property, Hugo sets forth a system that provides for heirs but does not embrace giving heirs the full property rights of their parents.

What is perhaps surprising is how Hugo explains the interaction of the two principles:

Le principe est double, ne l'oublions pas. Le livre, comme livre, appartient à l'auteur, mais comme pensée, il appartient—le mot n'est pas trop vaste—au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous. (Marques nombreuses d'approbation)¹⁶⁸

Hugo here parses between books as things and the ideas within them. For Hugo, authors have rights in the things, but the thoughts belong to humanity. Furthermore if the two principles conflict, authors rights must bow to the public's interests because the public is

¹⁶⁶ See Hugo, *supra* note 159, at 106.

¹⁶⁷ *Id.* at 107. Hugo calls the fee “très faible” which means weak or small here. *Id.*

¹⁶⁸ *Id.*

in fact the main concern of authors. At least according the recorder, the conclusion was met with approval. Yet it seems that this group would be upset by such a view. How could the public domain which is only introduced at this point in the speech, supersede the author? Hugo already laid the groundwork for this position.

First, he established the practical point about a mandatory royalty. Insofar as the practical concern of who should benefit from later publishing—those related to the author or some publisher—was on the audience’s mind, the royalty covers the issue. Second, when Hugo discusses the potential conflict between the two rights, he equates the public domain with the human spirit: “le droit de l’écrivain et le droit de l’esprit humain.” So when Hugo opened his speech declaring that literature is the human spirit and writers bring forth that spirit, he established a world where one could not claim that the interest of writers trumps the interest of humanity. Thus, to Hugo’s credit, he is consistent in his philosophy.

Furthermore, Hugo offers that such a sacrifice of authors’ interests to the public interest will not be necessary,¹⁶⁹ because authors’ and the public interest are in fact the same; the two travel together as light.¹⁷⁰ For Hugo, literary property is part of opening and sharing knowledge so that light is spread by increasing the number of schools and books in the world.¹⁷¹ The pure incentive views of U.S. copyright are not present. Instead, this openness and generation of light is vital to moving civilization forward.¹⁷² Books and schools are part of that larger ideal. And if one must choose between the

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Cf. Margaret Chon, *Intellectual Property “From Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007) (explaining and demonstrating the relationship between copyright, access to textbooks, social justice, and the theory of human capacity and development as offered in Amartya Sen and Martha Nussbaum).

authors' rights and civilization as an open system in which thought is shared, civilization must trump.

As such although Hugo's speech offers a rather glorious view of authors and literature, it does not show what supports the idea that copyright *should* provide for heirs. In addition, it does not offer a foundation for the unlimited view of copyright duration which some attribute to the authors' rights approach of continental Europe. At most it argues for limited copyright with mandatory royalty and explicitly calls for the public domain to trump authors' rights if the two conflict. Last, Hugo's views regarding the way literature and ideas aid progress rather than supporting a pure property view of copyright with perpetual, exclusive control, arguably connect well with recent work regarding the way in which access to ideas fosters further creation and militates in favor of limited copyright.

D. Historical Findings and Lessons

Contrary to the idea that copyright is designed in part to provide for heirs, the preceding review of the historical debates regarding copyright show that heirs played at most a minor explicit role in the creation of descendible copyright. As Ricketson noted, the idea that copyright must persist past an author's life had little foundation. Nonetheless, one can see that similar to the recent debates regarding the CTEA, heirs were sometimes props to further authors' interests in longer terms. This use of heirs was especially potent when copyright term lasted less than an author's life but still did not show how or why copyright should extend beyond an author's life. Moreover the

European debates—where one might expect to find a more absolute explanation and defense of pure, descendible copyright—present a different view. There one finds precursors to current views about the way in which copyright must provide a balance between authors and the public’s ability to access and use information. Indeed, at its core the European view lays the groundwork for denying author’s rights in cases where one must choose between author’s rights and the public interest.

Despite history failing to provide clear evidence supporting the claimed relationship between copyright and heirs and apparently undercutting such a view, it provides insight regarding the justifications offered to advance the differing positions. Questions and views regarding Lockean labor, Hegelian personality, and utilitarian theories permeate and inform the historical debates discussed above. Then, and now, philosophical views regarding property and the way in which literature interacts with society play an important role in understanding what if anything supports heirs’ alleged place in copyright policy and how best to structure the copyright system. In addition, these theoretical questions can be understood as questioning whether copyright ought to be descendible at all. As such the next part looks at philosophical theories that may or may not justify the role heirs should have in copyright and/or the idea of descendible copyright. Parts II.A and B examines labor-based persona-based theories for copyright respectively, and finds that although both present viable arguments to justify a living author’s claim to copyright as property, neither points to a reason for copyright to be used as a way to provide for heirs. Part II.C looks at utilitarian justifications for copyright and then draws on empirical evidence that undercuts the broad claims regarding heirs as good custodians and the need for long copyright as a way to combat possible underproduction

of works that would otherwise be in the public domain. Part II.D synthesizes the theoretical findings to see what lessons they provide.

II. Philosophical Theories To Explain Copyright and Inheritance

It is not surprising that the debates regarding copyright often appealed to Lockean labor, Hegelian personality, and aspects of utilitarian theories to justify the idea of stronger authors' rights. These theories cover the main theoretical foundations for intellectual property.¹⁷³ An examination of the theories offers two benefits. First, it reveals whether or not any of the theories (offered before and today) explain why copyright should be descendible. Second, it lays the groundwork for a more coherent understanding of how to manage copyright policy.

A. Lockean Labor Theory

Lockean, labor-based arguments for intellectual property are a major way in which intellectual property rights are justified and permeate the way the law views copyright.¹⁷⁴ Webster, Clemens, the 1858 Congress, and Hugo raised labor as a key

¹⁷³ See generally Fisher, *supra* note 3, at 173; accord Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 734 n. 47 (2007) (“U.S. IP laws are premised on four justifications”: instrumental utilitarianism, Lockean “labor-desert theory”, personality theory, and custom-based theory).

¹⁷⁴ See e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 524-529, 520-539 (1990) (tracing the Lockean view of natural law and labor-based copyright in England and the United States); accord Aoki, *supra* note 173 (noting Locke’s labor-based theory as a key way to justify intellectual property); Wendy Gordon, *Intellectual Property* in THE OXFORD HANDBOOK OF LEGAL STUDIES 624 (2003) (“On the philosophical side, theories developed from a Lockean base have been the most influential in IP.”). Although there is a debate regarding whether intellectual property should be seen a real property, see, e.g., Gordon at 619 (investigating the question “Is it Property?”); Rochelle Cooper

factor in why society ought to protect literary works. Under this view one begins with the basic point that creation involves one's labor. Insofar as one has labored to produce something, one owns it. This view continues to have force. For example, recent calls to treat intellectual property as real property and claims of alleged theft or piracy of intellectual property that equate intellectual property to real property indicate that the natural rights view may be at high mark.¹⁷⁵ Yet, critical examination of natural rights theory and its view regarding inheritance demonstrates that the theory does not lead to a pure property view for copyright. Furthermore, even if natural rights theory did support the pure property view, the theory does not support a broad right of inheritance.

1. Natural Law and Copyright

Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 406-410 (1990) (tracing the shift to a pure property approach to trademark rights and noting the way in which this shift limits the potential for expressive use of trademarks); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005) (arguing that use of "[t]he rhetoric of real property, with its condemnation of 'free riding' by those who imitate or compete with intellectual property owners," has resulted in "a legal regime for intellectual property. . . in which courts seek out and punish virtually any use of an intellectual property right by another"), Hughes has noted that the products of intellectual labor especially writings have been viewed as property for hundreds of years. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Privacy, Propertization, and Thomas Jefferson*, S. CAL. L. REV. 993, 1004-1005 (2006). For a discussion of intellectual property as real property in the context of copyright and its duration see Saul Cohen, *Duration*, 24 U.C.L.A. L. REV. 1180, 1183-1185 (1976) (acknowledging the difference between tangible and intangibles but arguing in general for as long a term as possible).

¹⁷⁵ See e.g., Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005) [hereinafter Mossoff, *Is Copyright Property?*], and Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) [hereinafter Mossoff, *What Is Property?*]; cf. Margaret Jane Radin, *A Comment on Information Propertization and its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 28 (2006) (noting "Many proponents of information propertization have pushed an analogy with real property." but arguing that "We do not need to-- and should not--accept the analogy that information propertization is equivalent to land propertization"). For an example of the popular position that real property is the best way to understand intellectual property see Mark Helprin, *A Great Idea Lives Forever. Shouldn't Its Copyright?* NY TIMES, Section 4, May 20, 2007.

As Wendy Gordon and Alfred Yen have argued natural rights theory has important limits.¹⁷⁶ Indeed Adam Mossoff, one of the more ardent proponents of a natural rights approach to intellectual property, acknowledges as much.¹⁷⁷ Possession is a key part of the natural rights approach to property.¹⁷⁸ The way one possesses is through labor; and it is labor under Locke’s view that determines one’s property interest.¹⁷⁹ But it is not only labor that justifies property. As Yen has explained, “Since people owned their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor. Thus, a person who mixed her labor with an unowned object became morally entitled to property in that object.”¹⁸⁰ Mossoff argues further that the key in natural law is that possessory rights, the right to acquire, use, and dispose of

¹⁷⁶ See Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism In the Natural Law of Intellectual Property* 102 *YALE L.J.* 1533, 1535 (1993) (“When the limitations in natural law’s premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests”); Yen, *supra*, note 174, at 546-557 (examining natural law and modern copyright to show how natural law on its own terms has inherent limits regarding the way one should treat copyright) and at 557 (“The point is that the property rights authors deserve under natural law are neither unlimited nor perpetual. Many copyright claims must be denied because they imply the privatization of public domain material. More importantly, even if property rights are recognized, it is entirely appropriate to restrict those rights to a limited number of years, thereby eventually dedicating the entire work to the public domain.”).

¹⁷⁷ See Mossoff, *What Is Property?*, *supra*, note 175, at 441 (arguing in general for an integrated, natural rights based view of property and stating “It is important, though, for integrated theorists not to overstate their claims. The integrated theory does much for the property scholar, but it does not do everything. An integrated theorist, for example, would be hard pressed to deduce from the possessory rights the optimal term limit for a copyright or patent. The integrated theorist maintains that there should be legal protection as such for intellectual property, but important details of this protection are not deducible from the integrated theory.”)

¹⁷⁸ See e.g., Yen, *supra* note 174, at 522 (noting that possession plays a key role in natural law understandings of property and that this view stems from Roman law); accord, Mossoff, *What Is Property?*, *supra* note 175, at 395 (“[T]he substance of the concept of property is the possessory rights: the right to acquire, use and dispose of one’s possessions. . . . Exclusion therefore represents only a formal claim between people once civil and political society is created, and it has meaning only by reference to the more fundamental possessory rights that logically predate it.”).

¹⁷⁹ See Yen, *supra* note 174, at 523.

¹⁸⁰ *Id.*

property,¹⁸¹ flow from what is “own’s own” which begins with one’s “life, limbs, and liberty.”¹⁸²

In other words there is an inherent limit for property under the natural law view: life. For the focus is on life. To have life and exercise liberty one must be able to support that life which in turn leads to being able to exercise liberty and to have property to support one’s life which results in a familiar triumvirate: life, liberty, and property.¹⁸³ As such insofar as intellectual property has become a key if not dominant part of our economy one can appreciate that one’s creations are treated as a type of property that flows from one’s labor and supports one life.¹⁸⁴ Thus natural rights intuitively and structurally supports the possibility of strong life-rights for copyright; but the same intuition and structure points to a limit regarding the inheritance of copyright.

2. The Social Dimension of Natural Law and Inheritance

Work by Jeremy Waldron shows that even under a natural law analysis, inheritance is not absolute.¹⁸⁵ Instead one sees that for Locke natural law requires that one leave enough to maintain for surviving dependents; so the first portion of the estate goes to them but “apart from the needs of dependents, there are no natural rights of

¹⁸¹ See Mossoff, *What Is Property?*, supra note 175, at 395.

¹⁸² *Id.* at 383-384.

¹⁸³ *Id.* at 381, 384; see also Gordon, supra note 176, at 1559-1560 (discussing the relationship between liberty, property, and the commons and noting Locke’s view that people have “a right to possess and use as much as was needed to ‘provide for their Subsistence,’” (citation omitted).

¹⁸⁴ See Yen, supra note 174, at 557 (“Authors certainly create material in which they deserve property rights.”).

¹⁸⁵ See generally, Jeremy Waldron, *Locke on Inheritance*, 19 JOURNAL OF THE HISTORY OF PHILOSOPHY 39 (1981)

succession.”¹⁸⁶ The key idea is the distinction between a state of nature world and civil society world: “In the state of nature ownerless property reverts to common stock of mankind and may be appropriated subsequently by anybody who can use it. In a civil society, however, the legislature is likely to make detailed provision for the orderly disposition of such property.”¹⁸⁷ As Waldron sums “In general, the acquisition and transfer of property come under the jurisdiction of civil law once a property holder enters society.”¹⁸⁸

In addition, as Carol Rose has shown even Blackstone, who is famous for the over-simplified view of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” had reservations about the way property actually works.¹⁸⁹ Rose explains that, like Locke, Blackstone begins with a state of nature premise where there is a commons from which all may draw and claimed property by occupancy which was a temporary situation.¹⁹⁰ Once society grew and began to develop resources, resources became scarce and permanent rights emerge to allow “‘occupiers’ to avoid conflicts with one another and encouraged them to labor on the things to which they now

¹⁸⁶ *Id.* at 50.

¹⁸⁷ *Id.*; *see also id.* at 45-46 (explaining the way in which the idea of providing a minimal level of subsistence fits within Locke’s view of bequest) and at 48-49 (detailing how civil society’s structures interact with the state of nature and offering “Indeed, Locke seems to be convinced that once civil governments are set up there will be only very limited scope for the direct acquisition of property by the investment of labor.”).

¹⁸⁸ *Id.*; *see also id.* at 49. Lord Macaulay’s speech regarding term extension in England in 1841 also drew on the civil aspect of inheritance. *See* Parliamentary Debates, *supra* note 111, at 345 (“Surely, Sir, even, those who hold that there is a natural right of property must admit that rules prescribing the manner in which the effects of the deceased persons shall be distributed are purely arbitrary, and originate altogether in the will of the legislature.”).

¹⁸⁹ *See generally* Carol Rose, *Canon’s of Property Talk, Or, Blackstone’s Anxiety*, 108 *YALE L.J.* 601 (1998) (quoting 2 William Blackstone, *Commentaries on the Laws of England* 2 (facsimile ed. 1979) (1765-69)).

¹⁹⁰ *Id.* at 606.

claimed a durable right.”¹⁹¹ According to Rose the idea here is utilitarian: “Exclusive dominion is useful because it reduces conflicts and induces productive incentives. As Blackstone observed, no one would bother working and cultivating if someone else could ‘seise upon and enjoy the product of his industry, art, and labour.’”¹⁹² So “necessity” creates property and “civil society” and governments preserve that property.¹⁹³

Again the turn to civil society to order property rights appears. But even more so than for Locke, inheritance is suspect. In Blackstone’s view death meant that the estate would return to the commons and then belong to the new “first occupant and user.”¹⁹⁴ But because of the disruption that would follow from such a rule, Blackstone argued that society enacted legislation to set forth the proper way to handle the issue of inheritance.¹⁹⁵ As Rose puts it, “In Blackstone's presentation, property has a place as a natural right, but it is at best incomplete, applying to current occupancy but evidently not to more permanent claims, and especially not to claims based on inheritance.”¹⁹⁶

Returning to the issue of descendible copyright one finds greater problems than already seen in the arguments authors assert to justify the practice. The claim that natural law demands that property be fully descendible is now limited by the idea of “apart from the needs of dependents, there are no natural rights of succession.”¹⁹⁷ Looking at the Blackstonian notion of exclusivity, one sees that although it may support and indeed presage the incentive argument that one must have property rights or others will simply

¹⁹¹ *Id.*

¹⁹² *Id.* at 607.

¹⁹³ *Id.*

¹⁹⁴ See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary War*, 76 MICH. L. REV. 1, 7 (1977) (quoting and citing 2 William Blackstone, *Commentaries on the Laws of England* at 13).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at note 22.

¹⁹⁷ See Waldron, *supra* note 185, at 50.

‘seize upon and enjoy the product of his industry, art, and labour’¹⁹⁸—an argument that is quite strong in the utilitarian approach to intellectual property—there too civil society enters to order property and especially inheritance rules. In simplest terms, descendible copyright is not a foregone conclusion under natural rights theory.

B. Persona-based Theoretical Interests

Personality or persona arguments are another key way to justify intellectual property rights.¹⁹⁹ This view was not present in Webster and Clemens’s arguments, but plays an important role in the continental European understanding of copyright advanced in 1858 and later by Hugo. In brief, this view holds that the creation is an expression of the creator’s will and personhood.²⁰⁰ Thus insofar as one thinks of one’s creations as extensions of oneself or that one invests part of one’s being into one’s creation, one adheres to what Margaret Radin calls the intuitive view of personhood: “Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we

¹⁹⁸ *Id.* at 607.

¹⁹⁹ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 289-290 (1988); see also PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996). The theories trace their roots to Immanuel Kant and Georg Hegel. See Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1976-1978 (2006); accord Fisher, *supra* note 173, at 171, 174. There is, however, some divergence as to how those theorists’ views drive the analysis and whether they are compatible with each other. See Fisher at 191 (noting Kant and Hegel’s differing views of an author’s ability to alienate rights regarding copying); DRAHOS at 79-82 (explicating the difference and clash between Kantian and Hegelian based views of personality and its relation to property).

²⁰⁰ This view can be seen in the 1858 Congress. See *supra* note 126. For general summary of the personality see William Fisher, *supra* note 173, at 171, 174. Margaret Radin’s *Property in Personhood* is one of the most well-known articulations of this view. Radin’s project “attempts to clarify a [] strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of ‘things.’ This ‘personhood perspective’ corresponds to, or is the dominant premise of, the so-called personality theory of property.” Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

constitute ourselves as continuing personal entities in the world.”²⁰¹ At this stage one can appreciate that if part of one’s being was constituted in a thing, one should have a claim over it, and another’s use of it could pose problems.

Accordingly, one may write a short story, and it may well be personal property in Radin’s sense of the term; or it may be a commissioned story, and one may write it with little personal connection to it. In some cases the writing may never be published, be left to someone, and person may find her attachment to the property to be personal. Indeed given the subjective nature of this view, both the creator *and* the owner of the creation may be bound up with the creation.²⁰²

Put differently, Radin points out that there is “personhood interest [] in fungible property”²⁰³ but that interest is on a continuum. The closer to personal property the thing is, the stronger interest or entitlement one has in preserving that property.²⁰⁴ Thus some items may be so close to personhood that no compensation would suffice and other items may so fungible that “the justification for protecting them as specially related to persons disappears.”²⁰⁵ Another important aspect of the continuum understanding is that it denies

²⁰¹ *Id.* at at 959. Radin uses the “a wedding ring, a portrait, an heirloom, or a house” as examples of such things. *Id.*

²⁰² For one account of how this distinction poses problems *see generally* George H. Taylor and Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 *Clev. St. L. Rev.* 141 (2006).

²⁰³ *See* Radin, *supra*, note 200, at 1008, *see also id.* at 986-989 (detailing the contours of the personal to fungible property continuum and explaining “Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone’s being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum.”); Madhavi Sunder, Property in Personhood, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams, eds. 2005) at 2 (“Far from offering a singleminded assault on commodification, Radin is a ‘philosophical pragmatist’ who acknowledges that economic and cultural inequalities mandate that sometimes even very private things may be bought and sold, but only under carefully regulated circumstances.”).

²⁰⁴ *See* Radin, *supra*, note 200, at 987 (“Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”) and at 1005-1006 (explaining that some items are so close to personhood that no compensation would suffice and others are fully fungible).

²⁰⁵ *See id.* at 1005-1006.

that there is a personhood interest when attachments are fetishistic which here means one asserts an irrational attachment that “is inconsistent with personhood or healthy self-constitution.”²⁰⁶ So the idea of healthy self-constitution arises within the issue of personal property, but it points to Radin’s shift from property to a broader notion of the importance and power of personhood.

For Radin asserts that “some personhood interests not embodied in property will take precedence over claims to fungible property.”²⁰⁷ Here the theory moves beyond personal property to other interests. As detailed elsewhere, “when Radin turns to the question of using someone else’s property (e.g., a mall) for speech interests, she argues that the speech interests trump based on personhood interests. When two people need use of a space such as a mall, one determines who needs the property more in light of their respective personhood claims.”²⁰⁸

“The emphasis here is on *personhood* not property.”²⁰⁹ It is the necessity of the individual or public accessing the non or less personal property so they can have

²⁰⁶ See *id.* at 968-969. Insofar as this Article develops a sense of how to parse what is fetish and what is not in the context of intellectual property it may respond to Fisher’s call to “adequately deal[] with” “the problem of fetishism.” Fisher, *supra* note 200, at 192.

²⁰⁷ *Id.* at 1008.

²⁰⁸ See Deven R. Desai, *Property, Persona, Preservation*, (forthcoming TEMPLE L. REV. 2008), (citing Radin, *supra* note 200, at 1009).

²⁰⁹ Desai, *supra* note 208; see Radin, *supra*, note 200, at 1015 (arguing that someone’s claim over another’s fungible property “is strongest where without the claimed personhood interest, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.”); accord Sunder, *supra* note 203 at 8 (“Assertions of power over one’s own identity necessarily lead to assertions of property ownership. . . . Property enables us to have control over our external surroundings. Seen in this light, it is not enough to see all claims for more property simply as intrusions into the public domain and violations of free speech. Instead, we may begin to see them as assertions of *personhood*.”)

“opportunities to develop and express personhood” that drives this result.²¹⁰ Radin later explained and developed this idea as human flourishing.²¹¹

Here one may see that Radin’s view comports with the 1858 Congress and Hugo’s description of the balance between the author’s rights and the public domain. For Hugo argued that the author’s work is part of progress. It is the essence that allows civilization to advance and grow. Rejecting the public domain runs contrary to the author’s role in society, and to hold too tight author’s rights enslaves thought. Indeed, Hugo offers a dichotomy similar to Radin’s: when one must choose between the individual author’s rights and the public domain, the public trumps because that is the way the human spirit is free and fulfils its destiny. Today he may have said in Radin’s terms, the public domain feeds the potential for human flourishing and demanding author’s rights over that possibility is fetishistic.

Picking up on this element of author’s rights approach to copyright Roberta Kwall expresses another view of personality-based intellectual property and has argued that U.S. copyright law should recognize moral rights as they protect the “human spirit, an interest that transcends the artist’s concern for property or even reputation.”²¹² Furthermore Kwall has argued that U.S. copyright law should have a right of attribution—honor in the 1858 Congress and Hugo’s terms—as part of author’s rights and the

²¹⁰ Radin, *supra*, note 200, *Id.* at 1010.

²¹¹ See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903-1915 (1987) (explaining the link between personhood and flourishing and arguing “that market-inalienability is grounded in noncommodification of things important to personhood.”); accord Radin, *supra* note 200; Fisher, *supra* note 200, at 171 (summarizing that some see this view as supporting the creation of “social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing.”). Professor Julie Cohen’s discussion of Radin’s work notes this distinction but places human flourishing as somewhat separate from Radin’s concept of personhood. Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1383 (2000).

²¹² Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152 (2001)

personality approach to copyright²¹³ and grounds the call for an attribution right in “the dignity and personality interests of the author, and the ability of the author to command her reputational due.”²¹⁴ Kwall, however, explicitly states that such rights must be limited to the life of the author.²¹⁵

Some may argue that current European views of moral rights demand a stronger form of the rights.²¹⁶ Others see moral rights view of authorship as part of a Romantic view of authorship that over-privileges authors’ rights.²¹⁷ Yet, even for those who want or require a broader notion of moral rights, it appears that there is a lack of uniformity regarding whether such rights should extend beyond the copyright term.²¹⁸ Again, what theoretical grounds exist for such rights persisting beyond life is unclear. Furthermore Kwall’s view matches Hugo’s vision: authors have large control in their life, but when

²¹³ See Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 *WAS. L. REV.* 985 (2002) (calling for a federal right of attribution for copyrightable works because copyright and trademark law fail to address personality or other non-monetary interests with which an attribution interest is concerned).

²¹⁴ *Id.* at 996.

²¹⁵ See Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *NOTRE DAME L. REV.* 1945, 1957-1958, 1969-1970, 2003 (2006) (describing a system where the author has control over her work in life but returns it to the community at death and the idea of author’s stewardship as entailing inspiration that fuels creation but as part of a cyclical process).

²¹⁶ See e.g., Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 *COLUM. VLA J.L. & ARTS* 199, 200-201, 203 (1994) (noting the view that Article 6^{bis} of the Berne Convention which addresses moral rights is “minimalist” and does not capture the range and breadth of rights found across European laws covering moral rights such as the divulgation right and the withdrawal right and in Spain the rights regarding access to sole or rare copies in another’s possession).

²¹⁷ Cf. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 *DUKE L. J.* 455, 497-498 (1991) (arguing that moral rights approaches embrace a Romantic author perspective).

²¹⁸ Dietz, at 213-217 (detailing European countries’ varying views of whether moral rights exist in perpetuity or expire with the copyright term and concluding it is “a question of culture and policy” perhaps better left to “the legal and cultural traditions of individual countries.”)

they die, the work returns to public to fuel further inspiration and creation²¹⁹ and is closer to that view of European copyright.²²⁰

Thus, although the personhood approach involves property, the ideas that one may have a claim over someone else's property and that life is terminus for personality-based rights point to limits on property in this theory. One cannot claim property, or one can claim it but that claim will lose, when another requires that property for personhood or human flourishing. At this point, human flourishing as it relates to copyright seems to involve understanding that what type of system will allow individual flourishing or development through creation while also allowing others to draw on and use those creations so that they too may develop. The details of what a system that fosters such potential looks like come later.²²¹ For now a key insight is that the right is again personal. It is connected to the author's life, and, like the Lockean view, does not support extension of the life interests to heirs. At most persona theory indicates a possible tension between heirs and society regarding necessity for the property in question.

C. Utilitarian-based Theoretical Interests

²¹⁹ Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1957-1958, 1969-1970 (2006) (describing a system where the author has control over her work in life but returns it to the community at death and the idea of author's stewardship as entailing inspiration that fuels creation but as part of a cyclical process).

²²⁰ As Dietz notes, many European countries facing a tension between public use and moral rights employ cultural and policy views to allow comments and criticism on the work and in some cases do not allow heirs to exercise the right to withdraw a work from the public. *See* Deitz, at 215.

²²¹ *See infra* Section III.

The standard or most popular explanation for intellectual property protection in U.S. law is utilitarian; the goal is the maximization of social welfare.²²² This approach to intellectual property “requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.”²²³ In simplest terms this view holds that the law must provide protection for the creation of nonrivalrous goods²²⁴ such as a writing because after its creation “it is like an idea: it need only be created once and has an infinite capacity in that once it is created there is no additional marginal cost in allowing others to use it.”²²⁵

As William Fisher explains the utilitarian approach raises questions regarding what welfare maximization means and how it operates in this context.²²⁶ He notes that three approaches have emerged to answer these questions: incentive theory, optimizing patterns of productivity, and rivalrous invention.²²⁷ Under the incentive theory one wishes to establish a system where the duration of protection and/or strength of protection is “increased up to the point where the marginal benefits equal the marginal

²²² See e.g., Fisher, *supra* note 173, at 169; accord Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1306 (2003) (“The economic rationale is widely accepted as the primary philosophical underpinning for U.S. copyright law and policy.”).

²²³ See Fisher at 169.

²²⁴ *Id.* (noting William Landes and Richard Posner’s work on copyright theory and their explanation that unlike tangible goods, intellectual goods are easily copied at little or almost no cost after creation); but see Brett Frischmann and Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 272-273 (2007) (explaining that nonrivalrous goods allow for simultaneous use without depriving others of use *and* that often such use is a spillover use which does not compensate the creator but often produces another creation which others may use rather being a passive consumption).

²²⁵ Desai, *supra* note 208, (citing and quoting Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 946 (2005) (“An idea only needs to be created once to satisfy consumer demand while an apple must be produced for each consumer. Essentially, this means that the marginal costs of allowing an additional person to use an idea are zero.”)).

²²⁶ See Fisher at 179.

²²⁷ *Id.*

costs.”²²⁸ The optimization of productivity approach draws on Harold Demsetz’s work and concludes that full internalization of costs, that one should be able to recoup any possible income for other’s enjoyment of one’s literary or artistic work, is best because one would then know what consumers want and then would invest one’s efforts and resources accordingly.²²⁹ The rivalrous invention view addresses the problem that the current intellectual property system can decrease social welfare because creation and innovation is often uncoordinated and thus redundant, wasteful acts occur.²³⁰ Whether this view fits well with copyright and inheritance remains to be seen.

1. Utilitarian Claims Regarding Creation, Incentives, and Heirs

The incentive branch tracks closest to the reasons offered for the extension of copyright to heirs. As seen above, authors plead that they needed the copyright extension to care for their heirs. More recently the argument has been that authors would not create without a long term or have much more incentive to create when the copyright term is long and in this case long equals the life of the author plus numerous (seventy years) for heirs. Although not stated directly, the claims that author’s wish to use copyright to care for their spouses or inept children is an incentive argument. The unstated idea (or threat) is that authors would pursue other endeavors so that without better protection and

²²⁸ *Id.*

²²⁹ *Id.* (citing and quoting Paul Goldstein for the application of Demsetz’s ideas to literary and artistic work); *see also* Brett Frischmann and Mark Lemley, *supra* note 224, at 265-266 (“The basic idea behind “internalizing externalities” is that if property owners are both fully encumbered with potential third-party costs and entitled to completely appropriate potential third-party benefits, their interests will align with the interests of society, and they will make efficient (social welfare-maximizing) decisions. ... [Property owners] must also internalize benefits in order to have the proper incentive to invest in maintaining and improving their property. According to the Demsetzian theory, internalization is the silver bullet that magically aligns private and social welfare.”)

²³⁰ *Id.*

incentives creation would stop or at least diminish significantly. But as Professors Brett Frischmann and Mark Lemley note despite many applying the internalization view to creation²³¹ not all creation requires incentives.²³² Furthermore some argue that the nature of incentives is less clear.²³³

Nonetheless, authors have claimed that providing for their children is a motivation for writing. That claim is dubious for two reasons. First, authors who make this argument have already earned in their lifetime and could easily leave money or buy life insurance as a way to provide for heirs while still leaving creative works for society's use. Second, as practical matter, the idea that a work will provide for heirs is more of a dream than a reality. Few authors are actually successful; high sales for *any* book are rare.²³⁴ Indeed at least one study indicates that most writers do not look to writing as the prime source of income.²³⁵ If an author knows that work is not sustaining one while alive, the idea that an author thinks the work will sustain heirs after the author is dead is incoherent.

²³¹ See Brett Frischmann and Mark Lemley, *supra* note 224, at 266 (“The Demsetzian view is more or less the same in the context of innovation. If an inventor cannot capture the full social benefit of her innovation, the argument goes, she will not have enough incentive to engage in the research and development that will produce that innovation. If there are spillovers from innovation, they must be interfering with incentives to innovate, and we should find them and stamp them out.”).

²³² See generally, *id.* at 279-281.

²³³ See e.g., Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 515 (1996) (“Cultural norms can substitute for legal property rights as an incentive for production. In many situations, contrary to Benthamite reasoning, people produce without monetary benefit-internalization incentives.”); see also Desai, *supra* note 208, (examining the growth of attention economics as a way to explain how online creation generates value but not in a pure monetary manner); Greg Lastowka, *Digital Attribution: Copyright and the Right To Credit*, 87 B.U. L. REV. 41, 51-63 (2007) (tracing monetary and reputation incentives for creation and showing where the two intersect and diverge).

²³⁴ Tim O'Reilly, *Search and Rescue*, NEW YORK TIMES, A27, September 25, 2005 (“only 2 percent of the 1.2 million unique titles sold in 2004 had sales of more than 5,000 copies.”); Sathnam Sanghera, *It's not always good to let the novel out*, TIMES U.K., Business 53, February 16, 2008 (“The United Kingdom has similar numbers: “of 200,000 books on sale last year, 190,000 titles sold fewer than 3,500 copies. More devastating still, of 85,933 new books, as many as 58,325 sold an average of just 18 copies.”); see also Landes and Posner, *supra* note 14 at 475 (finding average of fifteen years of value for copyright).

²³⁵ Martin Kretschmer and Philip Hardwick, *Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers*, December, 2007 (“60% of professional writers” in the United Kingdom and Germany require another source of income and engage in non-authorial work to survive) available at <http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf>

Furthermore, recall that authors' claims for long or perpetual copyright as a method of support for surviving spouses and children rely in part on notions of women's inability to work. Today, that view is unsustainable.

In addition, the idea that all authors work to provide for their families is a rather large assumption. Remember that Clemens's testimony suggests he wanted the state to care for his heirs by extending copyright term, because would rather waste his income and ignore caring for his heirs. In general terms this idea is that one should not have to manage whatever one makes in one's lifetime such that there is something left for surviving spouses and heirs. Of course Senator Hatch deployed a single story of a laudable heir who managed inherited copyrights and generated income. That instance proves little and reveals another major assumption that is troubling if not false from a utilitarian analysis.

This one does not take the guise of providing for heirs. Instead it paints a picture that heirs are somehow better custodians than anyone else. The argument tracks a related custodial argument: without long copyright great works will not be published for corporations will have little incentive to publish. This position seems to fit within the utilitarian analysis. But two things undercut this claim. First, heirs' behaviors to thwart publication—a concern that the continental Europeans acknowledged and sought to curtail—show not only that heirs are poor custodians, they often thwart the other side of the utilitarian balance between incentive and fostering further use of the creation. Second, recent work by Professor Paul Heald shows that public domain works in general do not suffer from under publication.

2. Heirs: Poor Custodians and Roadblocks to Progress

As the Anglo-American discussions acknowledged and the European debates decried, heirs open the potential for monopoly, the establishment of a type of aristocracy, and the denial of access to or use of creations.²³⁶ Recent examples demonstrate that heirs' interests run contrary to the interest of having material available for others to use. In addition, insofar as one thinks longer copyright term through heirs (or corporations) fosters better development and exploitation of creative works, evidence suggests that the opposite is true.

a. Heirs' Misbehaviors

Heirs' behaviors can be capricious or even malicious as they exert control over copyrighted material. This behavior denies access to and use of material that serves as the basis for others' to create new works—an ideal that Hugo championed. For example Stephen James Joyce, James Joyce's only living heir,²³⁷ manages the Joyce estate and has often tried to prevent academic uses of public material related to Joyce and prevented public readings of such material. The estate leverages its copyright power to threaten and limit legitimate use of the material²³⁸ so much so that in one instance Professor Carol Schloss, a James Joyce expert, had to sue the estate of James Joyce to protect her ability

²³⁶ See *supra* notes 102-103, 138 and accompanying text.

²³⁷ See D.T. Max, *The Injustice Collector*, THE NEW YORKER, June 19, 2006, at 34.

²³⁸ See Amended Complaint for Declaratory Judgment and Injunctive Relief at ¶¶47-66 (detailing the efforts of the Joyce estate to prevent the publication of Schloss' work and the changes to the work based on the threats of litigation), at ¶¶ 80-88 (detailing the Joyce estate's use of litigation and to stop arguably fair uses), and at ¶¶93-96 (showing the way in which the estate invokes copyright to further non-copyright interests such as privacy).

to use material for her scholarship.²³⁹ The Joyce estate is not alone. The estates of T.S. Elliot, J.R.R. Tolkien, J.M. Barrie, J.D. Salinger, Sylvia Plath, Samuel Beckett, and Bertolt Brecht have expressed similar displeasure at and/or desires to control academics' approach to the creator's work.²⁴⁰ Descendible copyright fosters such problems.

Unlike authors who labor and pour their being into a work, heirs simply sit back and collect rent without appreciation for the creative system upon which their parent drew to create in the first place.²⁴¹ In addition, it is not that all heirs agree about how to manage estates. The Martin Luther King estate is currently in a lawsuit regarding the general management of the estate.²⁴² The Tolkein estate disagrees about how to manage the estate and whether the film adaptations should receive the family's blessings.²⁴³

Thus the image of heirs managing the material well has a counter image: fighting and petty heirs who deny others access to work or and disagreeing about what works can and cannot be made or released to the public. Rather than a world where further creation occurs and new material is produced, a world where fewer works are made because of pettiness and the need for permission is in place. A related issue is the claim that longer

²³⁹ Professor Schloss had the assistance of the Stanford Law School Cyberlaw Clinic Center for Internet and Society. See *Fair Use Project and Cyberlaw Clinic at Stanford Law School Represent Scholar in Lawsuit Against the Estate of James Joyce* available at <http://cyberlaw.stanford.edu/Shloss%20v.%20Joyce%20Estate%20Press%20Release.pdf> (last visited July 11, 2006). A copy of the complaint is available at <http://cyberlaw.stanford.edu/Complaint%20Endorsed%20Filed%206-12-06.pdf> (last visited July 11, 2006).

²⁴⁰ See Max, *supra* note 237, at 36 (noting the Elliot estate's view of academic work); Ethan Gilsdorf, *Lord of the Gold Ring*, BOSTON GLOBE, 10, November 16, 2003 (noting the Tolkien estate's approach to literary material); Matthew Rimmer, *Bloomsday: Copyright Estates and Cultural Festivals*, 2 SCRIPTED, 383, 393, 427 (September, 2005) (citing the Barrie's estate exertion of resurrected property interests to stop later work based on Peter Pan and noting the other author's estates tendency to thwart historians).

²⁴¹ Cf. Patry, *supra* note 27, at 927-928, 932-933 (noting the beneficiaries of term extension are those who have already created copyrighted works and those who live off income from trust funds from already famous authors).

²⁴² See Errin Haines, *Lawsuit Exposes Growing Rift Among King Children*, AP, July 19, 2008, available at <http://abcnews.go.com/US/wireStory?id=5409001>.

²⁴³ See Gilsdorf (detailing the disagreement between Christopher Tolkein, son of J.R.R. Tolkein and manager of the estate, and his son Simon resulting in Simon's removal as trustee).

copyright will nonetheless foster publication of works because without that protection, publishers would not have reason to publish the great works; the public domain will result in under exploitation.²⁴⁴ Until recently that claim had little to prove or disprove it. Paul Heald's work, however, shows why this claim is unpersuasive. It is a complex study that merits some explication to see how its findings impact the role of heirs in copyright.

b. Evidence of Greater, Not Less, Production for Public Domain Works

Heald's study seeks "to determine whether extending a property right in an existing work of fiction is necessary to ensure its adequate exploitation. To that end, the set of 166 public domain works, published from 1913-1922, and the set of 168 copyrighted works, published from 1923-1932, were compared over time in terms of their in-print status, number of available editions in 2006, and their current 2006 price."²⁴⁵ The study shows "that from 1988-2001, public domain bestsellers were in print at the same rate as their copyright-protected counterparts. After 2001, the public domain books are available at a significantly higher rate than the copyrighted books."²⁴⁶ In addition when one examines the probability of being in print as it relates the number of years elapsed

²⁴⁴ For example, Cohen's work on duration pretends to take seriously the idea of the public domain but argues strongly that authors work more when offered protection for their work and similarly holds that the idea that the public domain will possibly result in less expensive works is as "equally" supported as the idea that copyright will foster more publication because again that protection is necessary to cover costs. See Cohen, *supra* note 174, at 1181. Heald's work provides evidence that the public domain fosters greater publication and at a lower prices and thus shows how this sort of claim, although common, is less powerful and perhaps false in the face of dropping production costs for many copyrighted goods. See Paul Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1033 (2008).

²⁴⁵ *Id.* at 1039.

²⁴⁶ *Id.* at 1040.

since publication, it appears that “eighty years after publication ... public domain works will be more available than copyrighted works.”²⁴⁷ Variance in editions of books did not indicate underexploitation either.²⁴⁸

The study also examined the most enduringly popular books of the comparison period. Again public domain status did not hurt the probability of being in print, number of editions in print over time, and comparative shelf space (which might indicate whether a book was really available for sale).²⁴⁹ But if one is interested in the public’s cost of obtaining one of these durable works, a difference in price is found: “The lowest average price listed by Books In Print is \$4.45 for a durable public domain book and \$8.05 for a durable copyrighted book, an 81% higher average price.”²⁵⁰ Even if one limits the field to major publishers’ editions, one sees a 41% higher average price in general and if one compares Amazon’s pricing one sees 55% higher average price.²⁵¹ The study further probed the price question by examining only the Penguin Classics editions as a way to control for popularity and/or quality of printed material discrepancies.²⁵² Again the copyrighted work cost more, and, at 56% higher average cost, tracked the findings of the Amazon comparison.²⁵³ In short, one sees a deadweight loss here.²⁵⁴ Furthermore, the study offers evidence that nonowners (i.e., non-copyright holders) will indeed publish work and often recover currently unpublished but “easily duplicated works.”²⁵⁵

²⁴⁷ *Id.* at 1043.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1044-1047.

²⁵⁰ *Id.* at 1048.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 1049.

²⁵⁴ *Id.* at 1053.

²⁵⁵ *Id.* at 1051.

So when one considers that heirs become a proxy for a longer copyright term in general, two points become clear. Heirs often hinder rather than help copyrighted work reach the public. Copyright is not necessary to foster better custodial efforts of many easily duplicated works.

D. Theoretical Findings and Lessons

At this point one can see that heirs provide a nice prop. Those seeking longer term for copyright cannot simply assert that they wish to rent seek and have their children benefit for no work. They can, however, invoke a blend of Lockean labor, personality, and utilitarian arguments to give the appearance of injustice and to try and found the basis for extending copyright term. Indeed, insofar as copyright term lasts less than one's life, it seems too short. Both Lockean notions of being able to sustain one's life and personality theories that seek to protect that which is an extension of or somehow an embodiment of one's being support protection during life. Nonetheless both also hold that these interests diminish if not extinguish at death.

Utilitarian theory may support leaving copyrights to heirs, but only if those copyrights are used to increase the access and use of the underlying material such that we have reach "an optimal balance" between incentives to create *and* "widespread public enjoyment of those creations."²⁵⁶ As Terry Fisher notes, "The truth is that we don't have enough information to know who is right" regarding incentive claims in general.²⁵⁷ In

²⁵⁶ See Fisher at 169.

²⁵⁷ *Id.* ("With respect to incentive theory, the primary problem is lack of the information necessary to apply the analytic. To what extent is the production of specific sorts of intellectual products dependent upon maintenance of copyright or patent protection? With respect to some fields, some commentators have

addition, little evidence supports the claim that authors look only to writing as a way to support them when alive which calls into question any system based on the dream of a work supporting heirs after the author is dead. There is evidence, however, that the fears of some misbehavior and mismanagement by heirs have been realized. Heirs can and do thwart, rather than foster, better use of copyrighted material. This behavior can upset the ability for widespread enjoyment. In addition, Heald's empirical work indicates that the shorter a work is under anyone's control, the sooner it will reach a widespread public. As such, the idea that copyright ought to take care of heirs prolongs the period of time between exclusive, limited use and edifying public use. To understand this point one must have a fuller conception of edifying use and of who is making such use. In short, one must see how there is another, ignored heir: society.

Put differently, lineal descendents are not the only heirs that copyright policy ought to consider. Society-at large is as much an heir to copyrighted work as an author's children. The next section sets forth the material necessary to understand society as heirs.

III. The Missing Heirs: Society At Large

To refresh: the heirs assumption holds that a purpose of copyright is to provide for heirs. As shown above, neither history nor theory supports the assumption. Furthermore,

answered: very little.”). For example during the CTEA debates at least one group of economists argued that the extension from 50 years after life to 70 years provided miniscule increased incentive (“less than 1%”) from the current life plus 50 term. *See* Brief of Brief of George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser in *Eldred*; *cf.* Stan J. Liebowitz and Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 457 (2005) (arguing that greater empirical work yet to be done may show that the extra twenty years provides significant incentives).

there is a different, important heir—society—that the current heirs assumption misses. The historical and theoretical analysis presented above and recent work regarding infrastructure and spillover theory point to the way that society is as much, if not more, of an heir to creation than lineal descendents. The next sections examine society as an heir to creation. Part III.A. examines the nature of creative cycles and copyright’s place in those cycles. Part III.B. builds on that material to show how the idea of intergenerational equity further supports viewing society as an heir to creativity.

A. Creative Cycles and Copyright

Creativity requires inputs. As Radin has put it “[C]reativity is deeply a collective matter; in a sense, all creativity is collective creativity.”²⁵⁸ Similarly, Larry Lessig’s model of free culture explains how unencumbered culture operates as inputs for others to use in their creation.²⁵⁹ Jessica Litman and James Boyle have explicitly disputed the notion of creation out of nothing.²⁶⁰ This notion of communitarian creative process is not a new one.²⁶¹ Authors at the 1858 Congress in Brussels described creations as a common source for inspiration and other creative acts²⁶² and challenged members of the audience to deny that great writers of modern times study and dig through the works of those who

²⁵⁸ Radin, *supra* note 233, at 510.

²⁵⁹ See LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* at 21-30 (2004).

²⁶⁰ Jessica Litman, *The Public Domain*, 39 EMORY L. JOURNAL 965, 965-967 (1990); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 57 (1996) (“[E]ven [] remarkable and ‘original’ works of authorship are *not* crafted out of thin air. As Northrop Frye put it in 1957, ... ‘Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise.’”).

²⁶¹ See *e.g.*, Desai, *supra* note 208, (examining philosopher Wilhelm Dilthey’s presentation of each human being as a part of a productive nexus in which one is both a taker and creator in this process; one is a part of a productive nexus).

²⁶² See ANNALES, *supra* note 122, at 435. (“C’est que, messieurs, le domaine public forme un fonds commun ou chacun s’inspire, puise, cherche sa voie, se la fraye”).

came before²⁶³ as part of the creative process. Not only literary and cultural explanations of creativity view the creative process as a feedback system. Recent economic work regarding spillovers parallels these views.

Spillovers are “uncompensated benefits that one person's activity provides to another.”²⁶⁴ They are externalities which can be either positive or negative.²⁶⁵ Some argue that all externalities require complete internalization.²⁶⁶ Yet as Frischmann and Lemley explain, “[S]pillovers are good for society. There is no question that inventions create significant social benefits beyond those captured in a market transaction.”²⁶⁷ Indeed, studies show that industries and cities with high spillover rates generate more innovation.²⁶⁸ Yet, these greater innovations are not because of some sort of theft or free-riding; “rather, they are part of a virtuous circle because they are in turn creating new knowledge spillovers that support still more entrepreneurial activity.”²⁶⁹

Although couched in terms of inventions, this presentation of spillovers matches the description of creation offered in 1858 and comports with the non-economic presentation of creation as a communal process. So far then several different approaches and experiences converge on the idea that creative systems function best when one has

²⁶³ *Id.* (“Que seraient les grandes écrivains des temps modernes s'ils n'avaient pu étudier et fouiller les œuvres de ceux qui les ont devancés dans cette vaste arène ouverte au génie, des l'instant où l'homme s'est mis en relation avec ses semblables, ou la terre lui a été livrée?”).

²⁶⁴ See Brett Frischmann and Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007).

²⁶⁵ *Id.* at 262 (“[P]ositive (or negative) externalities are benefits (costs) realized by one person as a result of another person's activity without payment (compensation).”).

²⁶⁶ *Id.* at 266.

²⁶⁷ *Id.* at 268.

²⁶⁸ *Id.* at 268-269.

²⁶⁹ *Id.* at 269; accord Radin, *supra* note 233, at 515-516 (examining the balance between no property and full property protection for intangible creations and noting “[T]here's a feedback relationship: while the ‘right amount’ of information may depend upon the existence of a particular desired culture, at the same time the development of that particular desired culture may depend upon there being available the ‘right amount’ of information.”).

increased and improved access to previous creations,²⁷⁰ because creation, by its nature, draws on others' creations. That point suggests a duty to allow others to create based on one's work. In other words, that duty may flow from an understanding of intergenerational equity as it explains the way in which society is also an heir to creative works.

B. Intergenerational Equity

Once one appreciates the communal nature of creative systems and that everyone in some way draws on other's works to create new works, the idea of intergenerational equity naturally follows. For if one acknowledges that creation is a derivative process, one is hard pressed to explain why his work should somehow be exempt from feeding others' creation. Again, the 1858 Congress understood this point and explicitly described the creative cycle as providing fertile ground for future generations to till.²⁷¹ Later Hugo declared that authors' property rights must cede to their main concern: nurturing the public by sharing works in the public domain.²⁷² These ideas see society as an equal, and possibly superior, heir to an author's lineal descendants. In other words, intergenerational equity may demand that copyright pay more attention to society's claim to a creative work and may show that society's claim is greater than an author's lineal descendants.

²⁷⁰ Cf. MICHAEL HELLER, *THE GRIDLOCK ECONOMY* (2008) (detailing the way in which too many and fragmented property rights create an anticommons or wasteful underuse); accord Francesco Parisi and Ben Depoorter, *The Market for Intellectual Property: The Case of Complementary Oligopoly*, in *THE ECONOMICS OF COPYRIGHT: DEVELOPMENT RESEARCH AND ANALYSIS*, W. Gordon and R. Watt, eds) 165 (2003) ("An increase in the number of copyright holders exercising independent control on the price of their respective licenses exacerbates the degree of underutilization.").

²⁷¹ See ANNALES, *supra* note 122, at 435. ("ouvre des voies nouvelles, qu'il appartient aux générations a venir de féconder").

²⁷² See *supra* notes 167 to 171 and accompanying text.

As Larry Solum has put it “The problems of intergenerational ethics are notoriously some of the most difficult in moral and political philosophy.”²⁷³ Although a full discussion of the contours of intergenerational equity and copyright merits separate investigation, a brief discussion here illustrates how the idea relates to copyright and heirs. Discussions of intergenerational equity often focus on real property²⁷⁴ and the question of how much one generation can consume a resource to its favor but to the detriment of future generations.²⁷⁵ In cultural contexts ideas of communal ownership similar to ones offered by the 1858 Congress and Hugo arise, but the cultural protectionists are often focused on rivalrous cultural items, such as art, that may be irreplaceable.²⁷⁶

Yet, copyrighted works are intangible and nonrivalrous so, unlike real property, copyrighted material cannot be consumed unless the original is destroyed and no copies remain. As a matter of intergenerational equity, the question shifts from consumption to access and use. Who should have access to and the ability to use creative works—works that drew on communal resources in the first place: a small group of heirs who may or may not be good custodians of creations, or, society at large?²⁷⁷

In a sense these questions echo the tension that arises when two or more people claim they need a specific property to develop their personhood and pursue what human

²⁷³ Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 164(2001).

²⁷⁴ *Id.* at 168.

²⁷⁵ See Brett Frischmann, *Some Thoughts on Shortsightedness and Intergenerational Equity*, 36 Loy. U. Chi. L.J. 457, 461-62 (2005).

²⁷⁶ See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1195-96 (1990); see also JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT* (2001) (examining the clash between property rights which allow private owners of artifacts to destroy or cut-off access to artifacts and society's need for access to such artifacts); but see Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000) (arguing for communal rights to protect intangible cultural resources such as songs).

²⁷⁷ Cf. Solum, *supra* note 273, at 169-171 (noting difference between lineal descendents and future generations in general when one considers the meaning of intergenerational).

flourishing.²⁷⁸ Analogous work by Martha Nussbaum helps understand the way in which copyrighted material fits into the idea of human flourishing. Nussbaum has looked at the question of human development and sought to set forth what are the “most central human capabilities”²⁷⁹ necessary for such development. Nussbaum explicitly calls out “being able to use imagination and thought in connection with experiencing and producing expressive works and events of one’s own choice, religious, literary, musical, and so forth” as one of the central aspects of human capability and part of humanity’s process of education and progress.²⁸⁰ As such, insofar as lineal descendants lock up expressive works, they take away resources vital to human flourishing and human development as those endeavors seek to draw on those expressive works to partake of society and in turn contribute to it.

Another way to understand the tension between lineal descendants and society is as a problem of fetish. Fetish here is an irrational attachment that “is inconsistent with personhood” that should not to be honored.²⁸¹ Given that more than one person can use copyrighted material, it may be that lineal descendants’ interests are a type of fetish.

Arguably, the desire to invoke labor and persona based theories to justify copyright on the one hand but ignore them to rationalize descendible copyright on the other hand, is irrational and possibly a fetish. Moreover, regardless of whether labor and persona based theories of property would characterize such attachment to a copyrighted work as a fetish, neither supports the idea of descendible copyright. They both indicate

²⁷⁸ See *supra* notes 208 to 211.

²⁷⁹ See Martha Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 285-286 (1997).

²⁸⁰ *Id.* at 287; *cf.* Chon, *supra* note 172.

²⁸¹ See *supra* note 206 (citing Radin for the idea that one can become overly attached to property in an unhealthy way).

that once one dies, little if anything should pass to lineal descendents, because the basis for the property, the author, is dead.

So, given that an author's lineal descendant can enjoy a work for his human development while others do so simultaneously suggests that this narrow groups' interests is a fetishistic view of literary property and one to which copyright policy ought not defer. And even if one decides that the position is not a fetish, copyright's nonrivalrous nature makes a lineal descendant's claim to require exclusive use for his development untenable. Both the descendent and society can make use of the material to further their respective developments.

Nonetheless, authors and lineal descendents offer a generation-based argument regarding copyright's term that must be addressed as one determines what intergenerational equity may require of copyright policy. This claim argues for the necessity of extending the life term so that it tracks the increasing average life span of people. More precisely, the view holds that it is fair and part of the purpose of copyright to feed the immediate offspring of authors. It focuses on an author's lineal descendents and makes a distinctly generational argument.

Yet, as William Patry notes, "This argument is internally contradictory" for the current life plus seventy year term protects not only one generation but on average four to five generations.²⁸² "Extension of protection to such remote heirs is impossible to justify in terms of encouraging the author to create, or any reasonable societal interest in the author's immediate heirs."²⁸³ Unless one agrees that authors should be allowed to use copyright as a way for descendents to receive passive income not only while they are

²⁸² See Patry, *supra* note 27 at 931.

²⁸³ *Id.* at 932.

minors but for decades beyond that point, the idea makes little sense.²⁸⁴ Furthermore, if an author fails to exploit a work during her life, the potential for descendants to do so is low.²⁸⁵ Thus although the idea that copyright will generally provide for descendants is nice, it is also an illusion. Given the rarity of authors' success while alive and their related need for supplementary income,²⁸⁶ descendants will certainly have to retain day-jobs, as it were, while trying to exploit a parent's creation. A copyright policy that serves the dream of long-term passive income in the face of these realities is incoherent.

Furthermore, if an author has exploited a creation during her life such that it generates income, a ready solution is possible. As a matter of seeking an affirmative social good, children should try to be employed, and the author should take that income and invest it and/or purchase life insurance as most people who wish to leave something to their lineal descendants. This approach does not rely on wishful thinking about future income streams. Instead it acknowledges the difficulties of creation and encourages better behaviors by authors and lineal descendants. Put differently, as a question of intergenerational equity, the claim that copyright must provide for immediate offspring

²⁸⁴ Cf. id. (“Not a single example has been given of a work that failed to make a profit in its first seventy-five years, or during the life of the author plus fifty years, but which would make a profit if term was extended an additional twenty years.”).

²⁸⁵ Id.; For an unpublished work the odds are even worse. The book industry is notoriously bad at predicting which books will sell well. See e.g., Derek Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 388 (2008) (detailing the highly unpredictable nature of book publishing, an average 23.87% return rate for books, and “persistent risk” in the industry); see also Dianne Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DePaul L. Rev. 1121, 1139 (2003) (noting publishers difficulty in predicting which books would “enjoy a long shelf-life”); Daniel Gross, *Book Clubbed, Why Writers Never Reveal How Many Books Their Buddies Have Sold*, SLATE, June 2, 2006 available at <http://www.slate.com/id/2142810/> (noting several book advances of \$1 million or more that sold poorly); Edward Wyatt, *The Fall Season's Winners and Losers*, NEW YORK TIMES, E1, December 7, 2005 (\$2 million advance to Martha Stewart and planned initial book run of 500,000 copies but sales of only 37,000 books and disappointing sales numbers for Salman Rushdie in contrast to unexpected sales for Joan Didion and President Jimmy Carter's works).

²⁸⁶ See Martin Kretschmer and Philip Hardwick, *Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers*, December, 2007 available at <http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf> (finding that the majority of authors must maintain non-writing jobs to supplement their writing income).

thus lacks basis in fact. Copyright does not usually reach this goal. In the cases where lineal descendents can generate income from a copyrighted work, copyright over-provides not just the immediate off-spring but several generations thus fostering rent-seeking and other undesirable behaviors.

In sum, the assumption that copyright is supposed to provide for lineal descendents runs contrary to insights regarding the relationship between authors and society. Copyright may be necessary to provide protection for creative work. There is strong practical and theoretical support for copyright to last as long as the author's life. Beyond that period of time, however, copyrighted material serves another important function: it is a vital input in the creative cycle and interaction with such material is required as a central capability human development. From this view, future generations have a strong claim to be understood as heirs to creative works.

French congresses, modern creativity theorists, and recent economic theorists all come to same conclusion: creation is fueled by other creation. Human capacity theorists see the ability to access and use creations "in connection with experiencing and producing expressive works and events of one's own choice" as vital to fostering the continued development of individuals and humanity in general. Thus it appears that as a matter of intergenerational equity, we all owe something back to the society which provided the material for our creation. Each future creative individual ought then to have the ability to draw from the creative pool as part of her creative process, which will have the potential to stimulate yet more creation. Little supports leaving the underlying work to heirs and denying society access to the legacy it fostered in the first place.

IV. Alternative Approaches and Conclusion

To be clear, this Article has questioned the assumption that copyright was designed to or ought to provide for heirs. Neither history nor theory offers a sound basis to focus on heirs as part of copyright policy. In addition, there is evidence that when heirs have control over copyright they do more harm than good. Furthermore, the nature of creativity points to an often overlooked heir: society itself. Nonetheless, one may ask what should be copyright's model duration? This section offers some possible models that flow from the goal of having a copyright system with theoretical coherence. Like possibilities (i.e., perpetuity) presented in previous copyright debates, these approaches offer ways copyright *could* change and point to a question well beyond the scope of this Article: namely what the ideal term for copyright should be. The goal here, however, is to show that several possible options exist to address many of the ills present in copyright and that the heirs assumption exacerbates. This section thus offers some ideas on the topic as an invitation for further discussion and a way to illustrate that genuine alternatives to the current model of life of the author plus a term of years exist.

A. Possible Models for Copyright Duration

There are a range of possibilities for copyright's term. One has only to recall the original term of fourteen years and the ensuing expansions with their renewal requirements to appreciate that many works with us today fared well under something far less than the life of the author plus a term of years model in place now. Indeed, the

theoretical arguments analyzed above show that rather than theory, political interests, the lobbying efforts of living authors, and political feasibility had much to do with the shifts in copyright's duration. Answering which of the following possibilities is politically palatable or feasible is a matter for a separate article. Nonetheless, seeing the possibilities allows one to appreciate that copyright's term does not have to be a one-way ratchet leading to longer and longer duration.

Briefly then, here are a few possible options. Neil Netanel argues that copyright should “ideally” have the 28-year term with a 28-year renewal.²⁸⁷ He also offers that unpublished works should have a five year term so that some incentive is in place for their production even after an author dies.²⁸⁸ For Netanel this system provides incentives to authors and other potential publishers while diminishing the speech burden copyright imposes on users of copyright works.²⁸⁹ In contrast, one might want a term that based on the life of the author alone. The early arguments for extending of copyright's term came against a backdrop of systems that removed copyright while the Webster and Clemens recoiled at the thought of losing control over their work while they were alive. As shown above, a range of theories support a life term. In addition, a life term does little harm to determinacy of the copyright system as any system, such as the current one, based on life has an indeterminate variable regarding the potential length of copyright for a given work.

²⁸⁷ Netanel, *supra* note 50, at 205.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 200-205. As Netanel notes attempts to cure duration's problems fall short because they often turn on a vague and ungenerous understanding of a non-commercial use requirement. *Id.* at 206. *Cf.* Frischmann and Lemley, *supra* note 224, at 285-286 (noting that copyright may be thought of as a semi-commons where duration and scope are supposed to provide “leaks and limitations on the private rights” but that determining what uses are permitted can nonetheless be difficult).

One could also imagine a purely fixed term of years without renewals. The current approach of 95 years from first publication or 120 years from creation for works made for hire (in essence corporate works),²⁹⁰ might be a metric to inform a fixed copyright term for individual authorship. One would not encounter the issues of renewals and determining whether the work was in the public domain or not would be simpler. Authors could create a work at ten, twenty, fifty, or one hundred years old and have simple fixed term that would meet the theoretical concern for providing for an author while alive and in some cases beyond that point.²⁹¹

As another alternative, William Landes and Richard Posner have argued that either an indefinitely renewable copyright or one that has “an initial term of twenty years and a maximum of six renewal terms of ten years each, for a maximum duration of eighty years” would be economically efficient.²⁹² According to them, copyright has “an expected or average life of only about fifteen years.”²⁹³ A work’s low life span and high renewal costs would mean that most work enter the public domain quickly, while those that are valuable will be able to maintain protection so long as they are valuable.²⁹⁴ This view runs contrary to the idea of a life term, but it does address the reality of the low-likelihood that an author will generate significant value from a work.

Given Heald’s recent work regarding more than sufficient production of precisely the type of works Landes and Posner seek to promote and the way those works stimulate

²⁹⁰ Anonymous work and a pseudonymous work have the same term but morph to life plus seventy if the name of an author is attached to the work during the 95 or 120 years provided that the name appears in a registration with the Copyright Office as specified under the Copyright Act. See 17 U.S.C. §302(c).

²⁹¹ See Hsiang-Ching Kung, *Deaths: Final Data for 2005*, 56 NATIONAL VITAL STATISTICS REPORT, No. 10, at 1 (2008) (noting average life expectancy in the United States is 77.8 years) available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_10.pdf.

²⁹² William Landes and Richard Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003).

²⁹³ *Id.* at 475.

²⁹⁴ *Id.* at 517-518.

further creation, the perpetually renewable model is not favored by this Article. If, however, one combined Landes and Posner's model regarding short term renewals with Hugo's model of a fixed copyright royalty and strong limits regarding heirs' ability to curtail the public's ability to access and use a work, one would have a system that pushes much material into the public domain while still accounting for possible underproduction and access concerns for works that enjoy a robust market.

Again these models are possibilities to address flaws in the current system. None requires heirs as part of their solutions. Instead, they show that problems stemming from copyright's protection of all works under the subject matter of copyright—instead of only registered works—are reduced by limited terms. Later users can more easily determine whether a work is available for use or not. The models provide authors ample coverage to allow them to benefit from their creations during their life. Depending on which model one chooses and when an author dies, heirs may or may not be explicitly covered. And that is the point. Heirs have not, need not, and ought not be part of a coherent copyright policy.

B. Conclusion

Copyright and its scope have been the subject of legal discourse for hundreds of years. Various theoretical foundations have been offered to explain copyright and to sculpt its contours. These arguments have shifted over time, as has copyright's reach, depending on whether publishers or authors have the upper hand and the interests they wish to advance. Duration has always been a key issue in this debate. Given the power of

copyright, there is no reason to think that current holders will rest easy once the material that drove the Copyright Term Extension Act again nears entry into the public domain. Because a concern for heirs has consistently been offered as a primary justification for the extension of copyright, it will likely be offered again. For these reasons this Article has examined the basis for the assumption that copyright is designed to protect heirs and found several problems.

The historical debates regarding copyright do not support the claim that copyright's design or purpose was to protect heirs. Moreover, there is no theoretical basis for descendible copyright. Probing the predominant, yet varying, theories offered to explain copyright shows that none of them support descendible copyright, but they do support, if not mandate, a life term for copyright. As such, when copyright terms were less than life of the author or structured so that they could easily result in work entering the public domain while the author was still alive, there was reason to demand longer terms. Nonetheless, rhetorical analysis of the arguments offered to extend copyright's duration, shows that, even during this early period, the arguments were overstated and often invoked heirs as way to advance the cause of extending copyright's duration but without support for the claim that heirs matter. This tactic has helped foster a system with an over-long and unstable copyright term, one based on the life of the author plus seventy years and possibly longer as new calls for term extension arise.

The heirs assumption not only lacks a sound historical and theoretical grounding; it has negative normative implications as well. Historical, theoretical, and economic theories agree about the way in which creation fosters future creation: each cycle of creation builds on the outputs of the last one. A system that prolongs the inability to use

an output inherently slows down the next cycle of creation. Thus, extending the copyright term in the name of providing for heirs imposes a cost on society.

The question then becomes one of what is theoretically and practically supported for copyright's term. History and theory support a life term. Given the current system of life plus a number of years, however, moving to that standard seems unlikely. Nonetheless, this Article has shown that theoretically supported alternatives to the current model exist as a way to open avenues to new thoughts about copyright's duration. Regardless of which model is put forth, insofar as heirs are invoked to justify copyright's term or its expansion, such arguments lack foundation and should be seen as proxies for other agendas and interests.

In short, whenever an extension of copyright term is sought, heirs are offered as an explanation for why the extension is necessary. The assumption and myth is that heirs matter for copyright policy. This Article has shown they do not and should not. Indeed, if one admits that we are all heirs to cultural creation and that we are all heirs who draw on such work to create anew, the longer copyright locks up material, the longer it denies society its inheritance.