THE COPYRIGHT TERM DEREGULATION ACT/ PUBLIC DOMAIN ENHANCEMENT ACT

The CTDA/PDEA corrects a problem created by the current structure of copyright law in light of the potential of the Internet to spread knowledge and creativity.

The Problem: Until 1976, copyrights in the United States were granted in a two-part term: for the copyright owner to get the benefit of a maximum term, he had to renew the copyright at the expiration of the original term. That meant, for example, under the 1909 Act, which gave a maximum term of 56 years, a copyright owner had to renew the term after 28 years to get the full 56 year term.

The vast majority of copyright owners did not renew their copyrights. In 1973, for example, more than 85% of copyright owners did not renew. Thus, until 1976, the *average term* of copyright was significantly below the maximum term. Again, in 1973, the average term was just 32.2 years, while the maximum was 56 years.

In 1976, Congress repealed this renewal regime. The view at the time was that renewal imposed a burden on copyright owners with no clear benefit to the public. Renewal was relatively cumbersome, resulting in many instances where copyright owners forgot or failed to renew. American law was unforgiving, so these failures meant the copyright was forfeited. And because the technologies of publication were relatively expensive, works in the public domain could not be spread unless a commercial publisher chose to republish them. If a commercial publisher wanted to republish them, that publisher would be in a position to contact the copyright owner. Thus, the renewal system was thought to impose costs but without any real benefit.

The Internet has changed this calculation significantly. Because of digital technologies and the Internet, we now have the capability to digitize content and make it available on the Internet at a vastly cheaper cost. This could mean, for example, that libraries

and schools could offer much large collections at no additional cost. Similarly, because of digital technologies, film and recordings can be digitized and shared broadly, both to preserve the original recordings, and to enable others to use them cheaply.

Yet under current law, it is practically impossible to be able, legally, to gain access to this material. The costs of identifying copyright owners for this work is prohibitively high — especially when the work is no longer commercially exploited. And the vast majority of this work is no longer commercially exploited.

For example, when the Sonny Bono Copyright Term Extension Act extended terms by 20 years, it extended copyrights for works beginning in 1923. Of the work produced during the first twenty years after 1923 (1923-42), Justice Breyer estimated that only 2% has any continuing commercial value. The balance is unused, and because of the existing system, unusable, because of the costs of identifying and securing permission from copyright owners. There is no registry of copyright owners, nor any database to know whom to contact. So just at a time when the technologies of the Internet could be used to spread this knowledge widely, much of this material is totally unusable.

The burdens imposed by existing law are of two sorts. First, the law effectively blocks access to this material. Brewster Kahle, for example, has announced a project to make as many out of print books available for free on the Internet as his archive can. In 1930, for example, there were 10,057 books published in America. In 2000, 174 of those books were still in print. If Brewster wanted to make the 9,883 remaining books available, he would have to determine the copyright status for each of those remaining books, and track down the current copyright holders for those works. Obviously the cost of that would be prohibitive.

Second, the law actually causes the destruction of important parts of our cultural past. The clearest case here is film. Over 96% of the film made between 1923 and 1946 is not commercially available. Most of that film sits unused and unrestored in film archives. Because of copyright restrictions, most of this film will remain unrestored, because again the cost of locating and clearing rights for these films — many of which were produced by firms that no longer exist — is impossibly high. But this content exists, for the most part, on nitrate based film — a medium that decays rapidly. Thus, by the time the copyrights in

these films expire under current law, the films will literally have decayed.

The Solution: The CTDA/PDEA solves these problems by reviving, in a limited form, the American tradition of renewal. Under the proposed law, a copyright owner would need to pay a $1 maintenance fee 50 years after a work was "published." If the copyright owner paid the fee, then he would enjoy the benefit of the full copyright term. If he did not, then the work would pass into the public domain. Given historical estimates, we expect that close to 98% of copyrighted work would pass into the public domain after just 50 years. Or put differently, for 98% of copyrighted work, it is not even worth $1 to the copyright owner to continue the copyright.

This solution would impose a slight burden on 2% of the copyright owners; it would realize an enormous benefit to the public. Copyright owners would be required to file a form 50 years after publication and pay a $1 fee. That form would effectively update copyright records, making it easier for the public to locate copyright owners to secure permission to use their works. It would also assure that work that is no longer commercially exploited would pass into the public domain so that others could build upon it and spread it as they can.

This solution would not shorten the term for anyone who wanted the maximum term of protection. Depending upon how the regulations were drafted, it could permit agents or publishers a presumptive right to register and pay the $1 fee. And, correcting an unnecessary harshness in the law, the regulations could forgive copyright owners who correct a failure to register within a reasonable time.

This legislation could make real the vast potential of the Internet to lower the cost of access to information and to enable the spread of culture. Imagine google-izing all knowledge (or at least 98%) 50 years old using the technology of the net. Or imagine enabling schools or researchers easily to share and incorporate film from this period into modern works. The History Channel, for example, depends upon a vast library of public domain films for its productions. It, and others, would benefit greatly from more material being made available generally.

Conclusion: Much of the debate about copyright in the context of the Internet has pitted copyright owners against technology. The choice has been presented as if we need to sacrifice the interests of copyright owners to benefit technology, or that technology is being made to suffer in order to benefit copyright owners.

This proposal presents no such choice. Copyright owners who have a reason to continue their copyright could do so easily; but the public domain, and the growth it inspires, could benefit too.

It would benefit this debate greatly for Congress to consider an accommodation of copyright law in light of the Internet that was not perceived as anti-copyright, and that could greatly benefit the spread of knowledge through the Internet.